Animal & Natural Resource Law Review

Michigan State University
College of Law

July 2024

Volume XX

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

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

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Animal & Natural Resource Law Review

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The discourse surrounding the extension of habeas corpus rights to nonhuman animals is complex and ever-evolving, culminating in the recent, groundbreaking case Nonhuman Rights Project, Inc. v. Breheny. The dissenting opinions in Breheny signal a promising shift in judicial thinking toward recognizing nonhuman animals' fundamental right to bodily liberty.

The Breheny dissents do not go far enough, however. They brush aside the central argument that U.S. courts have raised thus far to deny animals their day in court – that nonhuman animals do not bear legal duties or social responsibilities in human society, and as such, do not deserve fundamental legal rights.

In fact, non-human animals do bear legal duties and social responsibilities within their communities and within our own. Animals' participation in human civilization is undeniable and vital, thereby necessitating a reevaluation of their standing within the legal system.

Nonhuman animals have participated in legal proceedings throughout human history, officially and unofficially, whether as plaintiffs, victims, or subjects of punishment. Animals bear legal duties by engaging in these processes and adhering to legal outcomes.

Nonhuman animals bear social responsibilities, as well. Social responsibility, often undefined by the judiciary, is pertinent to animals just as it is to humans. Elephants live within complex societies, displaying intricate communication, coordinated actions, empathy, and assistance toward fellow elephants. Other animal species exhibit similar sociological patterns, indicating that animals indeed bear responsibilities within their communities, and develop unique cultures.

Shared knowledge and socially acquired behaviors demonstrate animals' abilities to contribute to collective welfare, challenging the argument that animals lack social responsibilities. Moreover, animals adapt their behavior in response to human influence.

The argument that "animals are not humans" is an outdated rationale for denying animals their rights. By acknowledging animals' social responsibilities and legal duties, humans can and should initiate legal reforms that consider animals' contributions to society and the mutual obligations shared between species. Granting habeas corpus protections to select animals, as seen in the case of Happy the Elephant, could open doors to recognizing the duties animals bear and the roles they play in human and nonhuman societies.

Because animals bear legal duties and carry social responsibilities, they are intertwined within the fabric of human society. As the judiciary moves toward a more expansive understanding of animals' roles and contributions, our nation's legal framework should grow to accommodate an equitable coexistence that benefits both humans and nonhuman animals alike.

Deconstructing Concepts about Nature: An Alternative Perspective for Ecofeminism based on the Rights of Nature[1]

Leslie E. Terrones[2]

Introduction

In the last few decades, several professionals involved in multiple environmental fields have been venturing on a quest to formulate new environmental perspectives with the intention of seeking out solutions that would help solve the current climate crisis. In the midst of this crusade, two perspectives have emerged: Ecofeminism and the Rights of Nature.

The Rights of Nature movement has only been around for a few decades, but it wasn't until Ecuador recognized the rights of Pachamama in its Constitution, that it gained momentum and started expanding and spreading to various countries. The notions it proposes about the world, however, date back to religious and philosophical traditions, as well indigenous worldviews. Ecofeminism has been around for a little longer. The movement at its core proposes that there are deep and essential connections between the domination of women and the domination of nature, which could be historical, cultural, symbolic, political, etc., and argues that, once acknowledged, they can help dismantle the practices that have been hurtful to both women and nature.

[1] For practical purposes, this paper will only address the general arguments used by most ecofeminism proponents; it will not take into consideration the new trends or variants that exist in the movement nowadays nor the concerns about its application in legal theory. The same goes to Rights of Nature, where it presents only the main ideas that are central to the movement without addressing its application in practice nor the related new doctrines that are currently emerging (e.g., Earth Law or Earth System Law, etc.).

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Both movements criticize the anthropocentric view of current environmental philosophies and legal systems. While Ecofeminists propose to reexamine the male-gender bias that is present in the world's treatment of nature, proponents of the Rights of Nature focus instead on moving to a more ecocentric point of view that sees the world in a more friendly and holistic way. Although, from this first glimpse they both, apparently, aim for a reconception of the current societal structures, when getting deeper into the structural ideas of these movements, one might find that their postulates seem very distant from one another.

This article will question these disparities and try to find common ground between both movements, starting by presenting a basic review of Ecofeminism followed by an introduction to the approaches in which the Rights of Nature is built upon. It later continues with an exploration of the similarities and discrepancies between the two with the intent of finding if there's a way both can benefit from each other. Finally, based on the findings of both movements, new ideas about the conception of nature will be presented with the aim of inspiring new notions of the world and a new valorization of nature that could help push towards an end of the domination of nature and women once and for all.

I. Ecofeminism and the Defining Dichotomies of Nature

a. Nature as Female?

Ecofeminism is based on the theory that conceptual frameworks formed over the years have feminized nature and naturalized women, reinforcing a patriarchal-androcentric matrix that is based on a system of gender oppression that strengthens a logic of domination that has materialized not only in language forms but also in the totality of social ties.[3] A conceptual framework, says Warren, "is a set of basic beliefs, values, attitudes, and assumptions which shape and reflect how one views oneself and one's world."[4]

For Ecofeminists, before the scientific and industrial revolution, the primary idea of nature was that of a designed hierarchical order between the cosmos and society that saw people as an organic component

[3] Pablo Pereira & Laura Borsellino, Ecofeminismo y derechos de la naturaleza. Cruces entre Ley, Estado y sensibilidades, 11 papeles del centro de investigaciones de la sacultad de ciencias jurídicas y sociales de la uniL. 59, 62-63 (2021) (Arg.).

[4] Karen Warren, *The Power and the Promise of Ecological Feminism*, *in Environmental ethics*: readings *in theory and application* 398 (Cengage Learning, 7th ed. 2016).

of a higher existence.[5] Nature encompassed not only humans, but also animals, and was connected by an inherent power that operated between material objects and phenomena.[6]

But the acceleration of commercial development and technological innovation prompted a change in human attitudes and behaviors towards nature—since, according to Merchant,[7] the image of the earth as a living thing was a cultural restriction to their actions—and included a switch from a veneration of a nurturing bounteous, kind, life-giving mother who provided for the needs of mankind in an ordered, planned universe to a need for mastery and domination of this wild and uncontrollable female being.[8] Such a change of perception instilled ideas that later shaped the cultural, social, and political values of power over nature and the desire for its conquest that have kept society moving in the modern world.[9]

Therefore, a new dichotomous thinking that creates pairs of antagonistic and sexualized concepts of nature was born, one that associates it with the feminized notions of emotion and subjectivity, in contrast to a masculine figure that represents culture, reason, objectivity, and the mind.[10] This new framework, "separates as opposite aspects of reality that in fact are inseparable or complementary e.g., it opposes human to nonhuman, mind to body, self to other, reason to emotion," Warren adds.[11]

The immortal and transcendent conception of male, as opposed to a non cultural, mortal conception of female, became universal thanks to an androcentric bias in the evolution of thought.[12] This promoted its survival over the years,[13] generating normative dualisms and legitimizing operations of subordination by reducing a complex, multivariate, and biodiverse reality to a binary and exclusive mindset where higher value or superiority is attributed to one side over the other.[14]

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[5] Carolyn Merchant, THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION 6 (Harper & Row 1983).

[6] Id.

[7] *Id*. at 3.

[8] Michael E. Zimmerman, *Feminism, Deep Ecology, and Environmental Ethics*, 9 Env't Ethics 21, 37-38 (1987).

[9] Merchant, *supra* note 5, at 2-4.

[10] Pereira & Borsellino, *supra* note 3, at 63.

[11] Karen Warren, Feminism and Ecology: Making Connections, ENV´T ETHICS 3, 7 (1987).

[12] Janis Birkeland, *An Ecofeminist Critique of Mainstream Planning*, 8 TRUMPETER 72, 74 (1991).

[13] Zimmerman, sup*ra* note 8, at 37-38.

[14] Warren, supra note 11, at 6-7.

The now patriarchal value-hierarchical thinking centered on the logic of dualisms that perpetuates power and autonomy became the norm and instilled a rationale of domination where nature only existed to serve man's purpose, lacking inherent value in and of itself. Since nature was now linked to a woman figure, a subordination of the latter to man could therefore be justifiable.

b. Human-nature Relationship

Considering the structure of oppression as well as the interconnections that exist between the domination of women and of nature, Ecofeminism proposes a reconstruction of social interactions aimed at dismantling the patriarchal thinking that oppresses both.[15] Ecological problems should be addressed, Ecofeminists argue, with the inclusion of feminist perspectives and—fundamentally—feminist values.

The main solution Ecofeminists suggest is to reinterpret the connections we have with organisms and nonhuman communities, and to conceptualize the world as a group of beings that build relationships based on a series of moral feelings to achieve binding agreements based on respect, responsibility, and consideration towards each other.[16]

Ecofeminism questions the central pillars of objectivist and neutral thought[17] and suggests that relationships should follow an open-minded and attentive encounter established on sensitivities that will lead to an attitude of care or compassion.[18] Warren, following Marilyn Frye's idea, calls this a "loving" perception, in which the way we perceive the other is an expression of love for one, and where the limits of such perception are determined by the ability to respond lovingly.[19]

At this point, it's important to acknowledge that even though the movement recognizes that biotic pluralism exists in nature, and we owe a moral duty to the elements in it, we are urged to respect the individuality of every component instead of trying to merge with them.[20] The distinction between the self and others, between human and nonhumans, must prevail over the identification of ourselves as a part

[15] Lori Gruen, Dismantling Oppression: An Analysis of the Connection between Women and A*nimals, in* ECOSEMINISM: WOMEN, ANIMALS, NATURE 80 (Greta Gaard ed., 1993), https://www.jstor.org/stable/j.ctt14bt5pf

[16] Rodrigo Ocampo, *La ética ambiental desde la visión de la Ecología Profunda y el Ecofeminismo*, 11 PAPELES DEL CENTRO DE INVESTIGACIONES DE LA REVISTA CIENCIAS HUMANAS 65, 75 (2014).

[17] Pereira & Borsellino, supra note 3, at 65.

[18] Freya Mathews, Relating to Nature: Deep Ecology or Ecofeminism?, in FEMINIST ECOLOGIES 35 (L. Stevens et. al., 2018).

[19] Warren, *supra* note 4, at 138.

[20] Mathews, *supra* note 18, at 35.

of nature as a whole.[21] "Nonhumans are independent, dissimilar, and different than humans," Warren says,[22] and neither of them ought to be identifiable with any kind of cosmos.[23]

II. Recognizing Rights for Nature

From Ecuador to New Zealand, to India and Bangladesh, and even some jurisdictions in the U.S., different countries and territories have now recognized that nature has rights[24]. From a body of water to historical parks and even ecosystems, the movement has been flexible and has molded and evolved to suit the ideologies and needs of the people living in those lands, causing it to branch out into various subtopics and adopt different edges[25].

Formally speaking, the starting point of the Rights of Nature movement was the publication of Christopher Stone's *Should trees have standing?* where he proposed to extend legal rights not only to natural objects (forest, ocean, rivers, etc.), but to the natural environment as a whole.[26] While he inspired many philosophers and jurists to propose new ideas that would later be integrated into real life and legal scenarios in multiple territories, even before his new theory gained momentum, ecologists such as Aldo Leopold were already questioning humans' relationship with nature[27].

The concept of imagining nature as something other than just an object to take advantage of, however, was not first forged by these aforementioned American theorists[28]. For some cultures, the notion of

[21] Id. at 45.

[22] Warren, *supra* note 4, at 137.

[23] Mathews, supra note 18, at 45.

[24] Until November 2023, 35 countries around the world (including, among others, the United States of America, New Zealand, Mexico, Bangladesh, Panama, etc,) had adopted the Rights of Nature theory, with 22 of them having effectively internalized it in their jurisdiction. See Osprey Orielle Lake, Shannon Biggs and Natalia Greene. RIGHTS OF NATURE. REDEFINING GLOBAL CLIMATE SOLUTIONS & ENVIRONMENTAL PROTECTION FOR SYSTEMIC CHANGE 5 (2023).

[25] For an analysis of the different schools of thought in the Rights of Nature and their respective lines of reasoning see Darpö, Jan. CAN NATURE GET IT RIGHT? A STUDY ON RIGHTS OF NATURE IN THE EUROPEAN CONTEXT (2021).

[26] Christopher Stone, Should trees have standing? Towards legal rights for natural objects, 45 S. CAL. L. REV. 450, 456 (1972).

[27] See Aldo Leopold, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE (1949) (Leopold's most notable work is A Sand County Almanac: And Sketches Here And There, where he describes his own perception of the land and the relationship people should have with it.) .

[28] *See* U.N. ECOSOC, Study on the need to recognize and respect the rights of Mother Earth, at 8-14, U.N. Doc. E/C.19/2010/4 (2010) (Although the UN mentions non-indigenous cultures in its report, it can be inferred from their analysis of pre-

this entity having some kind of value or moral importance equal to—or even above—humans has long been rooted in their philosophies and beliefs since they began existing.[29] From indigenous views of the world to more Western concepts of rights, many ideas have cemented the rights of nature's doctrine. This section will briefly address these two main viewpoints as well as the role they've played influencing the way the movement has been adapted in different jurisdictions.

a. Theoretical Approaches

i. Utilitarianism

The first theory—probably the most practical one—that has been adopted by activists to support the Rights of Nature movement is also one of the most used by proponents of environmental ethics, utilitarianism. Under this philosophy, the main argument for considering nature as a subject of rights is that by doing so, the level of legal protection to nature would "rise," seeking to incorporate stronger safeguards that would make environmental protection policies effective.[30]

This position assumes that environmental laws, thus far, have proven to be inefficient in stopping the destruction of the environment and insufficient in preserving the environment for future generations.[31] If nature is not properly protected, an ecological crisis could lead to serious economic consequences. This could occur due to the expenses incurred from assuming the management of environmental impacts or the collapse of numerous productive chains if the natural resource base were to be lost.[32] A new paradigm would then be a useful instrument not to protect a valuable asset in itself but to avoid the "unforeseeable consequences" of its destruction.[33]

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colonial Andean history that indigenous peoples' respect and reverence for the Earth and its elements predates contemporary ideas about nature.)

[29] David R. Boyd, The Rights Of Nature: A Legal Solution That Could Save The World, xxix (2017).

[30] Farith Simon Campaña, *Los derechos de la naturaleza en la constitución ecuatoriana del 2008: alcance, fundamentos y relación con los derechos humanos*, 17 REVISTA ESMAT 231, 244 (2019).

[31] Id.

[32] Eduardo Gudynas, *Derechos de la Naturaleza y políticas ambientales, in* DERECHOS DE LA NATURALEZA. EL FUTURO ES AHORA 46 (Alberto Acosta & Esperanza Martínez eds., 2009).

[33] Farith Simon Campaña, *Derechos de la Naturaleza: ¿Innovación Trascendental, Retórica Jurídica o Proyecto Político?,* 13 IURIS DICTIO 9, 16 (2013).

ii. Biocentrism

In opposition, biocentric philosophies do not claim that all things within nature have the same inherent value; instead, only living beings have such value insofar as they constitute ecosystems, which are life systems that support each other, in which each thing plays an important role. Although for biocentrists, the main focus is on individuals, since they're living things that possess a good of their own, have their own ends and seek the means to achieve them,[34] making them worthy of respect, they argue that it is still the individual's goal to protect the continuity of life systems and life groups.[35]

Under this logic, all individual beings have equal and inherent value and matter more than non-living ones, but that value becomes more meaningful when they become a part of their ecosystems and collectivities. It's the individual's moral obligation therefore to focus on safeguarding the living parts of nature over the nonliving parts since it is the good (well-being, welfare) of individual organisms that determines our moral relations with the Earth's wild communities of life.[36]

iii. Holism

In opposition to biocentric philosophers that claim that individual living things have interests that ought to matter in moral decision making,[37] another environmental ethic that set up the Rights of Nature movement's premises was holism, which argues that ecological or articulate wholes (such as ecosystems, biomes, species, etc.) have intrinsic value of their own as well as properties that could grant them moral status.[38] The goal for holists is for everyone to go beyond class, gender, and species and find their deepest fulfillment in harmony with nature.[39]

This doctrine bifurcates into the complementary ideologies of ecocentrism and deep ecology. Ecocentrism's first proponent was Aldo

[34] Amaranta Manrique et al., Ecoética Y Ambiente. Enseñanza Transversal En Bioética Y Bioderecho 9 (Universidad Nacional Autónoma de México. Instituto de Investigaciones Jurídicas 2019).

[35] Carlos Soria, *Entrevista a Alberto Acosta sobre los Derechos de la Naturaleza*, servindi (Sept. 21, 2018), https://www.servindi.org/actualidad-noticias/21/09/2018/entrevista-alberto-acosta-sobre-los-derechos-de-la-naturaleza.

[36] Paul Taylor, *Biocentric Egalitarianism*, *in* environmental ethics: readings in theory and application 177 (Cengage Learning, 7th ed. 2016).

[37] *I*d. at 216.

[38] Eric Nash, The Philosophical And Legal Implications of Granting Ecosystems Legal Personhood*,* 16 (May 2020) (Undergraduate Research Scholars Thesis, Texas A&M University) (on file with the Texas A&M University Library).

[39] Louis P. Pojman et al., environmental ethics: readings in theory and application 216 (Cengage Learning, 7th ed. 2016).

Leopold[40] who introduced the idea of a "Land Ethic," a perception of nature not merely as a resource for human beings, but rather as the center of value, aiming for a state of harmony and respect between men and land.[41] He argues that something is right when it is aimed to preserve the integrity, stability, and beauty of the biotic community and is wrong when it tends otherwise.[42] Consequently, as Zimmerman puts it, "ecocentrism calls for humans to respect all beings and the ecosystem in which they arise."[43]

Deep ecologists, on the other hand, are holists who do not argue for a sense of community, but rather for an identification of every component of nature as a part of a whole, composed not only by the sum of its parts—which are not limited to beings which can reciprocate—but by the interconnection between them.[44] The proponents of this theory argue that the universe is a network of relationships that are all components of a single natural system that exists thanks to the interdependency of its elements, and where individuals are not capable of surviving by themselves since they rely on others to exist.[45] For deep ecologists, humans are not separated from nature, since the world is not a collection of isolated objects, but are part of a network of phenomena that are interconnected and interdependent.[46]

Interests of the whole, in consequence, surpass individual interests because the interests of these are, at root, the interests of wholes.[47] Self-realization is accomplished by the realization of the greater whole[48] in which all beings are just components of it and are equally valuable.[49] According to Næss,[50] its biggest proponent, all forms of nature, for instance, have intrinsic value, regardless of their usefulness or external evaluations that may be made by others (humans and nonhumans).

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[40] Id. at 217.

[41] Leopold, *su*p*ra* note 27, at 196.

[42] Id. at 211.

[43] Michael E. Zimmerman, Deep Ecology, Eco-Activism, and Human Evolution, 13 REVISION 3, 122, 123 (1991).

[44] Arne Næss, Eco*sophy T: Deep Versus Shallow Ecology*, *in* ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION 225, 226 (7th ed. 2017).

[45] Mathews, *supra* note 18, at 37.

[46] Terry Hoy, TOWARD A NATURALISTIC POLITICAL THEORY. ARISTOTLE, HUME, DEWEY, EVOLUTIONARY BIOLOGY, AND DEEP ECOLOGY 94 (2000).

[47] Pojman, *supra* note 39, at 216.

[48] Colette Sciberras, Deep Ecology and Ecofeminism: The Self in Environmental Philosophy 12 (Sept. 2002) (M.A. thesis, Lancaster University) (on file with author).

[49] Pojman *supra* note 39, at 216.

[50] Næss, *supra* note 44, at 229.

b. Indigenous conceptions of nature

Although some of the philosophies mentioned above have been cited in extensive jurisprudence and used as the basis to issue legislation recognizing the Rights of Nature, they come from perspectives that do not necessarily portray the true origins of the movement. They have all been formulated from a Western point of view, where the starting point has been the anthropocentric philosophy as the ruling norm[51], and the objective has been either to turn that centralism upside down[52] or to turn the attention to other living beings besides humans. Nonetheless, the idea of nature as an entity that needs protection and recognition has not been historically limited to just those conceptions. Long before those theories were born, indigenous civilizations already had their own ways of viewing nature and humans' role on Earth.

One of the leading and highly influential cultures has been, without a doubt, the Andean Cosmovision,[53] a doctrine that played a fundamental role in advocates of nature's rights to push for its inclusion in the Ecuadorian Constitution[54] and their recognition in Bolivia's internal laws.[55] Andean Cosmovision philosophy dates back 5000 years and consists of a mix of different beliefs and people's customs that existed across the Andean region, which includes territories that are now part of Peru, Bolivia, Argentina, Chile, Ecuador, and Colombia. The philosophy was originally inculcated in indigenous societies by the Incas and Quechua people but, centuries after their fall, it still remains and survives in a latent form among these countries' populations.[56]

Andean Cosmovision's combination of multiple religious and social dogmas is supported by the sacred bonds that bind human beings and the cosmos, heaven, and earth. Under these ideas, everything is alive, and everything is intertwined in it; every entity that composes it,

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[51] Erin O'Donnell et. al., *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 Transnat'l Env't L. 403, 410 (2020).

[52] Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophie*s, 9 Transnat'l Env't L. 429, 452 (2020).

[53] The first study that touched on the Harmony with Nature resolution issued by the United Nations in 2009 (A/RES/64/196) even focused heavily on this culture to exemplify how indigenous beliefs were influencing the recognition of the rights of nature. See U.N. ECOSOC, supra note 28.

[54] Andreas Gutmann, *Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in* Ecu*ador*, *in* Rights of Nature: A Re-Examination 38-39 (Daniel P. Corrigan & Markku Oksanen eds., 2021).

[55] Boyd, *supra* note 29*,* at 189.

[56] Illona Suran, La cosmovision andine comme fondement philosophique des droits de la nature, Notre Affairs à Tous (May 7, 2021), https://notreaffaireatous.org/la-cosmovision-andine-comme-fondement-philosophique-des-droits-de-la-nature/.

through an omnipresent and positive energy called Pachamama, which circulates constantly within nature, is considered itself as a whole.[57] Pachamama, despite Western beliefs, doesn't just mean Mother Earth,[58] but instead, it is the result of a coexistence of peoples with the Living; it is the time and space[59] that represents all human and non-human beings.

Although Pachamama is portrayed as a female presence, this is mainly for efficiency reasons as indigenous communities often use adjectives like fertile and life-providing to describe it, mainly due to the benefits they believe it gives to humans to sustain their existence.[60] Pachamama, however, is not just nature; it is a universal, divine and mystical intelligence that gives rhythm to the spiritual beliefs of the ancestral societies.[61] Its counterpart, Pachataita—roughly translated as Heavenly Father—is the masculine force with which it forms the fruitful Andean duality.[62]

Since Andean Cosmovision considers the world as a natural collectivity that brings together living, diverse, and variable communities[63] where its members (including humans) can only exist within,[64] relationships and interdependencies are its primary focus. Individuality, then, doesn't have a place in this conception because every entity is meant to perform a specific role with specific tasks to sustain the totality.[65] These mutual interactions should be cultivated and taken care of to achieve a state of equilibrium and harmony, which is the primary objective of every activity.[66]

This Andean Cosmovision based on relationships of harmony and balance has also transformed into a lifestyle known as *Allin* or most commonly known as *Sumak Kawsay*,[67] *Buen Vivir* in Spanish and *Good Living* or *Harmonious Coexistence* in English.[68] The principles behind

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[57] *Id*. at 3-4.

[58] *See id*. at 4; Gutmann, *supra* note 54, at 40 (noting that, in fact, calling it Mother Earth is oversimplifying its significance and could be offensive as it ignores its real meaning and complexity that considers the knowledge and traditions of indigenous peoples.).

[59] Gutmann, *supra* note 54, at 40.

[60] Irene Silverblatt, MOON, SUN, AND WITCHES: GENDER IDEOLOGIES AND CLASS IN INCA AND COLONIAL PERU 20 (1987).

[61] Suran, *sup*ra note 56, at 4.

[62] Id.

[63] Id. at 5.

[64] Gutmann, *supra* note 54, at 40.

[65] Id.

[66] Id. at 40-41.

[67] Joel Bengtsson, Sumak Kawsay and Clashing Ontologies in the Ecuadorian Struggle towards De-coloniality (2019) (Master Thesis Dissertation, Södertörn University) (on file with author) (Allin: good, correct, positive; Sumak: beautiful, sublime, excellent, plenitude; Kawsay: live, coexist).

[68] See Nancy H. Hornberger & Serafin N. Coronel-Molina, Quechua Language

this paradigm are built on the complete opposite to the separation from nature that the West proclaims; The Andean Cosmovision is instead about the symbiosis of humans with nature and the space-time quality of life.[69]

Regardless, not only Andean Cosmovision has influenced the movement. Other Amerindian philosophies—like the Māori in New Zealand—also portray nature as a superior yet interdependent entity and believe in the need to develop a deeper connection with it. As with the Pachamama notion, the primary beings of the world are not individuals but the relationship of harmony between all of them.[70]

Lastly, in Indian traditional knowledge, biodiversity is also a relational category in which every element of nature acquires its values and characteristics depending on the relationships that they have with other elements,[71] relationships that are rooted in a presumption of indivisibility. In these ideologies, the conservation of nature relies on the sacred meaning they attribute to this entity, seen as a whole, where invisible ecological biomass flows between its components, and that, through these linkages, ecological stability, sustainability, and productivity conditions are maintained.[72] Some authors have called these conceptions, whose objective is to aim for the recognition of the rights of nature in general, the "cosmopolitan" approach of the movement.[73]

In contrast, indigenous philosophies that have focused on particular species or natural entities that have ecological, economic, or cultural relevance have been called "domestic"[74] since they usually aspire for a recognition of the rights in a particular jurisdiction or for particular natural elements.[75] These approaches have been fundamental

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Shift, Maintenance, and Revitalization in the Andes: The Case for Language Planning, 167 INT'L J. SOC. Language 9 (2004) (This is not, however, an exact translation as the Quechua language is a contextual language where the meaning of the words depend on who's been addressed, the situation in which they're used, and the variation of the language that the speaker has adopted).

[69] ¿Qué es la Cosmovisión Andina?, RUMBOS (Jan. 8, 2020), https://www.rumbosdelperu.com/cultura/08-01-2020/que-es-la-cosmovision-andina/.

[70] O'Donnell, s*upra* note 51, at 409-410.

[71] Vandana Shiva, *Women's Indigenous Knowledge and Biodiversity Conservation*, *in* ECOFEMINISM 168 (Maria Mies & Vandana Shiva 2014).

[72] *Id.* at 171.

[73] *Human Rights & Rights of Nature*, *in* RIGHTS OF NATURE: A RE-EXAMINATION 102 (Daniel P. Corrigan & Markku Oksanen eds., 2021).

[74] I*d*.

[75] This has been the case, for example, of Colombia recognizing the right of the rivers and the Amazon (Colombian Constitutional Court, ruling T-622 from 2016; and Colombian Supreme Court, ruling 4360-2018); the White Earth Band of Ojibwe, forcing a tribal court of Minnesota to enforce the rights of wild rice (White Earth Tribal Court Case No. GC21-0428); the town of Barnstead, New Hampshire proclaiming the rights of the communities and ecosystem in their territory (Barnstead

in defining the way in which these rights have emerged and developed, which varies considerably from territory to territory.[76]

Truth is, still, that in most nations that share indigenous roots where rights for nature have been upheld, these have not been given to a particular or individualized entity but rather to objects that form an ecosystem (like rivers or forests) or to nature itself as a whole,[77] as they have acknowledged that these things share some sort of relation of interdependence that cannot be denied and that entitle them to be recognized. This superior being (in any of its forms) is, in consequence, according to the movement, the appropriate right-holder.[78]

III. Ecofeminism and the Rights of Nature: Intersections and Disparities

a. Do Ecofeminism and Rights of Nature have Things in Common?

i. Building on Relationships

As the reader might have noticed already, the most evident aspect that both Ecofeminism and the Rights of Nature movement share is their pursuit for a fundamental reconstruction of our conception of nature.[79] Both movements believe that the values society is based on nowadays are damaging to women as well as nature and that an urgent reconception of the world is needed to stop the abuse against them. They agree on the fact that nature has intrinsic value and must be protected. In that sense, they both seek for a restoration of the relationships between humans and nature[80] and propose a new way of organizing life where well-being and maintenance are placed at the center.[81]

Ecofeminists, for instance, acknowledge that people live in a community where relationships to others are the basis of our understanding of who they are[82] because all lives and processes are

US Water Rights and Local Self-Government Ordinance), etc.

[76] *Rig*hts *of Nature: Exploring the territory*, *in* rights of nature: a re-examination 3 (Daniel P. Corrigan & Markku Oksanen eds., 2021).

[77] Id. at 6-7.

[78] Jingjing Wu, Rights of Nature and Indigenous Cosmovision: A Legal Inquiry, ossa conf. archive (2020).

[79] Janis Birkeland, *An ecofeminist critique of manstream planning*, 8 Trumpeter J. of Ecosophy 72, 74 (1991).

[80] Eva Vásquez, Los Derechos de la Naturaleza como herramienta ecofeminista para colectivizar/diversificar/proponer otras formas de reproducción social de la vida at the 1st Congreso Internacional de Comunalidad, Puebla, Mexico (2015).

[81] Id.

[82] Warren, supra note 4, at 398.

somehow interconnected with each other[83] and therefore how a moral agent is in relationship to another becomes of central significance.[84] Power-based relationships must move towards an ethic of mutual respect that go beyond power, one with a more ecocentric view that considers the world as a sacred living being that sustains all forms of life[85] and where values of care, love, friendship, trust, and appropriate reciprocity are the maximum commands.[86]

Similarly, Rights of Nature advocates also consider the world to be connected.[87] They presuppose that a myriad of relationships exists between not nature on one side and individuals on the other, but rather between worlds and peoples.[88] As seen in indigenous philosophies, relationships are based in terms of reciprocal exchanges and balance within the cosmic network[89] that are put in place with the purpose of establishing a harmonious and respectful balance between humans and other beings.[90]

ii. Diversity and Inclusiveness

Another similarity found in both postures is their efforts to embrace diversity in all of its forms, that is, not only in relation to all manifestations of life (plants, animals, organisms, etc.), but within humans themselves.[91] Indeed, one substantial principle for Ecofeminists is the recognition not only of a plurality of species but also a plurality of narratives, stories, experiences, and sociocultural contexts[92] that ensures that all voices (notably those of less favored or—as they call it—oppressed persons) are given legitimacy.[93]

In the same way, Rights of Nature proponents search for a dialogue between cultures that includes the subordinate and marginal groups that have been forgotten for so long, to restore legitimacy to their knowledge, their ethics, and their wisdom.[94]

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[83] Birkeland, *supra* note 79, at 74.

[84] Warren, supra note 4, at 399.

[85] Vandana Shiva, Diálogo sobre Ecofeminismo con Vandana Shiva at Instituto de Estudios Ecologistas del Tercer Mundo 1 (Nov. 26, 2012).

[86] Warren, *supra* note 4, at 398.

[87] Tănăsescu, *supra* note 52, at 450.

[88] *Id*. at 451.

[89] Giulia Sajeva, *Environmentally Conditioned Human Rights,* in Rights of Nature: A Re-Examination (Daniel P. Corrigan & Markku Oksanen eds., 2021)

[90] Suran, su*pra* note 56*,* at 8; Gutmann, *supra* note 51, at 45.

[91] Shiva, *supra* note 85, at 3.

[92] Ocampo, *supra* note 16, at 76.

[93] Warren, s*upra* note 4, at 398.

[94] Suran, *supra* note 56, at 8.

iii. Contextual Ethics

A contextual ethic, according to Warren, "is one which sees ethical discourse and practice as emerging from the voices of people located in different historical circumstances."[95] For her, Ecofeminism is a contextual ethic because, not only does it give central place to the voices of women[96] but also evaluates if something (human and nonhuman) is worthy of consideration based on the specific relationship it has with others.[97]

Regarding the Rights of Nature, while I believe that it is not an ethic but rather a set of ethics that have things in common (like the aim for the respect of nature and its legal recognition in any form), the movement itself is still contextual since the limits for its legal applicability will depend on the notion people adapt regarding nature.[98] Some cultures, for example, would be more inclined to favor water bodies and forests rather than the entirety of the ecosystems in their lands, whereas others would opt to exempt people from proving standing and incorporate concepts such as guardianship or stewardship.

b. Can Ecofeminism and the Rights of Nature see eye to eye?

i. Western v. Indigenous Visions

Notwithstanding the similarities, Ecofeminist views and the rights of nature also differ in some ideas that draws an explicit, almost impenetrable line between the two. The biggest difference is the contrasting gender value that both movements attribute to nature and that constitute the pillars of their respective doctrines: the feminization of nature to perpetrate oppression versus a ubiquitous, nearly goddess-like representation.

Ecofeminism is based on the idea that historically conceiving nature as a female has played a crucial role in perpetuating its subordination to man, thus maintaining a logic of domination.[99] This idea, as we have seen, however, is based on Western views that have been in the making since the industrial revolution but does not account for the current–still alive–indigenous conceptions that do not adjust to modern beliefs. While some Ecofeminists explain that, precisely, the movement is a critique of Western societies and not indigenous ones, this conception only makes Ecofeminism a limited crusade and not one that seeks for a general change.

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[95] Warren, *supra* note 4, at 398.
[96] Id.
[97] *Id.* at 399.
[98] Tănăsescu, supra note 52, at 452.
[99] Warren, supra note 4, at 394.

In view of this, many Ecofeminist critics have gone so far as to say the movement is not diverse enough since, for the most part, it does not consider the voices of all women, namely indigenous ones. They contend that most discussions have been led by white women trying to find a new way to see their world and who do not truly care about other women's realities.

Rights of Nature, on the other hand, does not presuppose a domination of nature by humans but rather a relationship of partnership between the two. In Andean Cosmovision, for example, a female representation of nature does indeed exist but is not attributed a lesser value. Indigenous tradition rather imagines it as something out-of-this-world that, in cooperation with its male counterpart, helps maintain a spiritual stability on Earth.[100]

This vision has survived for centuries and dominates indigenous culture to this day in several South American countries and is shared with other cultures of the world. Although influenced by Western philosophies, this basic pillar of the movement has subsisted and has even become stronger thanks to the importance of common beliefs indigenous communities share. Contrary to Ecofeminism then, insomuch as the original ideas that triggered the movement comes from indigenous beliefs, Rights of Nature are inclusive by nature.

ii. Individuality v. the Whole of Nature

On another note, both movements disagree on the importance they place on individuality. For Rights of Nature enthusiasts, an individual doesn't have value by itself unless it contributes to the survival or the balance of the whole. That is because the core of the movement is, in this case, founded on the perception that we are all integrated into an interdependent totality where each element participates in a specific role within the Earth's ecosystem.[101]

In contrast, Ecofeminism interprets the interconnections in an individualistic rather than in a holistic sense.[102] Ecofeminists affirm that, while the nature/culture split should be denied, humans are all members of an ecological community (in some respects) but still different from it (in other respects)[103] owing a duty of compassion and respect for all elements of it. The ties of kinship and not the understanding of identification with nature is, for them, what motivates us to treat each other with care and consideration.[104]

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[100] Suran, s*upra* note 56, at 4.
[101] Id. at 8.
[102] Mathews, su*pra* note 18, at 45.
[103] Warren, *supra* note 4, at 398.
[104] Mathews, *supra* note 18, at 47.

iii. Hierarchical Thinking

Under Ecofeminist logic, the paradigm in which society is currently grounded places certain groups as inherently more valuable than others, reaffirming hierarchical structures (e.g., culture is positioned above nature and men above women). As a solution, they propose a reconceptualization of the world in which the criteria for the organization of the new social forms would be equality, non-violence, cultural diversity and participatory, non-competitive and non-hierarchical decision-making.[105]

Hierarchy, for the Rights of Nature philosophy, is crucial. According to indigenous reasoning, even if human, nonhuman, and other entities that exist in the world are mutually intertwined via dependent relationships with each other and have an assigned role that makes them equally valuable as the rest,[106] there is still a supernatural force that reigns above everything. A supernatural entity—like the cosmos or Pachamama for the Andean Cosmovision, for example—exists peacefully with all of the different beings that inhabit the relational world[107] but is yet worthy of a high respect. Consequently, a kind of reverence or admiration is created and deems itself essential to maintain the harmony between all the different elements of Earth.

iv. Anthropocentricism v. Androcentrism

Other critics of the Rights of Nature movement that might come from Ecofeminist views revolve around the theories that have forged the doctrine, like ecocentrism and deep ecology, claiming that these approaches are gender neutral and, as a consequence, they might be plagued by gender inequality.[108] Ecofeminists contend that, even when these theories agree that abstract, dualistic, atomistic, and hierarchical categories are responsible for the domination of nature, their critic of the anthropocentric world is incomplete as they do not consider androcentrism as the real root of the domination of nature.[109]

Howbeit, we have to remember that the movement has not only been inspired by deep ecology, utilitarianism, ecocentrism and other holistic views, but also—and more importantly—by indigenous culture. Claiming that the Rights of Nature is only based on arguments

[105] Tasneem Anjum, Ecofeminism: Exploitation of Women and Nature, 5 INT´L J. ENG. LITERATURE AND SOC. SCI. 846 (2020).

[106] Suran, *supra* note 56, at 8.

[107] Tănăsescu, supra note 52, at 449-50.

[108] Pereira & Borsellino, supra note 3, at 60.

[109] Zimmerman, supra note 8, at 37-38.

formulated almost exclusively by men[110] would be putting the movement in a box, limiting its scope to traditional Western ontologies and ignoring the leading role some indigenous peoples, especially women have played in engendering transformative environmental protection.[111]

v. Is There an Actual Need for Rights?

Perhaps the most significant criticism of Rights of Nature that could be extracted from Ecofeminist postulates is the questioning of the need to have rights. Since Ecofeminism focuses more on relationships and in the imposition of less dualistic moral concepts ("such as respect, sympathy, care, concern, compassion, gratitude, friendship and responsibility"), their proponents feel as if rights should be removed from their central position and be replaced by other less restrictive models.[112]Although so far, the notion of rights, as Ecofeminists claim, has been centered in an anthropocentric thought, this does not necessarily mean that the figure itself should be abolished.

On the contrary, Rights of Nature actually provides an opportunity to rethink about what rights really mean and in benefit of who—or rather, of what—they should be recognized. Their supporters argue that rights are gradual human constructs that have evolved over time,[113] so they can be shifted into incorporating nonhuman subjects,[114] which would cause legal decisions to widen their focus and consider their impacts on a complex web of relationships that constitutes nature.[115]

IV. Re-valuing Nature

Up to this point, I have presented the fundamentals of each movement as well as the connections and disconnections between the two. As it has been observed, while very coincidental, differences seem to surpass the resemblances of these philosophies. But what if there was a way for them to coexist? Is it possible that they find common ground and start learning from each other? Will Ecofeminism be willing to accept new ideas coined by Rights of Nature or are these theories just too far from its mission?

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[110] Id. at 38.

[111] O'Donnell, supra note 51, at 426.

[112] Anjum, supra note 105, at 846.

[113] Rubén Martínez Dalmau, Fundamentos para el reconocimiento de la naturaleza como sujeto de derechos, in La naturaleza como sujeto de derechos en el constitucionalismo democratico 40 (Liliana Estupiñán Achury et al.eds., 2019).

[114] Id.

[115] Gutmann, supra note 54, at 169.

a. Dismantling Patriarchy through a New Valorization of Nature

From what we have learnt so far about these movements, they both claim that the image we have of nature is what ultimately defines our course of action. This image either establishes, limits, or tears them down and determines the possibilities that define human behavior. In the case of Ecofeminism specifically, the dualisms defined by society have established a hierarchy in which less value is placed in nature and women, and, thus, they are seen as lesser than men. Men then, have the power to do with nature as they please, without restrictions.

Yet, is it always bad to personify nature as a female? Does giving it this attribute automatically mean they are oppositional to men and consequently have lesser value? Or is it possible to picture nature as something with female characteristics but not feeling the need to possess it, explode it, or even dominate it? Can we change the concept into something empowering rather than diminishing?

For Warren, the problem is not just that value dualisms *are used* but *the way* in which they are used, which, according to her, has been to perpetuate inferiority and justify subordination.[116] A dualism is a dichotomy where a cultural expression of a hierarchical relationship has been imposed, building a radical exclusion that makes equality something unthinkable.[117] Hence, not all dichotomies are dualisms, and not all dualisms are inherently bad; they only become a problem when they validate oppression.

Following this rationale, if a contrasting dichotomy is not necessarily associated with an oppressive framework, that means that the value we are assigning is not inherently harmful. A value hierarchy with these characteristics that despises domination would hence be accepted by Ecofeminists. The objective then is to look for a model that makes us rethink the values that have historically–at least in Western countries–dominated human nature and aim for a better design in which men and women can be given similar or complementary values instead of adversary ones so that a culture of equality instead of superiority can be achieved.

b. Constructing a New Conceptual Framework

But how do we start building this design for society grounded in new values? Where do we start? Would it be a completely new model, or can it be molded after a preexisting one? Would we need to create new values from scratch, or can we rely on the ones that already exist? The theory of value is applied to answer these questions, specifically the notion of intrinsic value.

[116] Warren, *supra* note 4, at 391.

[117] Val Plumwood, Feminism and the Mastery of Nature 47-48 (1993).

Value is a normative concept[118]. It requires a norm, which is a standard that has to be created, constructed, or somehow discovered before it can be applied, and it must be applied to have meaning.[119] There are three ways in which nature can be valued: 1) instrumentally, 2) aesthetically, and 3) intrinsically.[120] Intrinsic value is the value that is inherent to an object, act, or situation regardless of whether it benefits or harms an individual.[121] Intrinsic value means that the object itself is valued rather than the benefits it provides.[122] If nature has this kind of value, then humans must respect nature regardless of their subjective opinions.[123]

But how is it determined if nature has inherent value? According to Taylor, "in order to show that such an entity 'has' inherent worth we must give good reasons for ascribing that kind of value to it (placing that kind of value upon it, conceiving of it to be valuable in that way)."[124] For Ecofeminism, this value is dependent on the relationships we all have with the others and how these contribute to the community, but where individuality of every component is respected. Maintaining this separation, however, could lead to a problematic loop: the endless differentiation between the human and the non-human can instead bolster the hierarchical thinking Ecofeminists are trying to eradicate.

An exit of this apparent dead end could be the realization that humans are not radically separate or independent from nature, but instead a manifestation of it. The idea, attuned to the internal relatedness of all things as ingredients in a social cosmos, could potentially result in the respect of all nature that Ecofeminists look for.[125] Rights of Nature, especially indigenous thought, are precisely based in these postulates: they see nature as an entity that connects everyone where female and male figures are seen as equal and supplemental, needing each other to reach a greater good.

Intrinsic value, in this case, doesn't only consider the relationship within the elements of nature, but the linkages between them and the worth they create when working together as one unit. A view that takes into consideration intrinsic value imagined this way might have the potential to establish new conceptual frameworks that are not oppressive and thus are one that Ecofeminists would regard as ideal.

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[118] Marcel Wissenburg, Green Liberalism: The Free and the Green Society 95 (1998).

[119] *I*d.

[120] Mark Sagoff, *Zuckerman's Dilemma: A Plea for Environmental Ethics*, 21 Hastings Ctr. Rep. 32, 34 (1991).

[121] Eduardo Gudynas, *La Senda Biocéntrica: Valores Intrínsecos, Derechos de la Naturaleza y Justicia Ecológica* [*The Biocentric Path: Intrinsic Values, Nature Rights and Ecological Justice*], 13 Tabula Rasa 45, 50 (2010).

[122] Sagoff, *supra* note 120, at 33.

[123] Wissenburg, *supra* note 118, at 92.

[124] Taylor, *supra* note 36, at 182.

[125] Zimmerman, *s*upr*a* note 8, at 43.

Conclusion

In "The Death of Nature," Merchant recognized that the goals of the ecological and feminist movements could suggest new values and social structures based on the full expression of both men and women, as well as the maintenance of environmental integrity.[126] Years later, in Environmental Philosophy, Warren asked if there was a possibility for any ecological ethic to also be a feminist ethic and wondered if mainstream normative ethical theories could generate a theory that were not male based.[127] Both of these authors' research and proposals are seen nowadays as being essential to Ecofeminist thought.

But can Ecofeminism alone start a change in society? Whilst Warren suggested that not classical conceptions of feminism but a transformative one could do the trick,[128] I believe that, as long as the focus of this theory stays on the critics of the Western world and does not incorporate alternative conceptions of nature, such as the one indigenous people in the Rights of Nature movement share, a different kind of humanity-nature relationship would still just be a fantasy.[129]

In fact, some Ecofeminists like Shiva have highlighted the idea that the incorporation of the thoughts that Rights of Nature bring to the table could be the opening door to a new era in which both nature and the Earth, as well as human consciousness, come out of the prison of patriarchal capitalism in which we have been so far imprisoned.[130] If the real objective of Ecofeminism is to reconfigure what nature means for humans and—at last—what it means to be human,[131] then a more interaction of the movement with Indigenous cultures, languages, and ontologies is needed.[132]

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[126] Merchant, *su*pra note 5, at 19.

[127] Karen Warren, *Ecofeminism, in* Environmental Philosophy. From Animal Rights to Radical Ecology 273 (Michael Zimmerman ed.,1998).

[128] Warren, *supra* note 11, at 19.

[129] Zimmerman, supra note 8, at 44; see also Huey-li Li, A Cross-Cultural Critique of Ecofeminism, in ecofeminism. women, animals, nature 272-294 (Greta Gaard ed., 1993) (critiquing the lack of analysis of non-Western interpretations in Ecofeminist theory).

[130] Shiva, *supra* note 85, at 4.

[131] Warren, supra note 4, at 399, 401.

[132] O'Donnell, supra note 51, at 427.

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To Sustain Them Forever: Ensuring the Sauk-Suiattle Tribe's Access to Salmon through Treaty, Federal Trust Doctrine, and Rights of Nature Protections

Kelly Davis*

Introduction

Respect (Hold Sacred) All of the Earth—
Respect (Hold Sacred) All of the Spirits—
Remember (Hold Sacred) The Creator—[1]

These are pinnacle principles of the Lushootseed culture of the Pacific Northwest, those that the Sauk-Suiattle Indian Tribe ("the Sauk-Suiattle"), a federally recognized tribe,[2] uphold.[3] One such being of the Earth with whom the Sauk-Suiattle has a sacred covenant[4] is the salmon of the Skagit River, known in the Sauk-Suiattle's language as "Tsuladxʷ."[5] Salmon plays an integral role in "ceremonies, food security, traditions, learning, economies, and health."[6] Because of the important relationship between the Sauk-Suiattle and salmon, the Sauk-Suiattle are stewards of the salmon's continued existence.[7]

* Kelly Davis received her J.D in May 2023 from The George Washington University Law School. Thank you to Mr. Jack Fiander, Esq. for his diligent work as the attorney for the Sauk-Suiattle and for taking the time to provide me with guidance and feedback in my research efforts. I also want to thank Dean Randall Abate for his encouragement and feedback on this Article. Last but not least, I am grateful to my family and friends for their unwavering support.

[1] Amended Civil Complaint for Declaratory Judgment at 9, Sauk-Suiattle Indian Tribe v. City of Seattle, SAU-CUV-01/22-001 (Sauk-Suiattle Tribal Ct. Jan. 6, 2022).

[2] *See* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2114 (Jan. 12, 2023).

[3] *See* Amended Civil Complaint for Declaratory Judgment, *supra* note 1 at 9.

[4] *Id*. at 3.

[5] This Article discusses "salmon" as a resource. This characterization is not meant to suggest disagreement with the theory of the Sauk-Suiattle's complaint, however, that salmon are sentient, living beings. *See* Amended Civil Complaint for Declaratory Judgment, *supra* note 1 at 5.

[6] *The Sociocultural Significance of Pacific Salmon for Tribes and First Nations*, Earth Econ. (June 8, 2021), https://static1.squarespace.com/static/561dcdc6e4b039470e9afc00/t/60c257dd24393c6a6c1bee54/1623349236375/The-Sociocultural-Significance-of-Salmon-to-Tribes-and-First-Nations.pdf [hereinafter *Pacific Salmon Report*].

[7] Amended Civil Complaint for Declaratory Judgment, *supra* note 1, at 5.

The Gorge Dam, located on the Skagit River in Whatcom County in Washington,[8] presents a threat to the relationship between the Sauk-Suiattle and salmon. The Sauk-Suiattle previously filed lawsuits against the City of Seattle, Washington, ("Seattle") concerning the Gorge Dam and the other two dams on the Skagit River.[9] Local investigations found that Seattle's dams reduce almost 40 percent of the Skagit River[10] that is used for spawning habitat for fish, including salmon.[11] On April 28, 2023, Seattle City Light stated that it would install "trap-and-haul" fish passage systems, which would collect fish in containers to be driven by trucks to the Ross Reservoir, but the details on how the system will be implemented have yet to be finalized.[12] These fish passages are a result of a settlement between the Sauk-Suiattle and Seattle in this case,[13] but the fish passages do not address the cultural, spiritual, and other aspects of salmon beyond simply their population in the Skagit River. The Gorge Dam has also attracted federal agencies' attention for its impact on salmon populations, including the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries Service, National Park Service, National Forest Service, and Bureau of Indian Affairs.[14] Dams are well-known for causing a loss of spawning habitat, which is caused by the dam blocking valuable substrate and wood from flowing downstream, decreasing the amount of oxygen for fish downstream of the dam, and reducing a river's peak flow, which is the natural flow of the river that creates habitats for fish.[15]

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[8] *LIHI Certificate #5 - Skagit Project, Washington*, Low Impact Hydropower Inst., https://lowimpacthydro.org/lihi-certificate-5-skagit-project-washington/ (last visited Apr. 13, 2023).

[9] *See* Joseph Winters, *States, tribes, and NGOs hold polluters accountable in a 'tidal wave' of greenwashing lawsuits*, Grist (Oct. 6, 2021), https://grist.org/politics/states-tribes-ngos-hold-polluters-accountable-greenwashing-lawsuits-sauk-suiattle-indian-tribe/ (arguing that Seattle City Light engaged in "greenwashing" by claiming the Skagit River hydroelectric project is the "nation's greenest utility" while the project resulted in harm to the Skagit River's fish populations); *see also* Susannah Frame, *Sauk-Suiattle tribe sues Seattle over lack of fish passage on city's Skagit River dams*, King 5 (July 23, 2021, 12:58 PM), https://www.king5.com/article/news/investigations/sauk-suiattle-indian-tribe-lawsuit-seattle-city-light-dams-skagit-river/281-9b035f87-46e0-4944-89df-8a9cc6ee7a81.

[10] *See* Susannah Frame, *Seattle's Skagit River dams hurt salmon, orcas and Native American culture, agencies say*, King 5 (Feb. 18, 2021), https://www.king5.com/article/news/investigations/seattles-skagit-river-dams-hurt-salmon-orcas-and-native-american-culture-agencies-say/281-d4e483c2-1178-4af1-b8db-634e3b4009f7.

[11] *See* Frame, *supra* note 9.

[12] *See* Susannah Frame, *After years of conflict, Seattle City Light agrees to tribal demands on Skagit River*, King 5 (Apr. 28, 2023), https://www.king5.com/article/news/investigations/skagit-river-dams/seattle-city-light-agrees-tribal-demands-skagit-river-dams-fish-passages/281-8a1f0590-6988-4c22-b26c-796f550b84f1.

[13] *See id.*

[14] *See* Frame, *supra* note 9.

[15] *See How Dams Affect Water and Habitat on the West Coast*, Nat'l Oceanic

This Article focuses on the third lawsuit Sauk-Suiattle filed against Seattle, which alleges that the Gorge Dam impedes salmon from traveling upstream the Skagit River and has thus resulted in the loss of spawning and rearing habitat for salmon.[16] The Sauk-Suiattle argues that salmon have the inherent rights to "exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation,"[17] and the Sauk-Suiattle seeks declaratory judgment based on these principles in their lawsuit concerning the Gorge Dam.[18]

The Sauk-Suiattle's arguments are part of the growing rights of nature movement in the United States, which advances nature's right to exist, persist, and maintain.[19] Although the litigation was dismissed for lack of subject matter jurisdiction,[20] this Article will address the responsibility of the federal government to recognize and protect the Sauk-Suiattle's right to serve as the steward of its resources and culture.

Part I of this Article provides a brief history of the Sauk-Suiattle and the tribe's litigation against the City of Seattle and the Gorge Dam. Part II discusses the United States' treaties with Pacific Northwest tribes, tribes' civil authority over non-Indian actors, and the United States' responsibility to safeguard Native Americans' rights through the federal Indian trust doctrine. Part III details the rights of nature movement, how these principles are intertwined with tribal identity, and the current case law on rights of nature in United States tribal courts.

Part IV recommends that the United States, as a steward of tribal interests and resources, must discontinue the use of the Gorge Dam to avoid negatively impacting salmon because the federal Indian trust doctrine compels the protection of the Sauk-Suiattle's treaty rights and resources. The protection of the Sauk-Suiattle's treaty rights must include safeguarding the Sauk-Suiattle's sovereign authority to protect its salmon resources, and adding fish passages does not fully protect salmon and the Sauk-Suiattle. Part IV also proposes an expansion of tribal civil authority, namely the *Montana* doctrine,[21] to allow federally

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& Atmospheric Admin. Fisheries (Sept. 27, 2019), https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/how-dams-affect-water-and-habitat-west-coast.

[16] *See* Amended Civil Complaint for Declaratory Judgment, *supra* note 1, at 12-13.

[17] *Id.* at 2.

[18] *See id.* at 1-3.

[19] *See* Michelle Maloney, *Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 41 Vt. L. Rev. 129, 133 (2016).

[20] *See* Order on City of Seattle's Motion to Dismiss at 2, 4, Sauk-Suiattle Indian Tribe v. City of Seattle, SAU-CUV-01/22-001 (Sauk-Suiattle Tribal Ct. Aug. 7, 2022); Second Order on City of Seattle's Motion to Dismiss at 2, Sauk-Suiattle Indian Tribe v. City of Seattle, SAU-CUV-01/22-001 (Sauk-Suiattle Tribal Ct. Nov. 7, 2022).

[21] *See* Montana v. United States, 450 U.S. 544, 565-66 (1981) (ruling that

recognized tribes in the Pacific Northwest that have treaty-based fishing rights to take appropriate off-reservation actions to protect these rights. Even without such expansion in tribal authority, the Sauk-Suiattle can still protect its salmon resources through conservation and management practices grounded in the rights of nature and subject to the Washington Department of Fish and Game's review.

I. The History of the Sauk-Suiattle Indian Tribe and their Litigation Against the Gorge Dam

The Sauk-Suiattle was designated as part of the Skagit Tribe in the 1800s.[22] They were located along the Suiattle River of the Sauk tributary waters, which influenced the language and culture of the tribe.[23] In 1855, these villagers were known as the Sahkuméhus and Sabb-uqus.[24] When the United States signed treaties with Pacific Northwest tribes, Sauk-Suiattle Chief Wawsitkin refused to sign the Point Elliot Treaty with the United States because the tribe was concerned that it would not receive its own reservation; however, a sub-chief, Dahtdemin, signed and bound the tribe to the Treaty.[25] In the 1880s, settlers arriving into the Sauk and Suiattle Rivers area to lay claim to the land burned the tribe's village, which consisted of eight traditional cedar longhouses.[26] Some of the inhabitants left to join other tribes.[27] The Sauk-Suiattle currently has over 350 members.[28]

For the Sauk-Suiattle and other Pacific Northwest tribes, fish are a vital aspect of tribal "livelihood, subsistence and cultural identity."[29] As Chief Tommy Kuni Thompson of the Celilo Village noted, "We

tribes' civil authority does not extend to non-Indians on non-Indian lands within its reservation, except when non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or when non-Indians' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

[22] Robert H. Ruby et al., A Guide to the Indian Tribes of the Pacific Northwest 267 (3d ed. 2010).

[23] *See id.* at 266.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 266-67.

[27] *Id.* at 267.

[28] Sauk-Suiattle Indian Tribe, Sau-Ku-Mehu, https://www.sauk-suiattle.com (last visited Jan. 14, 2024).

[29] United States v. Washington, 384 F. Supp. 312, 357-58 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) [hereinafter "Boldt Decision"] (holding that thirteen state statutes and regulations did not "meet the standards governing their applicability to the Indian exercise of treaty fishing rights and therefore may not lawfully be applied to restrict members of tribes having such rights from exercising those rights.").

only provide for immediate needs of our families. [Selling fish] is not a business. The old Indians raised children on [the] proceeds of fish caught."[30] Pacific Northwest tribes use salmon for religious services, trade, dietary needs, cultural identity, and as an "indicator species" for the health of the region's flora and fauna.[31] One such religious ceremony is the "First Salmon Ceremony," which is "essentially a religious rite to ensure the continued return of salmon."[32] The Ceremony has "almost infinite variations,"[33] but there typically is a community feast of salmon and "the bones are returned to the river on a bed of western red cedar boughs to carry prayers so the salmon's spirit can bring messages that the people have shown proper appreciation and respect."[34]

The respect for salmon derives from the belief that salmon are immortal beings that return to their mortal bodies if they are respected in the First Salmon Ceremony.[35] Salmon are supernatural beings that voluntarily sacrifice themselves to Indian tribes, and these supernatural beings typically "dwelled in a huge house, similar to the houses of the Indians, far under the sea" that put on their "robes of salmon skin" when the annual salmon harvest begins.[36] Additionally, tribes believe that salmon harvesting must be conducted in a respectful way and not involve mistreatment when taking the salmon from the waters.[37] A story shared with children details how a terrible fate descended upon a mischievous boy who "poked out a salmon's eyes in play."[38]

For its salmon, the Sauk-Suiattle co-manages this resource with the state of Washington as it relates to the "equal share of the harvestable number of salmon returning annually."[39] The Sauk-Suiattle, along with nineteen other Pacific Northwest tribes,[40] meet every year with state representatives to discuss salmon fisheries management during the Pacific Fishery Management Council and North of Falcon processes.[41] The co-management process is characterized as "an ongoing, evolving process" by the Washington Department of Fish and Wildlife.

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[30] Joseph C. Dupris et al., The Si'lailo Way: Indians, Salmon and Law on the Columbia River 263 (2006).

[31] *See Tribal Salmon Culture*, Columbia River Inter-Tribal Fish Comm'n, https://critfc.org/salmon-culture/tribal-salmon-culture/ (last visited Jan. 14, 2024).

Boldt Decision, 384 F. Supp. at 351.

[33] Philip Drucker, Cultures of the North Pacific Coast 95 (1965).

[34] *Pacific Salmon Report*, *supra* note 6, at 11.

[35] *See* Drucker, *supra* note 33, at 94-95.

[36] *Id.* at 85.

[37] *See id.* at 95.

[38] *Id.*

[39] *About Us*, NW. Indian Fisheries Comm'n, https://nwifc.org/about-us/#gsc.tab=0 (last visited Jan. 14, 2024) (referencing *Boldt Decision*, 384 F. Supp. at 343-44, 403, 411).

[40] *See id*.

[41] *Salmon and steelhead co-management*, Wash. Dep't of Fish & Wildlife, https://wdfw.wa.gov/fishing/tribal/co-management (last visited Jan. 14, 2024).

Over the last few years, the Sauk-Suiattle has resorted to the courts[42] to protect salmon from one of the largest threats to its continued existence: hydroelectric dams. On January 6, 2022, the Sauk-Suiattle filed suit[43] in Sauk-Suiattle Tribal Court against the City of Seattle seeking declaratory relief to: (1) have Tsuladx^{w} be protected and be recognized as possessing "inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation;" (2) recognize that the Tribe possesses a right/public trust responsibility to protect and save Tsuladx^{w}; (3) "[d]eclare the [Sauk-Suiattle] have a legal duty to protect Tsuladx^{w} and to support healthy ecosystems from which to provide on-going food security to hunt, fish, trap and gather; which rights are protected by due process;" (4) recognize that the City of Seattle knew or should have known that "obstructions to Tsuladx^{w} way of life was undertaken without the free, prior, informed consent of Tsuladx^{w} as sentient beings" and without the consent of the Sahkuméhu; (5) acknowledge the City of Seattle infringed the rights protected under UNDRIP, among other declarations, because of Seattle's continued maintenance and use of the Gorge Dam.[44]

The complaint also alleges that the Gorge Dam's operations resulted in the loss of spawning and rearing habitat, which contributed to the decline of population salmon.[45] The decline in population caused the Sauk-Suiattle to refrain from fishing for salmon within their customary waters from about 1970 to 2018.[46] The Sauk-Suiattle argues it is their "Creator-given obligation and public trust duty to protect Tsuladx^{w} and protect and save its young, including the right to protect access to the waters necessary for Tsuladx^{w} to flourish within the territory of the Sahkuméhu and beyond."[47]

Judge Josh Williams of the Sauk-Suiattle Tribal Court dismissed the Sauk-Suiattle's case because "the sole issue for dismissal is the Tribe's lack of authority to regulate dams….The Tribe's intent o[r] desire to regulate the dams is irrelevant because '[a] declaratory judgment is no less an exercise of judicial power than an award of damages.'"[48] Judge Williams did rule, however, that the Sauk-Suiattle have inherent power to exercise its civil jurisdiction in this case because "[t]here is no

[42] Winters, *supra* note 9; Frame, *supra* note 9.

[43] There was a case in federal court on this same issue, but the dismissal was affirmed by the Ninth Circuit for lack of subject matter jurisdiction. *Sauk-Suiattle Indian Tribe v. City of Seattle*, 56 F.4th 1179, 1182 (9th Cir. 2022), cert. denied, 144 S. Ct. 74 (2023).

[44] *See* Amended Civil Complaint for Declaratory Judgment, *supra* note 1, at 1-3.

[45] *See id*. at 13.

[46] *See id.*

[47] *Id.* at 16.

[48] Second Order on City of Seattle's Motion to Dismiss, *supra* note 20, at 2.

logical distinction between fee land on the Reservation and fee land off the Reservation when it comes to a Tribe's need to protect its political integrity, economic security, health, and welfare of the Tribe."[49] The Tribe filed its appeal in Sauk-Suiattle Court of Appeals, with oral arguments to be held on April 21, 2023.[50] This case, however, was settled before oral arguments were held because of Seattle's commitment to install fish passageways.[51]

II. The Existing United States Legal Framework

This Part provides the current landscape of tribal sovereignty within the United States, along with a discussion on the expansions and contraction of tribal sovereignty in federal jurisprudence. It reviews the treaties between the United States and Pacific Northwest tribes that explicitly reserved the right to fish. It then explains the substantive protection of tribal treaty rights and interests that the federal Indian trust doctrine imposes on the federal government. It concludes with a discussion of a tribe's civil authority over non-Indian individuals on reservation and non-reservation lands through examining the *Montana* doctrine.

a. Treaties between the United States and Pacific Northwest Indian Tribes

From 1854 to 1856, Governor Isaac Stevens of the Washington Territory signed treaties with the Indian tribes of the Pacific Northwest to establish reservations and fishing rights, and these treaties became known as the "Stevens Treaties."[52] The Stevens Treaties are the Medicine Creek Treaty, Treaty of Point No Point, Treaty of Point Elliott, Treaty of Neah Bay, Treaty with the Walla Wallas, Treaty with the Yakamas, Treaty with the Nez Perces, and Treaty of Olympia.[53] The Sauk-Suiattle Tribe signed the Treaty of Point Elliott.[54] Each treaty contains roughly the same language pertaining to the right to fish[55]

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[49] *See* Order on City of Seattle's Motion to Dismiss, *supra* note 20, at 3.

[50] *See* [Proposed] Modified Scheduling Order at 1, Sauk-Suiattle Indian Tribe v. City of Seattle, SAU-CUV-01/22-001 (Sauk-Suiattle Tribal Ct. App. Jan. 9, 2023).

[51] *See* Frame, *supra* note 12.

[52] *See Treaty history with the Northwest Tribes*, Wash. Dep't of Fish & Wildlife, https://wdfw.wa.gov/hunting/management/tribal/history#:~:text=Stevens%20ultimately%20negotiated%20eight%20treaties,lands%20beyond%20these%20reserved%20areas (last visited Feb. 8, 2024).

[53] *See id.*

[54] *See* Ruby et al., *supra* note 22, at 266.

[55] *See Treaty history with the Northwest Tribes*, *supra* note 52.

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, [t]hat they shall not take shell-fish from any beds staked or cultivated by citizens.[56]

Treaties are interpreted by courts in favor of Indian tribes and to preserve their rights.[57] Courts have affirmed the Pacific Northwest Indian tribes' treaty right to fish and harvest salmon (and other fish) under the variety of treaties the tribes have with the United States because although the tribes ceded their land to the United States, the tribes reserved their original right to fish.[58] Pacific Northwest tribes' fishing rights explicitly include "not only…access to their usual and accustomed fishing places, but also…fish sufficient to sustain them" because the Indians reasonably understood their rights to extend to this level from the words of Governor Isaac Stevens.[59] In the Point Elliott Treaty negotiations, Governor Stevens stated "I want that you shall not have simply food and drink now but that you may have them forever."[60] The Ninth Circuit, however, did not define what constitutes "sufficient to sustain," but it connects "sufficient" to a tribe's ability to have a "moderate living" from harvestable fish.[61] These words provide not only fishing and gathering rights for the signing Indian tribes, but also a guarantee[62] that the fish

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[56] Treaty Between the United States and the Duwamish, Suquamish, and Other Allied and Subordinate Tribes of Indians in Washington Territory art. 5, Jan. 22, 1855, 12 Stat. 927 [hereinafter "Point Elliot Treaty"].

[57] *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians As Nonowners*, 52 UCLA L. Rev. 1061, 1102-03 (2005) ("Under these 'Indian canons,' courts are to interpret treaties as the Indians would have understood them, liberally in favor of the Indians, and as preserving Indian rights.").

[58] *See Boldt* Decision, 384 F. Supp. at 352-53, 356 ("[N]o words or expressions that would describe any limiting interpretation on the right of taking fish."). S*ee also* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (aff'g indirectly the *Boldt* Decision).

[59] United States v. Washington, 853 F.3d 946, 964-65 (9th Cir. 2017), *aff'd*, Washington v. United States, 138 S. Ct. 1832 (2018) ("[by] building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.") [hereinafter "Culverts Case"].

[60] Restatement of the L. of American Indians: Off-Rsrv. Hunting & Fishing Rts. § 83 cmt. d (Am. Law Inst. 2023).

[61] *See Culverts Case*, 853 F.3d at 965-66.

[62] The D.C. Circuit stated in dicta and without cited support that the Treaty of Point Elliott:

themselves would exist for the tribes.[63] Without sufficient salmon, cultural, social, and economic harm can befall a tribe, which results in a treaty violation.[64]

b. The Federal Indian Trust Doctrine

The federal Indian trust doctrine is best described as a "sovereign trusteeship" between the United States and an Indian tribe,[65] where it is "a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[66] The United States "has charged itself with moral obligations of the highest responsibility and trust" with federally recognized Indian tribes,[67] and these moral obligations under the federal Indian trust doctrine are grounded in the "applicable statutes, regulations, treaties, or other agreements"[68] between the United States and federally recognized tribes.[69] The federal Indian trust doctrine mimics a classic trust model, "with Congress as settlor,

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> does not guarantee the tribes "any constant quantity of fish, but merely equal access to fishing ground" in common with all citizens of the (Washington) territory. …[and] does not provide an independent basis for arguing that the flow of the river is required to be maintained at any particular level and gives additional support to considering the matter in a separate proceeding. *Swinomish Tribal Cmty. v. FERC*, 627 F.2d 499, 507 (D.C. Cir. 1980).

[63] *See Culverts Case*, 853 F.3d at 964-65.

[64] *Id.* at 961 (quoting United States v. Washington, No. CV 70-9213, 2013 WL 1334391, at *15 (W.D. Wash. Mar. 29, 2013)).

[65] *See* William H. Rodgers, Jr. & Elizabeth Burleson, Environmental Law in Indian Country § 1:9 (2022).

[66] Worcester v. Georgia, 31 U.S. 515, 555 (1832).

[67] Seminole Nation v. United States, 316 U.S. 286, 297 (1942); *see also* United States v. Creek Nation, 295 U.S. 103, 109-10 (1935) (holding that the federal government must take "all appropriate measures for protecting and advancing" Indian tribes' interests).

[68] *See* Miccosukee Tribe of Indians of Fla. v. United States, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006) ("despite the general trust obligation of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties, or other agreements.").

[69] *See* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian Tribes, the Government is something more than a mere contracting party."); *see also* Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for A Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 Fordham Env't L. Rev. 10, 41-42 (2013) ("Why should the [climate change relocation] fund be limited to federally recognized tribes when other indigenous communities that are not federally recognized may be equally deserving, as well as other non-indigenous communities? The answer lies in the federal trustee relationship that exists between the U.S. government and federally recognized tribes.").

the executive branch as trustee, the Indians as beneficiaries."[70]

The trust, however, additionally requires the United States to protect the "rights and resources"[71] and "tribal property and jurisdiction."[72] These substantive protections provided under the trust ensure that "retained reservation lands would be safeguarded from white occupation and natural resources would be protected from white appropriation…the modern trust responsibility must involve defending retained lands (and resource rights) from 'ecological threats…and the legal structure' permitting those threats."[73]

Courts have enforced these substantive protections for tribes under the federal Indian trust doctrine by requiring the United States to clean garbage dumps on reservation lands,[74] "preserve and protect" a tribal fishery when leasing appurtenant water rights,[75] and safeguard tribal resources.[76] Salmon is one such protected tribal resource under

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[70] Rodgers, *supra* note 65, at 10

[71] *See, e.g.*, Okanogan Highlands All. v. Williams, 236 F.3d 468, 479-80 (9th Cir. 2000) (noting that the Forest Service's environmental impact statement considered the Confederated Tribes of the Colville Reservation's hunting and fishing resources as an evaluation of the federal trust issues, and nonetheless held that the Forest Service did not violate its trust obligations); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999) ("Similar to its duties under the ESA, the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources."); Parravano v. Masten, 70 F.3d 539, 547 (9th Cir. 1995) ("Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."); Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv., 230 F. Supp. 3d 1106, 1141-42 (N.D. Cal. 2017) (favoring granting injunctive relief for placing protective water flows in the Klamath River because the United States Bureau of Reclamation operates the Klamath Project and has responsibility to protect the federally reserved fishing rights of the Hoopa Valley and Yurok Tribes).

[72] *See* HRI, Inc. v. E.P.A., 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction.").

[73] Jacqueline M. Bertelsen, *"Fed" Up with Acidification: "Trusting" the Federal Government to Protect the Tulalip Tribes' Access to Shellfish Beds*, 6 Wash. J. Env't. L. & Pol'y 495, 512 (2016).

[74] *See* Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1098-1101 (8th Cir. 1989) (holding that the Bureau of Indian Affairs and Indian Health Services must clean up garbage dumps on the Oglala Sioux Tribe of Indians' Pine Ridge Indian Reservation because the agencies violated RCRA and therefore breached their general fiduciary duty to the tribe by failing to clean such dumps).

[75] *See* Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1420-21 (9th Cir. 1990) (holding that the Department of the Navy has a fiduciary duty to "preserve and protect" the Pyramid Lake fishery, but nonetheless affirming the district court's determination that the Navy did not violate its duty by implementing conservation steps for the Pyramid Lake Paiute Tribe of Indians and the Pyramid Lake fishery).

[76] *See e.g.*, Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 749-50 (10th

the trust doctrine.[77] In *Parravano v. Babbitt*, the Ninth Circuit held that fishing rights extended outside the Hoopa Valley and Yurok Indian tribes' reservation to reach regulation of Chinook salmon because "[t]ribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights," and it would be pointless to protect fishing rights upstream if salmon can be overharvested in the ocean before migrating and be depleted.[78]

Tribes have also successfully applied the trust doctrine's substantive protections beyond reservation lands to protect their tribal and treaty-secured resources,[79] but there must be a treaty, regulation, or statute that establishes and defines the trust responsibility between the United States and tribes.[80] In *Northern Cheyenne Tribe v. Hodel*, the Department of the Interior offered in a sale to lease eight coal tracts surrounding the Northern Cheyenne Indian Reservation.[81] The

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Cir. 1987) (holding that the Secretary of the Interior had the authority to enact an interim game code on the White River Reservation because the Secretary had a duty to protect the Shoshone's treaty rights from the Arapahoe's overuse of shared wildlife resources on the Reservation in compliance with the Treaty of 1868 and Indian trust doctrine); White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614, 672 (1987) (holding that clearcutting and excessive harvesting in a unit of Indian forest land was a breach of the Government's fiduciary duty to the White Mountain Apache Tribe because the Government is held to the "higher duty of a trustee" when it is tasked with obtaining revenue and protecting Indian forests).

[77] *See* Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986, 988 (9th Cir. 2005) (detailing how Congress and the Department of the Interior enacted and implemented the Central Valley Project Improvement Act to restore the Trinity River to meet the federal government's trust responsibilities to the Hoopa Valley and Yurok Tribes).

[78] *See Parravano v. Masten,* 70 F.3d 539, 546-47 (9th Cir. 1995).

[79] *See e.g.*, Klamath Tribes v. United States, 1996 WL 924509 at *8-*9 (D. Or. Oct. 2, 1996) (granting the Klamath Tribes' preliminary injunction to prohibit eight timber sales on former Klamath reservation lands that would impair mule deer habitat, which are a resource that the Tribes' treaty rights depend on and provide "subsistence and way of life"); Northern Cheyenne Tribe v. Hodel, No. CV 82-116 BLG, 12 Indian L. Rptr. 3065, 3071 (D. Mont. 1985) ("[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 254, 256-57 (D.D.C. 1972) (holding that the Secretary of Interior's regulations to divert water away from Pyramid Lake to the Truckee-Carson Irrigation District was "defective and irrational" because his action failed to take into account his trust responsibility to the Pyramid Lake Paiute Tribe of Indians by unnecessarily diverting water to the detriment of the Tribe).

[80] *See* United States v. Mitchell, 463 U.S. 206, 224 (1983) ("[S]tatutes and regulations establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."); *see also*, Havasupai Tribe v. United States, 752 F. Supp. 1471, 1486-87 (D. Ariz. 1990) ("[The federal government] is not obligated to provide particular services or benefits, nor to undertake any specific fiduciary responsibilities in the absence of a specific provision in a treaty, agreement, executive order, or statute.").

[81] *See Northern Cheyenne Tribe,* No. CV 82-116 BLG, 12 Indian L. Rptr. at 3065.

Northern Cheyenne Tribe sued the Department of the Interior for the Department's failure to consider "social, economic, and cultural effects [] of this development on the tribe or measures to mitigate those effects" in the decision-making process and environmental impact statement for the lease sale.[82] The District Court of Montana concluded that the Secretary of the Department of the Interior had a duty under the trust doctrine to consider the coal tracts lease sale impacts on the Northern Cheyenne Tribe, even though those lease sales were "adjacent to or near" the tribe's reservation.[83]

The District Court of Oregon in *Klamath Tribes v. United States* granted the Klamath Tribes' preliminary injunction to prohibit eight timber sales on *former* Klamath reservation lands from proceeding because the United States government did not ensure that the Klamath Tribes' treaty rights and dependent mule deer resources would be protected.[84] The Klamath Tribes' treaty rights to "hunt, fish, trap, and gather" are intertwined with the mule deer, which is a resource that the Tribes' treaty rights depend upon and provide "subsistence and way of life."[85] In *Pyramid Lake Paiute Tribe v. Morton*, the Secretary of Interior's regulations to divert water away from Pyramid Lake to the Truckee-Carson Irrigation District were "defective and irrational" because his action failed to take into account his trust responsibility to the Pyramid Lake Paiute Tribe of Indians by unnecessarily diverting water to the detriment of the Tribe.[86]

c. The Montana Doctrine

The sovereignty of Indian tribes gives rise to a tribe's right to be "distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial…."[87] This sovereignty grounds the tribe's right to self-govern its affairs.[88] The Supreme Court, however, limited a tribe's inherent, unimpaired sovereignty concerning its civil jurisdiction over non-Indians on non-Indian land within a reservation.[89] A tribe retains its

[82] *Id.* at 3066.

[83] *See id.* at 3070-71.

[84] *See Klamath Tribes,* No. 96-381-HA, 1996 WL 924509 at *1, *3, *9.

[85] *See id.* at *1.

[86] *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 254, 256-57 (D.D.C. 1972).

[87] Worcester, 31 U.S. at 559.

[88] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 27 (1831).

[89] *See* Montana v. United States, 450 U.S. 544, 565-66 (1981); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that the Navajo Tribe lacked authority to impose tax on nonmember guests of hotel, as neither exception to general Montana rule that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers was applicable.).

inherent sovereign powers over non-Indians on non-Indian land in only two scenarios: (1) when non-Indians "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) when non-Indians' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[90] As stated otherwise, "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation…."[91] In addition to *Montana*, the Supreme Court also requires that when a tribe exercises its civil jurisdiction over non-Indians, the tribe's "adjudicatory jurisdiction over nonmembers may not exceed its regulatory jurisdiction."[92]

The *Montana* case led to the Supreme Court ruling on a wide range of legal issues. The Supreme Court determined that tribes lacked civil authority in regulating hunting and fishing by non-Indians on a reservation,[93] ruling in personal injury cases arising from accidents on state highways over reservation lands,[94] hearing and awarding damages in a tortious discrimination claim against a non-Indian bank concerning the "sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals,"[95] and taxing a non-Indian company's hotel on non-Indian land within the reservation.[96]

For off-reservation matters concerning non-Indians, whether and how *Montana* grants civil authority in such scenarios is a novel issue. In determining that there is a lack of cases that reject applying *Montana* to off-reservation activities,[97] the Seventh Circuit held that

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[90] Atkinson Trading Co., 532 U.S. at 651.

[91] Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997).

[92] FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 941 (9th Cir. 2019) (citing Strate, 520 U.S. at 453).

[93] *See* Montana, 450 U.S. at 548-49 (involving a conflict between the Crow Tribal Council and the state of Montana over which entity can assert authority over hunting and fishing by non-Indians within the Crow Reservation). Although the Crow Tribe of Montana and the United States have treaties related to hunting and fishing, those treaty rights are not at issue as it relates to off-reservation hunting and fishing. *See id.*

[94] *See* Strate, 520 U.S. at 442 ("[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways [over reservation land], absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.").

[95] *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 320 (2008).

[96] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) ("The question with which we are presented is whether [Montana] applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land [within the reservation].").

[97] *See* Wisconsin v. EPA, 266 F.3d 741, 749 (7th Cir. 2001) ("There is no case that expressly rejects an application of Montana to off-reservation activities that have significant effects within the reservation….").

the Environmental Protection Agency's determination that tribes have "inherent authority over activities [that] hav[e] a serious effect on the health of the tribe" was a reasonable one, even when such activities occur off-reservation.[98] The White Earth Ojibwe Appellate Court agreed that there is a lack of cases applying *Montana* to off-reservation activities, but the Court nonetheless determined that off-reservation activities do not fall under *Montana*'s second exception because "this jurisdictional dispute focuses on whether the appellants'/defendants' allegedly unlawful activities must have occurred on tribal land (or fee land on the Reservation) for the Tribal Court to have subject matter jurisdiction under the second Montana exception."[99]

III. Applying Rights of Nature Protections to Off-Reservation Tribal Interests

The rights of nature movement advances the position that nature has "the right to exist, the right to habitat (or a place to be), and the right to participate in the evolution of the Earth community."[100] Numerous foreign nations have recognized the rights of nature,[101] and over fifty communities in the United States have done the same.[102] The rights of nature movement advocates that the environment itself, and those individuals seeking to protect it, should have standing to sue when the environment is harmed.[103]

Recently, the National Congress of American Indians (NCAI) adopted a resolution titled "Supporting the Rights of Nature" ("the Resolution") and articulated that protecting nature is essential to Indian tribes' inherent sovereignty.[104] The Resolution lists[105] the White Earth

[98] *See id.*

[99] *See* Opinion at 9, 17, Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 (White Earth Band of Ojibwe Tribal Ct. App. Mar. 10, 2022).

[100] Maloney, *supra* note 19, at 133.

[101] Ecuador, Bolivia, Colombia, New Zealand, India, and Australia are some examples. *See* Randall S. Abate, Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources 125-64 (2020).

[102] *See* Alexandra Huneeus, *The Legal Struggle for Rights of Nature in the United States*, 2022 Wis. L. Rev. 133, 134 (2022).

[103] *See* Nicola Pain & Rachel Pepper, *Can Personhood Protect the Environment? Affording Legal Rights to Nature*, 45 Fordham Int'l L.J. 315, 334, 368 (2021) (discussing the different categories of standing frameworks for rights of nature).

[104] Supporting Rights of Nature, The National Congress of American Indians, Res. No. ANC-22-008 (June 2022).

[105] *Id.*

Band of Chippewa,[106] the Ho-Chunk Nation,[107] the Ponca Tribe of Oklahoma,[108] the Oneida Nation of Wisconsin,[109] the Navajo Nation,[110] the Yurok Tribe,[111] the Nez Perce Tribe,[112] the Tohono O'Odham Nation,[113] and the Menominee Indian Tribe of Wisconsin[114] as tribal nations that have adopted laws and resolutions recognizing the rights of nature.

As of April 2024, the White Earth Band of Ojibwe of the Minnesota Chippewa Tribe ("the Band") and Sauk-Suiattle are the only tribes that have legal challenges seeking protection of their rights of nature claims.[115] The Band adopted a "Rights of Manoomin" tribal law, which recognizes wild rice as having (1) the rights to exist, flourish, regenerate, and evolve and (2) the inherent rights to restoration, recovery, and preservation.[116] The Band sued the Minnesota Department of Natural Resources (DNR) for granting the Enbridge Line 3 Project a permit to use five billion gallons of water, which are needed for

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[106] *See* Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); Rights of Manoomin, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010 (Dec. 31, 2018); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05 (Dec. 5, 2018).

[107] *See* Establishment of Rights of Nature Workgroup, Ho-Chunk Nation Legislature, Res. No. 12-18-18 F (Dec. 18, 2018) (creating a rights of nature provision in the Ho-Chunk Nation's Constitution but still requiring approval by the Secretary of the Interior).

[108] *See* A Resolution Incorporating into Tribal Law Pre-Existing and Immutable Rights of and Responsibility for the Health and Welfare of Ni-ska and Ni'Zi'De, also known as the Arkansas and Salt Fork Rivers and all Ponca Waterbodies, Ponca Tribal Business Committee Ponca Tribe of Oklahoma, Res. No. 51-07062022. (July 6, 2022).

[109] *See* Proclamation of the Rights of Nature, Oneida Business Committee Oneida Nation, BC Res. No. 10-13-21-E (Oct. 13, 2021).

[110] *See 1 NNC* § 205 (2002) (providing that all creation has rights and freedoms to exist and "It is the duty and responsibility of the Din'e to protect and preserve the beauty of the natural world for future generations.").

[111] *See* Resolution Establishing Rights of the Klamath River, The Yurok Tribal Council, Res. No. 19-40 (May 9, 2019).

[112] *See* Resolution, The Nez Perce Tribal General Council, Res. No. SPGC20-02 (June 2020) (recognizing that the Snake River is a living entity with "fundamental rights").

[113] *See Recognition and Protection of the Sacred Ha:san*, The Tohono O'odham Nation, Res. No. 21-137 (May 11, 2021) (recognizing and affirming that nature should have legal personhood, especially for the Saguaros cacti).

[114] *See* Recognition of the Rights of the Menominee River, Menominee Tribal Legislature, Res. No. 19-52 (Jan. 16, 2020).

[115] Supporting Rights of Nature, *supra* note 104.

[116] Rights of Manoomin Ordinance, *supra* note 106, at § 1(a); Resolution Establishing Rights of Manoomin Ordinance, *supra* note 106, at § 1(a).

manoomin to survive and then be harvested.[117] The White Earth Band of Ojibwe Tribal Court denied the DNR's motion to dismiss because (1) treaty interpretation favors tribal sovereignty, (2) the Band is exercising its sovereignty to protect manoomin on and off its reservation by adopting appropriate laws, and (3) the DNR's potential impacts qualify as a "direct effect" under the second Montana rule because the DNR's permit "threatens the cultural welfare and continuity of the Band due to the unique status of Manoomin."[118] The White Earth Ojibwe Appellate Court dismissed this case because the DNR's activities did not take place on the Band's reservation to fall under the second Montana exception, therefore concluding a lack of subject matter jurisdiction over the case.[119] The White Earth Ojibwe Appellate Court reasoned[120] that the Supreme Court's emphasis that Indian tribes' sovereignty rests with its tribal members and territory[121] yields a lack of tribal sovereignty over off-reservation activities.[122]

IV. Safeguarding Salmon: Enhancing Substantive and Procedural Protections

Part IV advances two lines of arguments to protect salmon and the Sauk-Suiattle's covenant with salmon beyond installing fish passageways. First, the United States must enjoin performance of the Gorge Dam because the United States, as a steward, owes a duty under the federal Indian trust doctrine to the Sauk-Suiattle to protect its off-reservation fishing rights under the Point Elliott Treaty. Second, the Sauk-Suiattle should have civil authority over the City of Seattle for operating the harmful Gorge Dam through a proposed exception to the *Montana* doctrine to advance the Sauk-Suiattle's off-reservation

[117] *See* Complaint at 7, 14, 23, 35, Manoomin v. Minn. Dep't of Nat. Res., No. GC23-0428 (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021).

[118] Order Denying Defendant's Motion to Dismiss at 4, Manoomin v. Minn. Dep't of Nat. Res., No. GC21-0428 (White Earth Band of Ojibwe Tribal Ct. Aug. 18, 2021).

[119] *See* Opinion, *supra* note 99, at 17.

[120] *See id.* at 12-14.

[121] *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327 ("We have frequently noted, however, that the 'sovereignty that the Indian tribes retain is of a unique and limited character.'(citation omitted) It centers on the land held by the tribe and on tribal members within the reservation." (quoting United States v. Wheeler, 435 U.S. 31, 323 (1978))).

[122] *See* Brackeen v. Haaland, 994 F.3d 249, 424 (5th Cir. 2021); *see also* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1091 (8th Cir.1998) ("Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.").

rights and interests. The proposed exception is that federally recognized tribes in the Pacific Northwest that have reserved fishing treaty rights off-reservation should have civil authority, in its sovereignty as a tribe, to enforce and protect such treaty rights. Even if a new exception is not created, the Sauk-Suiattle can propose rights of nature-grounded conservation and management practices for consideration by the Washington Department of Fish and Game.

a. The United States, as Steward, has a Duty to Protect the Sauk-Suiattle's Fishing Treaty Rights.

Because the Sauk-Suiattle have enumerated off-reservation treaty rights in the Point Elliott Treaty to fish, the United States has a responsibility to prevent harm to such treaty rights and their underlying dependent resources under the federal Indian trust doctrine. This would compel the United States to stop the use of the Gorge Dam on the Skagit River for its harm to salmon.

i. The Sauk-Suiattle's Access and Use of Salmon is an Unimpeded Treaty Right.

The Sauk-Suiattle's fishing of salmon is a protected, well-established treaty right. Article 5 of the Point Elliott Treaty states: "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the [Washington] Territory."[123] Courts have upheld and protected the treaty right to fish, especially salmon, when the treaty rights were impeded by burdensome legislation on Pacific Northwest tribes[124] and state development projects.[125]

The Point Elliott Treaty's right to fish is well-established, but the treaty right goes beyond simply harvesting salmon to also ensuring there will be fish sufficient to "sustain" the Sauk-Suiattle.[126] "Sufficient to sustain" is not defined by the Ninth Circuit in its opinion, but the Ninth Circuit states that "the number of fish would always be sufficient

[123] Point Elliott Treaty, *supra* note 56, at art. 5.

[124] Boldt Decision, 384 F. Supp. at 403, 404 (finding that thirteen state statutes and regulations did not "meet the standards governing their applicability to the Indian exercise of treaty fishing rights and therefore may not lawfully be applied to restrict members of tribes having such rights from exercising those rights.").

[125] *See* Culverts Case, 853 F.3d at 966 (concluding that Washington's building and maintaining of barrier culverts violated the Stevens Treaties because the culverts blocked five million square meters of suitable salmon habitat, which would have produced salmon for tribes to harvest).

[126] *See id.* at 964.

to provide a 'moderate living' to the Tribes."[127] The Ninth Circuit seemingly characterizes "moderate living" as for the fishing sites to have value from harvestable fish.[128] However, harvestable fish is only one portion of the Sauk-Suiattle' and other Pacific Northwest tribe's "moderate living." These "harvestable fish" also are valuable and provide sustenance for the tribes' cultural and spiritual living, which the Ninth Circuit itself addresses throughout its opinion.[129]

Pacific Northwest tribes, including the Sauk-Suiattle, access and use salmon for dietary purposes, commercial trade and economics, and religious and cultural ceremonies.[130] The "First Salmon Ceremony" is a religious and cultural ceremony where a tribe returns the bones of the first caught salmon to the river to honor and respect the immortal salmon's spirit for there to be a continued salmon harvest for years to come.[131] Tribes also teach their children the importance of treating salmon in harvesting with the utmost respect, discouraging cruel methods of taking fish.[132] A lack of salmon results in "cultural and social harm to the Tribes in addition to the economic harm," which violates treaty rights.[133]

Therefore, because the Sauk-Suiattle's right to fish under the Point Elliott Treaty extends to the underlying right for the fish to "sustain" the Sauk-Suiattle economically, culturally, and religiously, this Article proposes the applicable treaty right for the Sauk-Suiattle's claim to be satisfied and protected under is the right to fish as well as the underlying sustenance right.

ii. The United States Must Enjoin Performance of the Gorge Dam Under the Federal Indian Trust Doctrine to Protect Such Treaty Rights.

For the United States to adhere to its responsibilities under the federal Indian trust doctrine, the United States must stop the use of the Gorge Dam to honor its treaty commitments on ensuring "food and drink…forever" to the Sauk-Suiattle Tribe.[134] The Point Elliott Treaty reserves the fishing rights of the Sauk-Suiattle,[135] and the federal Indian trust doctrine compels the United States to protect those treaty rights and fish resources, which encapsulates salmon protection.

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[127] *Id.* at 965.

[128] *See id.* at 965-66.

[129] *See id.* at 958.

[130] *See id.*

[131] *Boldt Decision*, 384 F. Supp. at 351.

[132] *See* Drucker, *supra* note 33, at 95.

[133] Culverts Case, 853 F.3d at 961 (quoting Washington, 2013 WL 1334391 at *15).

[134] Restatement of the L. of American Indians: Off-Rsrv. Hunting & Fishing Rts. § 83 cmt. d (Am. Law Inst. 2023).

[135] *See Point Elliott Treaty*, *supra* note 56, at art. 5.

The Point Elliott Treaty, as well as additional treaties with the Pacific Northwest Indian tribes, protect the fishing and gathering rights for the signing Indian tribes and the fish themselves to exist for the tribes.[136] The federal Indian trust doctrine then compels the United States to act as the guardian to ensure these treaty rights are unimpaired by its own actions, linking the United States' duty to follow the treaties it signs to the trust duty to protect such treaty rights.[137] Courts have found the federal Indian trust doctrine to protect treaty-secured rights and other tribal interests for tribal resources,[138] including salmon.[139] The treaty itself established the fiduciary relationship between the United States and the tribe, which includes the extent of the resources protected under the trust.[140]

Indian tribes' treaty rights and the dependent resources for those treaty rights are protected under the federal Indian trust doctrine. Like waterfowl and small and big game[141] supporting the Northern Arapahoe's treaty rights to hunt and fish,[142] and the mule deer supporting the Klamath

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[136] *See* Culverts Case, 853 F.3d at 964-65.

[137] *See, e.g.*, Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986, 989 (9th Cir. 2005) (detailing how Congress and the Department of the Interior specifically implemented the Central Valley Project Improvement Act to restore the Trinity River to meet the federal government's trust responsibilities to the Hoopa Valley and Yurok Tribes); Northern Arapahoe Tribe, 808 F.2d at 749-50 (holding that the Secretary of the Interior had the authority to enact an interim game code on the White River Reservation because the Secretary had a duty to protect the Shoshone's treaty rights from the Arapahoe's overuse of shared wildlife resources on the Reservation in compliance with the Treaty of 1868 and the Indian trust doctrine); Klamath Tribes, 1996 WL 924509 at *1,*9 (granting the Klamath Tribes' preliminary injunction to prohibit eight timber sales on former Klamath reservation lands that would impair mule deer habitat, which are a resource that the Tribe's treaty rights depend upon and provide "subsistence and way of life").

[138] *See, e.g.*, Northern Arapahoe Tribe, 808 F.2d at 749-50; White Mountain Apache Tribe, 11 Cl. Ct. at 672 (holding that clearcutting and excessive harvesting in a unit of Indian forest land was a breach of the Government's fiduciary duty to the White Mountain Apache Tribe because the Government is held to the "higher duty of a trustee" when it is tasked with obtaining revenue and protecting Indian forests); Klamath Tribes, 1996 WL 924509 at *8-*9; Northern Cheyenne Tribe, 12 Indian L. Rptr at 3071 ("[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation."); Pyramid Lake Paiute Tribe, 354 F. Supp. at 254, 256-57 (holding that the Secretary of Interior's regulations to divert water away from Pyramid Lake to the Truckee-Carson Irrigation District was "defective and irrational" because his action failed to take into account his trust responsibility to the Pyramid Lake Paiute Tribe of Indians by unnecessarily diverting water to the detriment of the Tribe).

[139] *See* Hoopa Valley Indian Tribe, 415 F.3d at 987.

[140] *See United States v.* Mitchell, 463 U.S. 206, 224 (1983); *see also* Havasupai Tribe, 752 F. Supp. at 1486-87.

[141] The at-issue regulations define "big game" as "any one of the following species of animals: elk, mule deer, whitetail deer, bighorn sheep, moose, antelope, black and grizzly bear, and mountain lion." 25 C.F.R. § 244.2 (1984).

[142] *See* Northern Arapahoe Tribe, 808 F.2d at 744, 748-50.

Tribes' treaty right to hunt,[143] salmon supports the Sauk-Suiattle's treaty fishing rights.[144] The federal Indian trust doctrine substantively protects these resources and requires the United States to protect these resources to ensure treaty rights are properly respected and secured by tribes.

Furthermore, the Indian trust doctrine applies to off-reservation tribal interests. The Northern Cheyenne Tribe successfully applied the trust doctrine to require the Secretary of the Interior to consider the effects that eight coal tract lease sales would have on the Tribe, even though the coal tracts were "adjacent to or near" the tribe's reservation.[145] The Klamath Tribes stopped timber sales on former reservation lands because of the timber sales' impacts on mule deer habitats, which the tribe is dependent on for subsistence and under treaty rights to hunt.[146] The Pyramid Lake Paiute Tribe challenged the Secretary of Interior's regulations to divert water away from Pyramid Lake and the Tribe to the Truckee-Carson Irrigation District, and the Secretary's regulations were found to be "defective and irrational" because he failed to consider his trust responsibility in choosing to divert water to the detriment of the Tribe.[147] Here, the United States must protect the Sauk-Suiattle's treaty rights to fish in their "usual and accustomed grounds and stations" off-reservation because off-reservation tribal rights, like the right to fish, still remain protected under the federal Indian trust doctrine.

Therefore, the United States has failed in its federal Indian trust duties by neglecting to remedy the impacts on the salmon population that have negatively affected the Sauk-Suiattle. Local investigators found that the Gorge Dam and the overall hydroelectric power projects have reduced almost 40 percent of the Skagit River[148] that is used for spawning habitat for fish, including salmon.[149] The Sauk-Suiattle's complaint echoes these impacts, alleging that the Gorge Dam's operations resulted in the loss of salmon spawning and rearing habitat, contributed to the declining salmon populations,[150] and caused the Sauk-Suiattle to refrain from fishing for salmon within their customary waters from about 1970 to 2018.[151] The United States itself has even expressed its concern over the dam's impact on the salmon population, with the United States Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries Service, National Park Service, National Forest Service, and

[143] *See* Klamath Tribes, 1996 WL 924509 at *1, *2, *9.

[144] *See* Culverts Case, 853 F.3d at 964-65.

[145] *See* Northern Cheyenne Tribe, 12 Indian L. Rptr. at 3070-71.

[146] *See* Klamath Tribes, 1996 WL 924509 at *1, *3, *9.

[147] *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252,254, 256-57 (D.D.C. 1972).

[148] Frame, *supra* note 10.

[149] *See* Frame, *supra* note 9.

[150] *See* Amended Civil Complaint for Declaratory Judgment, *supra* note 1, at 13.

[151] *Id.*

Bureau of Indian Affairs requesting a comprehensive fish passage study to determine the dam's impact on salmon populations.[152]

b. The Sauk-Suiattle's Authority to Protect and Manage its Salmon Resources should be Expanded in its Tribal Courts and Co-Management Practices.

The Sauk-Suiattle, as the steward for salmon, should have the authority to protect its resources and off-reservation treaty rights in its own tribal courts and not depend on the United States to be its steward over its salmon resources. This section proposes that the legal landscape on tribal sovereignty and civil authority must account for the uniqueness of Pacific Northwest tribes' position with the United States because the current case law does not account for off-reservation tribal rights created by treaty. Even without this new proposal, the Sauk-Suiattle is able to protect and act on behalf of salmon in rights of nature grounded co-management practices with Washington.

i. Federally Recognized Tribes in the Pacific Northwest should have Authority over their Treaty-Reserved Fishing Rights Off-Reservation.

Tribal sovereignty is limited to "the land held by the tribe and on tribal members within the reservation,"[153] and the *Montana* rule further reinforces such a principle by holding that tribes have civil authority over non-Indians on non-Indian lands within a reservation in only two circumstances.[154] These principles, however, do not take into account the fact that treaties made with Pacific Northwest tribes give these tribes rights that extend beyond such geography of the reservation into "usual and accustomed grounds and stations" off-reservation.[155] Because courts are applying *Montana* to off-reservation issues,[156] a new *Montana* exception must be created to account for the uniqueness of the Stevens

[152] *See* Frame, *supra* note 10.

[153] Plains Com. Bank v. Long Fam. Land & Cattle Co. 554 U.S. 316, 327 (2008).

[154] *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).

[155] *See Point Elliot Treaty* art. 5, Jan. 22, 1855, 12 Stat. 927; see also Treaty history with the Northwest Tribes, supra note 52.

[156] *See* Order on City of Seattle's Motion to Dismiss, *supra* note 20, at 2 ("That simplicity [of applying *Montana*], however, quickly became murky when analyzing the novel issue raised by this action: does the Tribe have adjudicative authority over nonmembers acting outside the reservation when those actions have a direct effect on the political integrity, the economic security, health, or welfare of the tribe?"); See Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516, slip op. at 2 (White Earth Band of Ojibwe Tribal Ct. App. Mar. 10, 2022)..

Treaties to reserve off-reservation treaty fishing rights and to provide tribes the civil authority to protect their rights in their own tribal courts.

The principal reason why this Article proposes a new rule is because *Montana* and its progeny differ from the Sauk-Suiattle's case by not addressing off-reservation treaty issues in their judicial opinions. In *Montana* and its subsequent cases, the tribal interests at issue were confined to reservation lands for the Crow Tribe of Montana,[157] the Three Affiliated Tribes of the Fort Berthold Reservation,[158] the Cheyenne River Sioux Tribe,[159] and Navajo Nation.[160] Even the 1837 Treaty between the United States and the Band referenced in the *Manoomin* case characterizes the rights of gathering wild rice to "upon the lands, the rivers and the lakes included in the territory ceded,"[161] potentially limiting the 1837 Treaty's interpretation to on-reservation matters.

For the Sauk-Suiattle, its land and tribal resources exist by virtue of a treaty, and those interests are also intertwined with the welfare of a treaty-secured off-reservation resource: salmon. The treaty negotiations itself states "not only that they would have access to their usual and accustomed fishing places, but also…fish sufficient to sustain them" because the Indians reasonably understood their rights to extend to this level from the words of Governor Isaac Stevens;[162] the *Boldt Decision* acknowledges that "[a]t the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon."[163] The right to fish became part of the Sauk-Suiattle by virtue of treaty, and the Sauk-Suiattle's sovereignty, by virtue of the Point Elliott Treaty, extends to its resources as part of its land and tribe off-reservation.

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[157] *See* Montana, 450 U.S. at 548-49 (involving a conflict between the Crow Tribal Council and the state of Montana over which entity can assert authority over hunting and fishing by non-Indians within the Crow Reservation). Although the Crow Tribe of Montana and the United States have treaties related to hunting and fishing, those treaty rights are not at issue as they relate to off-reservation hunting and fishing. *See id.*

[158] *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) ("[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways [over reservation land], absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.").

[159] *See* Plains Com. Bank, 554 U.S. at 320 ("This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.").

[160] *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) ("The question with which we are presented is whether [*Montana*] applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land [within the reservation].").

[161] *See* Treaty with the Chippewa, art. 5, July 29, 1837, 7 Stat. 536; *see generally Minn. Dep't of Nat. Res. v. Manoomin,* No. AP21-0516, 16 n.17 (White Earth Band of Ojibwe Tribal Ct. App. Mar. 10, 2022).

[162] Culverts Case, 853 F.3d at 964.

[163] *Boldt Decision*, 384 F. Supp. at 355.

Therefore, *Montana* should have a limited influence on the Sauk-Suiattle's case because the present case involves civil authority over off-reservation treaty rights issues, not relating to executive order reservation lands. Because courts seemingly desire to apply *Montana* to off-reservation treaty rights issues, however, a new rule should be created to expand tribal authority over its off-reservation resources to account for the unique circumstances of Pacific Northwest tribes and treaties with the United States that reserve their rights off-reservation.

ii. The Sauk Suiattle can Protect its Salmon by Adopting and Exercising a Rights of Nature Framework to Present to the State of Washington.

As seen in Section B.1., a new *Montana* rule should be created to account for the Pacific Northwest tribes' unique circumstances as existing by virtue of a treaty to give those tribes civil authority over off-reservation activities involving treaty resources. This Article's proposed new *Montana* rule also considers viewing the tribe and its interconnectedness to salmon as one entity, where sovereignty thus extends to salmon and their associated fishing treaty rights. However, even without the new *Montana* rule, the Sauk-Suiattle would be able to manage, protect, and dictate its salmon resources under a rights of nature framework. The limitation to such management, however, is that Pacific Northwest tribes must co-manage with Washington for salmon resources and harvest.[164] This Article proposes that the Sauk-Suiattle and other Pacific Northwest tribes should have their rights of nature framework considered and applied in conjunction with Washington.

Under the rights of nature movement, nature has "the right to exist, the right to habitat (or a place to be), and the right to participate in the evolution of the Earth community."[165] The rights of nature movement advocates that the environment itself, and those individuals seeking to protect it, should have standing to sue for when the environment is harmed.[166] Nature's health is vital to tribal sovereignty, and Pacific Northwest tribes are able to address "salmon losses by drawing on their deep-rooted sociocultural histories of respectful coexistence in adapting to changes in local ecosystems and climates."[167] Rights of nature laws protect nature's existence and health; and tribes can combine such

[164] *See id. at* 343-44, 403, 411; *see also*, N.W. Indian Fisheries Comm'n, *supra* note 39 (recognizing that the tribes as natural resources co-managers with the State of Washington with an equal share of the harvestable number of salmon returning annually).

[165] Maloney, *supra* note 19, at 133.

[166] *See* Pain, *supra* note 103, at 334, 368.

[167] Pacific Salmon Report, *supra* note 6, at 21.

rights of nature framework with tribal knowledge of salmon to improve "ecological integrity and sociocultural sustainability."[168]

This Article proposes that the Sauk-Suiattle, along with other Pacific Northwest tribes, should have their rights of nature and tribal knowledge framework considered to apply to salmon management. Under the *Boldt Decision*, salmon management is shared between the Pacific Northwest tribes and Washington as it relates to the "equal share of the harvestable number of salmon returning annually."[169] Every year, representatives from Washington and Pacific Northwest tribes meet to discuss salmon fisheries management, and the co-management process is "an ongoing, evolving process."[170] The "evolving process" could allow for consideration of non-scientific information, such as socioeconomic history of tribes in salmon fishing that they have performed over hundreds of years.[171] Therefore, this Article proposes the procedural protections in these management meetings for all tribal representatives to share their socioeconomic history and culture to better improve salmon harvesting for tribal and non-Indian interests alike.

[168] *See id.*

[169] N.W. Indian Fisheries Comm'n, *supra* note 39, *referencing Boldt Decision*, 384 F. Supp. 312, 343-44, 403, 411.

[170] Wash. Dep't of Fish & Wildlife, *supra* note 41.

[171] *See id.*

Conclusion

The Pacific Northwest tribes are intertwined with salmon to sustain their lifestyle. The United States recognized the importance of salmon to these tribes, and the Stevens Treaties explicitly gave the tribes the right to fish and the stewardship responsibility to sustain them. The Sauk-Suiattle are one of these tribes with such rights, and their rights are threatened by the existence and operation of the Gorge Dam on the Skagit River. With the allegation that the Gorge Dam impedes salmon from traveling upstream the Skagit River and has thus resulted in the loss of spawning and rearing habitat for salmon, the United States and the Sauk-Suiattle must act to protect salmon's inherent right to exist. The United States must discontinue the use of the Gorge Dam as to avoid negatively impacting salmon because the federal Indian trust doctrine compels the protection of the Sauk-Suiattle's off-reservation treaty rights and resources. It is the responsibility of the United States to recognize and protect the Sauk-Suiattle's right to serve as the steward of its resources and culture.

Additionally, the Sauk-Suiattle should have expanded civil authority to protect its salmon in its own courts. There must be a shift in the Indian civil sovereignty precedent of the United States, namely the *Montana* rule, to allow federally recognized tribes in the Pacific Northwest that have fishing treaty rights to take appropriate actions to protect such treaty rights, even if the action at issue takes place off-reservation and impacts such rights. Regardless of whether this new *Montana* rule is accepted, the Sauk-Suiattle can still propose a rights of nature framework to its co-management practices to be considered by Washington. The Sauk-Suiattle, along with other Pacific Northwest tribes, should be able to protect their resources through whichever framework they see fit, as they have been the stewards of their resources since time immemorial.

Teaching Animal Law in Europe

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Introduction

Since the dawn of civilization, animals have accompanied humans and played a fundamental role in the economies, customs, and traditions. It all began with the process of domestication that, allowing the utilisation of animals on a stable basis especially in agriculture, contributed to the wealth and social progress of mankind.[1]

This ancestral bond between humans and animals has evolved over time, reflecting culture and social needs that characterize each historical era. After this long journey, contemporary society has reached a greater awareness of the importance of animals and is mindful of their fate more than in the past. Since the second half of the twentieth century, the awareness of the proximity that exists between humans and animals has grown.[2] In fact, many citizens are concerned about animal welfare,[3] and support or participate in animal protection organizations.[4] This

KEY WORDS
Animals, law, society, teaching, learning.

NOTE
This article is based on sections of the book 'La enseñanza del derecho animal' (Tirant lo Blanch, 2021) by Marita Giménez-Candela and Raffaela Cersosimo, which have been translated and updated with the publisher's authorization.

ACKNOWLEDGEMENT
We are grateful to the members of the ANRLR Editorial Board for their work.

[1] *See generally* Marcelo R. Sánchez-Villagra, The Process Of Animal Domestication (Princeton University Press, 2022).

[2] *See generally* Marita Giménez-Candela, Transición Animal En España (Tirant Lo Blanch 2019).

[3] European Commission, *Attitudes of Europeans towards Animal Welfare*, EU (Mar. 2016), https://europa.eu/eurobarometer/surveys/detail/2096.

[4] *See, e.g., Who We Are*, Eurogroup for Animals, https://www.eurogroupforanimals.org/who-we-are (last visited Feb 11, 2024).

societal interest is confirmed by the positive response to campaigns that promote a good treatment of animals, especially for those produced for human consumption.[5] Civil society is also raising questions related to the relationship between humans and animals, since the latter are increasingly seen as life partners.[6] Despite the essential role they have played for human life, the law has always treated animals in relation to human interests, not as holders of their own interests, and both academia and legal practice have not considered them a relevant topic, with the consequence that their study in the realm of law struggles to make headway.[7]

The United States of America was the cradle of Animal Law education, and the pioneers of this discipline have been a group of lawyers, like Joyce Tischler, David Favre, and Steven Wise.[8] Their efforts have resulted in the creation of a lawyers' association, in university courses, in journals and books. In this country, the teaching of Animal law has been developed, not only for the good will of a group of professors and lawyers, but also thanks to the students' request to organize elective courses, and the response provided by various universities, including Harvard and New York.[9] In addition to classes, there is a significant production of legal literature[10] and specific reviews are dedicated to Animal Law.[11]

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[5] *See, e.g.*, *Vote for Animals: placing animal welfare at the heart of the EU Elections,* Eurogroup for Animals (Feb. 1, 2024),

https://www.eurogroupforanimals.org/news/vote-animals-placing-animal-welfare-heart-eu-elections; *see also, Our Campaigns*, Compassion in World Farming, https://www.ciwf.org.uk/our-campaigns/ (last visited Feb. 11, 2024).

[6] *See, e.g.,* Pim Martens & Bingtao Su, *Perceiving Animals Through Different Demographic and Cultural Lenses, in* Human/Animals Relationships In Transformation: Scientific, Moral And Legal Perspectives 93-94 (Augusto Vitale & Simone Pollo eds., 2022).

[7] *See, e.g.,* Rachel Dunn et al., *Teaching Animal Law in UK universities: the benefits, challenges and opportunities for growth*, 57 Law Teacher, 15, 17 (2022); *see also* Tagore Trajano de Almeida Silva, *Origins and Development of Teaching Animal Law in Brazil*, 31 Pace Env't. L. Rev. 501, 502 (2014); *see also* Teresa Giménez-Candela, *Teaching Animal Law in Spain*, 6 Derecho Animal 5 (2015). https://doi.org/10.5565/rev/da.263.

[8] See Joyce Tischler, *The History of Animal Law, Part I (1972 – 1987),* 1 Stan. J. Animal L. & Pol'y 1 (2008); *see also A Brief History of Animal Law, Part II (1985 – 2011),* 5 Stan. J. Animal L. & Pol'y 27 (2012); *see also* David Favre, *The Gathering Momentum*, 1 J. Animal L. 1 (2005).

[9] Megan A. Senatori & Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. Legal Educ. 209, 211 (2010); Bruce A. Wagman, *Growing Up with Animal Law: From Courtrooms to Casebooks*, 60 J. Legal Educ. 193, 198 (2010); Peter Sankoff, *Charting the Growth of Animal Law in Education*, in 4 J. Animal L. 105, 106-07 (2008).

[10] *See e.g.*, David Favre, Animal Law: Welfare Interests and Rights (3rd ed. 2019); *see also* Sonia S. Waisman et al., Animal Law in A Nutshell (3rd ed. 2021).

[11] *See, e.g.*, *Journal of Animal Law and Natural Resources Law Information*,

Many years after the North American experience, the teaching of animal law has made its entrance into a few European universities,[12] as well as in some Australian[13] and South American universities.[14] In Europe, the Autonomous University of Barcelona has been at the forefront of teaching Animal Law by offering both an undergraduate course and a master program for years, thanks to the vision of one its professors and the commitment of her team.[15] Other initiatives complemented these courses, such as the creation of a research center, a journal and a collection of books.[16] Despite all this, Animal Law is still struggling to establish itself in the academic world.

This paper examines what Animal Law is through its sources, and why this discipline should be taught and learnt, in the light of the European legal framework. The authors draw on their experience in the field of Animal Law.

I. How To Protect Animals

The reverence for nature, which includes both humans and animals, comes from ancient times.[17] This respectful attitude is revealed

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Animal Legal & Hist. Ctr., https://www.animallaw.info/policy/journal-animal-and-natural-resource-law-information (last visited Jan. 13, 2024); *Animal Law Review*, Lewis & Clark School, https://law.lclark.edu/law_reviews/animal_law_review/ (last visited Jan. 29, 2024).

[12] *See, e.g.*, Jean-Pierre Marguénaud, *La création d'un premier diplôme universitaire de droit animalier en France*, 1 RSDA 15 (2016); Marita Giménez-Candela, *supra* note 2, at 287, 310; Rachel Dunn et al., *supra* note 7, at 19; *see* Israel González Marino, *Origen y desarrollo del Derecho Animal como disciplina de estudio en la Educación Superior*, *in* Discusiones y desafíos en torno al Derecho Animal 231, 241, 247, 248 (Sept. 2018).

[13] Sankoff, supra note 9, at 119, 125, 147; *see also,* Nick James & Rochelle James, *What Are We Trying to Achieve by Teaching Animal Law to Law Students?,* 27 Legal Educ. Rev. 2, 3 (2017), https://doi.org/10.53300/001c.6098.

[14] Trajano de Almeida Silva, *supra* note 7, at 523, 527.

[15] Teresa Giménez-Candela, *Why study Animal Law?,* 4 Derecho Animal 1, 2 (2013) https://doi.org/10.5565/rev/da.283; *see also* Marita Giménez-Candela, *supra* note 2, at 287-91, 289-303.

[16] *See, e.g.*, Teresa Gimenez-Candela, *International Centre for Animal Law and Policy*, 7 Derecho Animal 1 (2016), https://doi.org/10.5565/rev/da.258; *Derecho Animal: Forum of Animal Law Studies*, https://revistes.uab.cat/da (last visited Feb. 25, 2024); *Collection of books: Derecho Animal*, Univ. Autònoma de Barcelona, https://publicacions.uab.cat/taxonomy/term/192 (last visited Jan 13, 2024); *Animals and the Law,* Tirant lo Blanch, http://www.tirant.com/editorial/colecciones/animales-y-derecho (last visited Jan 13, 2024).

[17] Teresa Giménez-Candela, *The De-objectification of Animals (I),* 8 Derecho Animal 1 (2017), https://doi.org/10.5565/rev/da.318; *see also*, Gimenez-Candela, *supra* note 2, at 163-68, 181-194 (referring to an analysis of the consideration of animals and nature in Classical Antiquity with a selected bibliography).

in Justinian's Digest (533 A.C.),[18] a compilation of all Roman classical legal texts, which contains the first rules on animals. From the famous text of Ulpian,[19] a distinguished jurist of the Severian period, who explains the meaning of the natural world and its legal regulation, the destiny that ties men to animals continues to question society and the law. However, what stands out, in the history of Western thought,[20] is the prevalence of an anthropocentric view of the world, even if the opinions of the authors who have dealt with this issue often do not coincide.[21]

The law has forgotten the animals for centuries. This silence is reflected in the immutability of their legal status[22] in most jurisdictions, and in the focus on their welfare.[23] Therefore, it has been hard to establish a distinction between ethical reflection (animal rights) and legal thought (Animal Law and Animal Welfare Law).[24] In this sense, Animal Law differs from the concept of animal rights, which refers to moral rights of animals, even though ethics may support the granting of legal rights.[25]

After a long silence, the law began to consider animal matters in recent times, also thanks to the contribution of other disciplines such as anthropology, ethology, and animal welfare science.[26] In particular,

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[18] "*Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iusris peritia censeri*", *Code Just. 1.1.1.3 (Ulpian); see* The Digest of Justinian (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985).

[19] S*ee generally* Johanna Filip-Fröschl, *Rechtshistorische Wurzeln der Behandlung des Tieres durch das geltende Privatrecht*, *in* Recht Und Tierschutz 21 (Friedrich Harrer & Georg Graf eds., 1994); *see also* Giménez-Candela, *supra* note 2, at 181,195, 211.

[20] *See* Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I,* 19 Animal L. Rev. 23, 25 (2012); *see also* Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II,* 19 Animal L. Rev. 347, 348 (2013).

[21] *See generally* Gary Steiner, Anthropocentrism And Its Discontent: The Moral Status Of Animals In The History Of Western Philosophy (University of Pittsburgh Press 2005).

[22] *See, e.g.,* Teresa Giménez-Candela, *Estatuto Jurídico de los Animales: Aspectos Comparados, in* El Derecho De Los Animales 150 (Basilio Baltasar ed., 2015); Giménez-Candela, *supra* note 17, 1-4; Teresa Giménez-Candela, *The De-objectification of Animals (II),* 8 Derecho Animal 1 (2017) (referring to the consideration of the animal as an object of law).

[23] *See generally* Sabine Brels, Le Droit Du Bien-Être Animal Dans Le Monde: Évolution Et Universalisation (L'Harmattan, 2017).

[24] *See* Teresa Gimenez-Candela, *An Overview on Spanish Animal Law, in* Animales y Derecho [Animals and The Law] 212 (David Favre & Teresa Gimenez-Candela eds., 2015).

[25] *See, e.g.,* David Favre, The Future Of Animal Law 49-80 (Edward Elgar Publishing, 2021).

[26] Gimenez-Candela, *supra* note 2, at 183, 184.

the evolutionary theories of Darwin,[27] as well as the ethological studies of Lorenz,[28] connecting humans to the rest of living beings, have helped spur the law.[29] In Europe, the first anti-cruelty laws[30] and the first animal protection societies became relevant in the 19th century.[31] In the second half of the 20th century the studies on animal welfare gave impetus to legislation, particularly at European and national level,[32] and only in recent years, the first reforms on the legal status of animals have been adopted in some countries.[33]

We are facing a great cause, despite the challenges associated with the diversity and complexity of the animal world, which complicates the debate on how animals should be protected through the law. In the Western philosophical and legal thought there are different positions,[34] which can be summarized as follows: a) humans have the duty to not cause suffering to animals,[35] a concept that has been translated into legal

[27] Charles Darwin, On The Origin Of Species (1859).

[28] *See generally* Konrad Lorenz, King Solomon's Ring (1952).

[29] *See* Bo Algers, *Applied Ethology in the EU: Development of Animal Welfare Standards and Actions, in* Animals and Us: 50 Years And More Of Applied Ethology 155 (Jennifer A. Brown et al. eds., 2016).

[30] In Europe, the first anti-cruelty legislation started in England with the Act to prevent the improper and cruel treatment of cattle on July 22, 1822 (Martin's Act), followed by the Cruelty to Animals Act on August 15, 1876, regulating the use and treatment of live animals is scientific research. *See* Kelch, *A Short History of (Mostly) Western Animal Law: Part II, supra* note 20, at 350-51 (2013).

[31] The first animal protection association was founded in London in 1824. See Our History Timeline, RSPCA, https://www.rspca.org.uk/whatwedo/whoweare/history (last visited Jan. 30, 2024). The British initiative inspired other countries, such as France (1845), Italy (1871) and Spain (1872).

[32] *See* Muriel Falaise, *Legal Standards and Animal Welfare in European Countries, in* Animal Welfare: From Science To Law 71 (Sophie Hild & Louis Schweitzer eds., 2019); see *also,* Andrea Gavinelli & Magdalena Knypinska, *Animal and the Law: Current policy/legal Framework at the EU level,* Animales Y Derecho [Animals And The Law] 201 (Teresa Giménez-Candela & David S. Favre eds., 2015).

[33] *See infra* Sections 3 and 5.1.

[34] *See generally* Elke Diehl & Jens Tuider (eds.), Haben Tiere Rechte? Aspekte Und Dimensionen Der Mensch-Tier-Beziehung (Bundeszentrale für politische Bildung 2019); Lucille Boisseau-Sowinski & Delphine Tharaud, Les Liens Entre Éthique Et Droit: L'exemple De La Question Animale (L'Harmattan 2019); Pablo De Lora Deltoro, Justicia Para Los Animales: La Ética Más Allá De La Humanidad (Madrid: Alianza Editorial 2003); Cass. R. Sunstein & Martha C. Nussbaum (eds.), Animal Rights: Current Debates And New Directions (OUP USA 2004); Silvana Castignone (ed.), I Diritti Degli Animali: Prospettive Bioetiche E Giuridiche (Il Mulino 1988).

[35] "[T]he question is not, Can they reason? nor, Can they talk? but, Can they suffer?" Jeremy Bentham, An Introduction To The Principles Of Morals And Legislation 149 (1907). In contemporary times, *see generally* Peter Singer, Animal Liberation: A New Ethics For Our Treatment Of Animals (1975).

rules;[36] and b) humans can grant rights to animals[37], a concept that is difficult to translate into positive law, as the current doctrinal basis of subjective rights should be overcome (so far, these rights refer to the private sphere, which belongs to every person, but not to animals).[38]

II. The Legal Framework in Europe: An Overview

In the last decades, the silence of law towards animals has been broken. The debate raised by scientists, jurists, philosophers, sociologists and politicians led to the Universal Declaration of the Animal Rights, proclaimed at the UNESCO headquarters on 15 October 1978.[39] This text has no legal force. However, it is the first international document on respect for all forms of life and serves as a reference for animal advocates.[40]

In the international context, some conventions have been adopted to protect species in danger as well as biodiversity,[41] but until now, there is no convention on the protection of the welfare of animals individually considered.[42] Alongside this legal regime, the World Organisation for Animal Health has adopted soft standards pertaining to animal health and zoonosis based on scientific data, which constitute guidelines and recommendations for its member states.[43] In addition to these international conventions and standards, in Europe, the legislators

[36] *See infra* Sections 5.2 and 5.3.

[37] Tom Regan, *The Case for Animal Rights*, Animal Welfare Collection 179-89 (M.W. Fox & L.D. Mickley eds., 1986).

[38] Marita Giménez-Candela, *Person and Animal: a closeness without prejudice,* 10 Derecho Animal 15, 18-19 (2019); Marita Giménez-Candela, *Dignity, Sentience, Personality: The Legal Relationship between Animals and Humans,* 9 Derecho Animal 18, 19 (2018); Teresa Giménez-Candela, *The De-objectification of Animals (II)*, *supra* note 22.

[39] *The Declaration of Animal Rights*, https://declarationofar.org/ (last visited Jan. 22, 2024).

[40] Jean-Marc Neumann, *La Déclaration Universelle des Droits de l'Animal ou l'Egalité des Espèces Face à la Vie*, *in* Animal Law–Tier Und Recht 360, 382-90 (Margot Michel et al. eds., 2012).

[41] International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 161 U.N.T.S. 72; Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES), Mar. 3, 1973, 933 U.N.T.S. 243; Convention on the Conservation of Migratory Species of Wild Animals, Jun. 23, 1979, 1651 U.N.T.S. 1; Convention on Biological Diversity, Jun. 5, 1992, 1760 U.N.T.S. 79.

[42] David Favre, *An International Treaty for Animal Welfare,* 18 Animal L. 237, 237-80 (2012).

[43] World Organization for Animal Health, Terrestrial Animal Health Code (1968); Manual of Diagnostic Tests and Vaccines for Terrestrial Animals (1989); Aquatic Animal Health Code (1995); Manual of Diagnostic Tests for Aquatic Animals (1995).

have adopted many rules on animals, which are based on the scientific assumptions of animal welfare science.[44] These rules are distributed in the law of the Council of Europe, of the European Union and in different branches of the law of the Member States at different levels (national, regional, municipal).

In the European supranational context, there are conventions of the Council of Europe[45] and legislations of the European Union.[46] Since 1968, the Council of Europe has been interested in animals and has adopted conventions seeking to protect their welfare. These acts are binding upon the signatory parties, which are EU Member States or third countries. These conventions pertain to issues relating to animals, considered products of a single market, such as the one the EU claimed to be, namely: farming, transport, slaughter, experimentation, and pet animals.[47]

In addition to the law of the Council of Europe, there is also that of the European Union, whose animal welfare legislation is particularly prolific.[48] Since 1974 it has regulated various areas in which animals are used: farming, transport, slaughter, experimentation.[49] This legislation

[44] Isabelle Veissier et al., *European Approaches to Ensure Good Animal Welfare,* 113 Applied Animal Behav. Sci. 279 (2008); Laurence Bonafos et al., *Animal welfare: European Legislation and Future Perspectives,* 37 J. Vet. Med. Educ. 26 (2010).

[45] European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, E.T.S. 87; European Convention for the Protection of Animals during International Transport (revised), Nov. 6, 2003, E.T.S. 193; European Convention for the Protection of Animals for Slaughter, May 10, 1979, E.T.S. 102; European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, Mar. 18, 1986, E.T.S. 123; European Convention for the Protection of Pet Animals, Nov. 13 1987, E.T.S. 125.

[46] *See, e.g.*, Council Directive 98/58, 1998 O.J. (L221) (EC); Council Directive 1999/74, 1999 O.J. (L203) (EC); Council Directive 2007/43, 2007 O.J. (L 182) (EC); Council Directive 2008/119, 2008 O.J. (L 10) (EC); Council Directive 2008/120, 2008 O.J. (L 47) (EC); Regulation (EU) 2017/625, 2017 O.J. (L 95/1); Council Regulation 1/2005, 2004 O.J. (L 03); Council Regulation 1099/2009, 2009 O.J. (L 303); Directive 2010/63, 2010 O.J. (L 276).

[47] See, e.g., European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, E.T.S. 87; European Convention for the Protection of Animals during International Transport (revised), Nov. 6, 2003, E.T.S. 193; European Convention for the Protection of Animals for Slaughter, May 10, 1979, E.T.S. 102; European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, Mar. 18, 1986, E.T.S. 123; European Convention for the Protection of Pet Animals, Nov. 13 1987, E.T.S. 125.

[48] Teresa Villalba, 40 Años De Bienestar Animal: 1974-2014 10 (MAGRAMA, 2015).

49 See, e.g., See, e.g., Council Directive 98/58, 1998 O.J. (L221) (EC); Council Directive 1999/74, 1999 O.J. (L203) (EC); Council Directive 2007/43, 2007 O.J. (L 182) (EC); Council Directive 2008/119, 2008 O.J. (L 10) (EC); Council Directive 2008/120, 2008 O.J. (L 47) (EC); Regulation (EU) 2017/625, 2017 O.J. (L

has shaped the law of the Member States via regulations, which are directly applicable, or via directives, which must be transposed into national laws. On the 13 December 2007, the European Union recognized animals as sentient beings[50] in Title II on the provisions having general application of the Treaty on the Functioning of the European Union (TFEU),[51] which is primary law in the hierarchy of sources of European Union law.[52] Article 13 TFEU proclaims:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage. [53]

In short, the EU has provided a legal framework on animal welfare, by virtue of which the Member States have the obligation to adapt their legislations in this area to the consideration of animals as sentient beings.[54] Article 13 of the TFEU is a provision of constitutional rank.[55]

95/1); Council Regulation 1/2005, 2004 O.J. (L 03); Council Regulation 1099/2009, 2009 O.J. (L 303); Directive 2010/63, 2010 O.J. (L 276).

[50] *See, e.g., The Lisbon Treaty: Recognising Animal Sentience,* Compassion in World Farming (Dec. 1, 2009), https://www.ciwf.org.uk/news/2009/12/The-Lisbon-Treaty-recognising-animal-sentience (on the petition to recognize animal sentience under art. 13 TFEU); *see also* Andrew Rowan et al., *Animal Sentience: History, Science, and Politics*, *in* Animal Sentience 31 (2021).

[51] The consideration that animals are sentient beings had already appeared in the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C340.

[52] *Cf.* Udo Bux & Mariusz Maciejewski, *Sources and scope of European Union law*, *in* Fact Sheets on the Eur. Union (Nov. 2023),

https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law.

[53] Consolidated version of the Treaty on the Functioning of the European Union, (TFEU) 2012, O.J. C326/47.

[54] *See, e.g.,* Marita Giménez-Candela, *Sentience and welfare for animals used in experiments*, 9 Derecho Animal 19, 23 (2018).

[55] *See* Enrique Alonso, *El Artículo 13 del Tratado de Funcionamiento de la Unión Europea: Los Animales Como Seres «sensibles [sentientes]» a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea [Article 13 of the Treaty on the Functioning of the European Union: Animals as "sentient" beings in light of the jurisprudence of the Court of Justice of the Union], in* Animales y Derecho [Animals and the Law] 31, 38, 39 (Teresa Giménez-Candela & David Favre eds., 2015).

This means the rules on animal welfare shall be interpreted in the light of the expression "since animals are sentient beings" contained in this article.[56] Consequently, the jurists operating in the EU Member States must consider this provision by dint of the primacy of European law,[57] even though the uncertainties caused by the exemptions relating to religious rites, cultural traditions and regional heritage remain, which may limit its application. Article 13 TFEU is an important provision, although this framework needs to be improved, since it does not consider the protection of the welfare of companion animals and wild animals.

In the national context, if we focus on the legislations of the European countries (EU Member States and third countries), it appears that the provisions on animals are disseminated in different texts: constitutions, civil codes, criminal codes, and animal welfare legislations.[58]

Austria, Germany, Italy, Luxembourg, Slovenia and Switzerland have included the protection of animals in their constitutions. In Austria, this protection is a fundamental obligation of the State, which "is committed with animal welfare" (§ 2 BVG Nachhaltigkeit).[59] In Germany, the basic law establishes the obligation of the State to protect the "natural foundations of life and animals", also considering its responsibility toward future generations (art. 20a GG).[60] In Italy, the "law of the State law governs the methods and forms of animal protection" (art. 9 Cost.).[61] In Luxembourg, the constitution promotes the protection of animal welfare (art. 11 bis Const.).[62] In Slovenia, the law ensures the protection of animals against cruelty (art. 72 US RS).[63] In Switzerland, the dignity of all living beings is enshrined in the federal constitution (art. 120.2 BV)[64] and there are other provisions on animals.[65]

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[56] Marita Giménez-Candela, *supra* note 54, at 22.

[57] Enrique Alonso, *supra* note 55, at 24, 25.

[58] *Legislation Database*, Glob. Animal L. Ass'n, https://www.globalanimallaw.org/database/index.html (last visited Feb. 11, 2024).

[59] Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung [Federal Constitutional Act on Sustainability, Animal Welfare, Comprehensive Environmental Protection, Securing Water and Food Supply and Research] Dec. 17, 2013, § 2-3 (Austria).

[60] Grundgesetz für die Bundesrepublik Deutschland [Basic Law] May 8, 1949, art. 20a (Ger.).

[61] Costituzione [Cost] Dec. 22, 1947, art. 9 (It.).

[62] Constitution du Grand-Duché de Luxembourg [Constitution] Oct. 20, 2016, art 11 bis (Lux.).

[63] Ustavno sodišče Republike Slovenije [Constitution] July 31, 2000, art. 72 (Slovn.).

[64] Bundesverfassung [BV] [Constitution] Apr. 18, 1999, art. 120.2 (Switz.).

[65] Bundesverfassung t [BV] [Constitution] Apr. 18, 1999, art. 80 (Switz.) (protection of animals); Bundesverfassung [BV] [Constitution] Apr. 18, 1999, art.

The legal status of animals varies from country to country.[66] Some civil codes still classify the animal in the category of things.[67] Other civil codes consider that "animals are not things".[68] The Polish civil code specifies that "only material objects are things".[69] Until now, only the French civil code,[70] the Portuguese civil code,[71] and the Spanish civil code[72] provide that "animals are living beings endowed with sensibility"[73] and no longer chattel.

All European countries, whether they are EU Member States or third countries, have adopted provisions to punish animal abuses and ensure respect for animal welfare, although there are many differences between them regarding the legal interests protected and the degree of protection. These provisions have been laid down in criminal codes, general animal welfare acts, and sectorial protection legislation.[74]

104.3b (Switz.) (agriculture); Bundesverfassung [BV] [Constitution] Apr. 18, 1999, art. 118.2b (Switz.) (health protection).

[66] *Legislation Database, supra* note 58.

[67] This approach derived from Roman Law made sense in an economy essentially rural as the Roman one. *See infra*, Section 5.1.

[68] Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] §285a (Austria); Bürgerliches Gesetzbuch [BGB] [Civil Code], §90a (Ger.); Azərbaycan Respublikasinin Mülki Məcəlləsi [Civil Code] art. 135.3 (Azer.); Codul Civil [C. civ.] [Civil Code] art. 287 (Mold.); Schweizerisches Zivilgesetzbuch [ZGB], [Civil Code] art. 641a (Switz.); Sachenrecht [SA] [Law of Property] art. 20a (Liech.); Código Civil De Cataluña [CCCat.] [Civil Code] art. 511-1.3 (Cat.); Občanský Zákoník [OZ] [Civil Code] §494 (Czech); Burgerlijk Wetboek [BW] [Civil Code] art. 2a (Neth.).

[69] Kodeks Cywilny [kc] [Civil Code] art. 45 (Pol.). *See also* Ustawa Z Dnia 21 Serpnia 1997 R. O Ochronie Zwierzqt [Animal Protection Act 1997] art. 1.1 (Pol.). ("An animal, as living being, capable of suffering, is not a thing.").

[70] Code civil [C. civ.] [Civil Code] art. 515-14 (Fr.) s*ee also* Code de l'Animal 22-25 (Jean-Pierre Marguénaud et al. eds., 2018); Marita Giménez-Candela, *The De-Objectification of Animals in the Spanish Civil Code,* 9 Derecho Animal 28, 33-34 (2018), https://doi.org/10.5565/rev/da.361.

[71] Código Civil [Civil Code], art. 201-B (Port.) s*ee* also Helena Correia Mendonça, *Recognising Sentience in the Portuguese Civil Code,* 8 Derecho Animal 1 (2017), https://doi.org/10.5565/rev/da.12; Giménez-Candela*, supra* note 70, at 35-36.

[72] Código Civil [C.C.] [Civil Code] art. 333 bis (Spain); s*ee generally* Guillermo Cerdeira Bravo de Mansilla & Manuel García Mayo (eds.), Un Nuevo Derecho Civil Para Los Animales: Comentarios A La Ley 17/2021, De 15 De Diciembre (Reus, 2022).

[73] Code civil [C. civ.] [Civil Code] art. 515-14 (Fr.); Código Civil [Civil Code], art. 201-B (Port.); Código Civil [C.C.] [Civil Code] art. 333 bis (Spain).

[74] *Legislation Database, supra* note 58; *see also* Teresa Villalba, Código de Protección y Bienestar Animal (2020) (Spain); Jean-Pierre Marguénaud et al., Code de l'Animal (2024) (Fr.).

III. Animal Law as a Distinct Discipline

The legislation regarding animals should become "clearer, more precise and more applicable"[75] and the legislator should particularly consider animal sentience when discussing the legal treatment of animals. In short, this means that: a) the amount of animal legislation makes sense if it is applied correctly; b) the heterogeneity of legal sources (international, European, national, constitutional, civil, criminal, administrative, environmental)[76] makes this application difficult; c) the legislator should simplify these rules; and d) bearing in mind that all animals are sentient beings.

If we refer to all the current legislation and legal cases, it can be argued that Animal Law is a specific legal field. It is the discipline that covers all legal rules pertaining to animals, as well as their application, interpretation and feasible amendments, with particular consideration of the scientific data on animal sentience.[77] This makes it possible to recognize that animals hold their own interests, as living and sentient beings, which the law should contemplate in order to respect and protect them.[78] It is, therefore, a question of proposing a modification of the traditional logic of rights, obligations, and responsibilities, which constitutes the core of the construction of the legal categories hitherto recognized in Western legal systems.[79] Precisely there lies the novelty and peculiarity of Animal Law. Otherwise, it is a legal discipline like the others, with the same requirements. In other words, sentience, as an ethical value and scientifically proven data, can be a valid criterion to justify the development of Animal Law as an autonomous discipline,[80] which deals with animals in a global and interdisciplinary way.[81]

The role of the scientific community is essential to translate the concept of animal sentience into legal rules.[82] Dialogue with other

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[75] Teresa Giménez-Candela, *Sentient Beings*, 5 Derecho Animal 1, 3 (2014), https://doi.org/10.5565/rev/da.277

[76] *Legislation Database, supra* note 58.

[77] *See generally* Debbie Legge & Simon Brooman, *Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime of Animal Ecocide?*, 41 Liverpool L. Rev. 201 (2020).

[78] *See, e.g.,* David Favre, *Integrating Animal Interests into Our Legal System*, 10 Animal L. 87 (2004); David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 Marq. L. Rev. 1021 (2010).

[79] *See, e.g.*, Sebastián Figueroa Rubio, *On the Relationship between Legal Responsibility and Legal Norms in the Kelsenian Framework,* 23 Revista Ius Et Praxis 383 (2017).

[80] *See also* Jean-Pierre Marguénaud et al., Le Droit Animalier 80 (2016).

[81] *See generally* Anne Peters (ed.), Studies In Global Animal Law (Springer Open, 2020).

[82] *See* Giménez-Candela, *supra* note 2, at 213-24; *but see* Charlotte E. Blattner, *The Recognition of Animal Sentience by the Law*, 9 J. Animal Ethics 121 (2019).

disciplines is therefore essential. The consideration of animals' interests represents a new challenge for legal progress, of which the incorporation of scientific data represents a dynamic element. The legal system should also handle conflicts between the interests of animals and those of society. There exists a new vision of animals as sentient beings–ones who can aspire to have a life worth living.[83] Such a perception justifies the use of other disciplines in a deliberate debate, which recognizes the peculiarity of animals as members of a legal system that tends to ignore they are sentient beings and not inert things and, consequently, possible legal subjects.[84] All this requires academic investigations,[85] which should be carried out within an autonomous domain of studies, instead of each branch of the legal disciplines involved in an issue or dispute. [86]

IV. The Main Spheres of Animal Law

In the field of Animal Law, it is possible to set three main spheres: 1) property and related areas; 2) animal abuse and prevention strategies; 3) animal welfare legislation.

a. Property And Related Areas

Private Law is a set of rules that govern the legal relations between individuals having patrimonial characteristics.[87] In most countries, this branch of law is characterized by the existence of consolidated and referential categories in which the animal is considered as a good, as a thing susceptible of appropriation, as something in someone's dominion. Only the law can limit this entitlement. Derived from Roman Law,[88] this concept of animal as property is reflected not only in the legislation of

[83] *See generally* Luciano Rocha Santana, La Teoría De Los Derechos Animales De Tom Regan: Ampliando Las Fronteras De La Comunidad Moral Y De Los Derechos Más Allá De Lo Humano (Tirant lo Blanch, 2018).

[84] *See* Giménez-Candela, *supra* note 22; Favre, *supra* note 78, at 1024; Giménez-Candela, *supra* note 2, at 175.

[85] Anne Peters, *Vom Tierschutzrecht zu Legal Animal Studies: Forschungsdesiderate und -perspektiven,* 7 Rechtswissenschaft 325 (2016); Margot Michel & Saskia Stucki, *Rechtswissenschaft: Vom Recht* über *Tiere zu den Legal Animal Studies, in* Disziplinierte Tiere? Perspektiven Der Human-Animal Studies Für Die Wissenschaftlichen Disziplinen 229 (Reingard Spannring et al. eds. 2015).

[86] Giménez-Candela, *supra* note 7, at 1; see *also* Luigi Lombardi Vallauri, Scritti Animali. Per L'istituzione Di Corsi Universitari Di Diritto Animale (Gesualdo, 2018); Jean-Pierre Marguénaud, *Quel droit animalier pour demain?,* RSDA 495, 498-99 (2014).

[87] *See generally* Guido Alpa & Mads Andenas, European Private Law (Pacini, 2022).

[88] Giménez-Candela, *supra* note 2, at 180-92.

civil law countries, but also in that of common law countries.[89] This notion is no longer justified and can be changed by using appropriate legal techniques.[90]

Indeed, the legal concept of thing varies according to times and civilizations.[91] Roman Law includes the animals into the category of things (*res*) because Roman society was essentially rural. This choice was not dictated in an abstract way, but for practical reasons, which responded to the economic demands of the society of that time. Even slaves, although recognized as natural persons, were legally treated as things, but it was the fact of integrating them into a legal category that made their manumission possible. This Roman categorization of animals as things in property was not due, like any other Roman legal creation, to an effort of abstraction, but, on the contrary, to the punctual work that the jurists had done in responding to the questions and conflicts arisen from the practice and economic demands of their epoch.[92]

Regarding slaves, also legally treated as things—although with the difference that they were always considered human beings—their inclusion in the category of things, owned by someone, led to the creation of the institute of manumission (which made them free persons and Roman citizens), precisely as an act expressing the existence of the dominical power.[93] Therefore, for Roman jurists, the Gaian division (*summa divisio)* between persons and things, did not correspond to a systematic categorization, as has later been done in the modern and contemporary legal systems, but rather (with respect to animals) to the need to distinguish between the property and the exercise of it. Moreover, without pretending to affirm the existence of a will to specifically protect animals in the Roman legal legacy, it can be said that this legal system—which reflected the social experience of that epoch—attributes

[89] Favre, *supra* note 78, at 1024-25.

[90] Giménez-Candela, *supra* note 70, at 145 (In 1992, Professor Jean-Pierre Marguénaud demonstrated that it was possible to conceive and introduce a specific type of personhood for animals ("*personnalité technique*") in the French legal system); *see* Jean-Pierre Marguénaud, L'Animal en Droit Prive (PUF, 1992) (In the German legal world, it is worth mentioning the research concerning the creation of an "animal legal personhood"); *see* Saskia Stucki, *Rechtstheoretische Reflexionen zur Begründung eines tierlichen Rechtssubjekts*, *in* Animal Law–Tier Und Recht, Development And Perspectives In The 21st Century 143 (Margot Michel et al. eds., 2012); see also Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 Ox. J. Leg. 533 (2020).

[91] Teresa Giménez Candela, Derecho Privado Romano 168-170 (2nd ed. 2020).

[92] Pietro Paola Onida, Studi Sulla Condizione Giuridica Degli Animali Non Umani Nel Sistema Giuridico Romano 507 (2nd ed. 2012).

[93] Teresa Giménez-Candela, *Bemerkungen* über *Freilassungen in consilio*, 113 Zeitschrift Der Savigny-Stiftung Für Rechtsgeschichte 64, 64-87 (1996).

the same respect for all living beings that permeates the texts of the ancient classical world.[94]

The classification as things can be problematic in the conflicts between humans, in which an animal is also involved. This happens, for example, in the controversies for the custody of animals in case of divorce or separation, in the seizure or confiscation of animals, in the issues arising from the presence of animals in private flats, public buildings, urban transport, hotels, residencies for elderly persons or nursing homes. This also happens in the adoption of a pet, in the trusts dispositions to cover the needs of an animal in case of death of the owner, as well as in the claims for moral damages due to the death of a companion animal (by accident, bite, veterinary negligence, etc.), when the owners discover that their beloved pets are worth for the law only what determines the market value. In these cases, the Courts need to make creative efforts –exceeding what the letter of the law strictly establishes– to interpret the rules on property, since the animal is not an object, but a living being.[95]

The rigidity of the legal categories does not correspond, however, to the mentality of contemporary society and to the new conception of the relationship between humans and animals, which demand the change of the traditional legal categories of reference. Consequently, a few countries adopted some reforms to remove the animals from the category of things in the civil codes, to be considered sentient beings.[96] As has been said,[97] the legislator has done this operation in two ways: a) using the negative expression "animals are not things",[98] which is technically difficult to apply in practice; or b) using the positive expression "animals are living beings endowed with sensitivity".[99] Of these techniques, the second is preferable, since it facilitates the interpretation and application of the legal rules, especially by judges.

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[94] Giménez-Candela, *supra* note 2, at 180-81.

[95] *See generally* Miryam Oliva Olivera, Los Animales De Compañía En Las Crisis De Pareja (Tirant lo Blanch, 2023); *see also* Paolo Donadoni, *Il cammino del "danno interspecifico" in Italia. Ricostruzione cronologica della giurisprudenza,* Animali E Diritto. I Modi E Le Forme Di Tutela 177 (Dario Buzzelli ed., 2023); Thibault Goujon-Bethan & Hania Kassoul, *Pour un Aggiornamento de la Responsabilité Civile: Vers la Reconnaissance d'un Préjudice Animal Pur,* 2 RSDA 527 (2022); Diana Cerini, *Lo Strano Caso dei Soggetti-Oggetti: Gli Animali nel Sistema Italiano e L'esigenza di una Riforma*, 10 Derecho Animal 27 (2019), https://doi.org/10.5565/rev/da.429; Margherita Pittalis, *Cessation of Non-Marital Cohabitation and Shared Custody of Pets*, 10 Derecho Animal 201 (2019), https://doi.org/10.5565/rev/da.412.

[96] Giménez-Candela, *supra* note 2, at 13-21.

[97] Giménez-Candela, *supra* note 70, at 28, 46; Cerini, *supra* note 95, at 27, 31.

[98] Civil Codes of Austria (1988), Germany (1990), Azerbaijan (1999), Moldova (2002), Switzerland (2003), Liechtenstein (2003), Catalonia (2006), Czech Republic (2012), Netherlands (2013), *supra* note 68.

[99] Civil Codes of France (2015), Portugal (2016), Spain (2021), *supra* note 73.

This technique could be exported in all Western civil law countries, incorporating changes in civil codes and other branches of law related to animals, so that the entire set of legal rules is coherent. The debate on the legal status of animals also includes the question of the personhood of the animal, which is already present in the doctrine,[100] as well as in some legal cases.[101]

b. Animal Abuse and Prevention Strategies

The provisions punishing the mistreatment and abandonment of animals can be found in the criminal codes and in the animal protection legislations.[102] In general, criminal law intervenes as *ultima ratio,* when the infringement of a legal good is so serious that it cannot be protected by the administrative sanction law. Moreover, the State has the obligation to protect any vulnerable (including animals), and its response to animal abuse is based on such an inexcusable obligation. If these legal norms (criminal and administrative) are examined, their common characteristic is that they establish that the conduct of human beings must not cause unnecessary pain and suffering to animals.[103]

The dilemma arises when it comes to establishing in which cases suffering is necessary to be authorized or punished. To determine the line between necessary pain and unnecessary suffering, a common technique consists of balancing human interests (e.g., treatment of diseases, nutrition, etc.) with those of animals (e.g., life, non-suffering, etc.), where the former almost always prevails.[104]

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[100] *See, e.g.,* Giménez-Candela, *supra* note 38; Jean-Pierre Marguénaud et al., *La Personnalité Animale*, Recueil Dalloz 28 (2020); Stucki, *supra* note 90; Visa Kurki & Tomasz Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* 119 L. & Phil. Libr. 3 (2017); Visa Kurki, *Legal Personhood and Animal rights*, 1 J. Animal Ethics 1, 47 (2021).

[101] *See, e.g.*, Favre, *supra* note 10, at 363-433.

[102] *See generally* Animales y Normas. Protección Animal y Derecho Sancionador (María Luisa Cuerda Arnau & Juan José Periago Morant eds., 2021); Falasie, *supra* note 32, at 71-75.

[103] *See generally* Animal Cruelty: A Multidisciplinary Approach To Understanding (Mary P. Brewster & Cassandra L. Reyes eds., 2013).

[104] In favour of the interests of animals, two decisions dated 2009 of the Swiss Federal Supreme Court on the use of primates in scientific experiments stand out. According to this Court, in the search for a balance between conflicting interests (advances in science *versus* the suffering of animals) the proximity between primates and humans must be considered, although their respective dignity cannot be placed on the same plane. In this regard, the Swiss Court found that the treatments in question would have inflicted pain, suffering and damage disproportionate to the value of the knowledge acquired through these experiments. Therefore, these investigations were banned. Bundesgericht [BGer] [Tribunal Federal] Oct. 7, 2009, 135 Entscheidungen Des Schewizerischen Dundesgerichts [BGE] II 405 (Switz.); Bundesgericht

In Europe, there are differences in the legal treatment of animals.[105] The laws sufficiently protect pets[106] and, to a lesser extent, production animals,[107] while wild animals are quite often forgotten.[108] It is true that wild animals appear in Environmental Law, but only as part of the fauna and belonging to species.[109] Environmental legislations distinguish endangered animals from others (e.g., a polar bear[110] seems of greater value than a wild boar[111]) because the goal of preserving biodiversity prevails.[112] There is also the hunting and fishing of animals, as well as animals considered (permanently or occasionally) as harmful that are often eradicated—without too much consideration—to control a dangerous exponential growth.[113] There are serious issues that involve both Animal Law and Environmental Law (i.e., climate change

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[BGer] [Tribunal Federal] Oct. 7, 2009, 135 Entscheidungen Des Schewizerischen Dundesgerichts [BGE] II 384 (Switz.).

[105] *Legislation Database, supra* note 58.

[106] *See, e.g.,* European Convention for the Protection of Pet Animals (1987, ETS. No. 125); *see also*, Código de Animales de Compañía (Teresa Villalba ed., 2024) (Spain); Code de l'Animal (Jean-Pierre Marguénaud et al. eds., 2024) (Fr.); Codice degli Animali da Compagnia (Corrado Sforza Fogliani et al. eds, 2019) (It.).

[107] *See, e.g.,* European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, E.T.S. 87; European Convention for the Protection of Animals during International Transport (revised), Nov. 6, 2003, E.T.S. 193; European Convention for the Protection of Animals for Slaughter, May 10, 1979, E.T.S. 102; European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, Mar. 18, 1986, E.T.S. 123; Council Directive 98/58, 1998 O.J. (L221) (EC); Council Directive 1999/74, 1999 O.J. (L203) (EC); Council Directive 2007/43, 2007 O.J. (L 182) (EC); Council Directive 2008/119, 2008 O.J. (L 10) (EC); Council Directive 2008/120, 2008 O.J. (L 47) (EC); Regulation (EU) 2017/625, 2017 O.J. (L 95/1); Council Regulation 1/2005, 2004 O.J. (L 03); Council Regulation 1099/2009, 2009 O.J. (L 303); Directive 2010/63, 2010 O.J. (L 276).

[108] *See, e.g.,* art. L 521-1 Code pénal [C. pen.] [Criminal Code] (Fr.); art. 340.1 bis Código Penal [CP] [Criminal Code] (Spain); Ley 7/2023, de 28 de marzo de protección de los derechos y el bienestar de los animales [Animal Welfare Act] (Spain).

[109] *See generally,* Adrienne Bonnet et al., La protection des animaux et le droit de l'environnement (L'Harmattan, 2023).

[110] *See* The International Agreement on the Conservation of Polar Bears and Their Habitat, Nov. 15, 1973, 2898 UNTS 243.

[111] *See* Erica von Essen et al., *The Many Boar Identities: Understanding Differences and Changes in the Geographies of European Wild Boar Management*, JEPM 1 (2023).

[112] *See, e.g.,* Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES), Mar. 3, 1973, 933 UNTS 243; Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, ETS 104 (art.9); Council Directive 92/43, 1992 O.J (L 206) (EC); Directive 2009/147, 2009 O.J (L 20) (EC).

[113] Teresa Giménez-Candela & Carly E. Souther, *Invasive Animal Species: International Impacts and Inadequate Interventions*, *in* What Can Animal Law Learn From Environmental Law? 621, 638, 651 (Randall S. Abate ed., 2d ed. 2015).

and farming animals, habitat loss and pandemics, etc.), so that these disciplines should interact in the interest of humans, animals, and the environment.[114]

Regarding farming animals, the legal rules present paradoxical but legal differences, even within the same species (e.g., a lamb may be slaughtered with prior stunning, or without stunning if the slaughter is made in accordance with certain traditions of a religious nature;[115] some ducks and geese may be fattened, without respect for the nutritional rules applicable to the same animals, to produce certain foods considered delicacies; [116] etc.).

Another issue arises from the use of animals in fights or various shows, many of them public and subsidized with public money.[117] In these cases, it is legitimate to ask whether a tradition can justify the agony, humiliation or torture of any animal, since the law punishes the abuse, and the modalities of use or exhibition of animals is considered unnecessary and cruel.[118]

Animal Law can encompass the analysis and criticism of these provisions from another point of view, considering which animals are protected, what action or omission is provided, and what punishment is established (e.g., fines, imprisonment, alternative programs to prison, etc.) without forgetting that each animal is a living and sentient being deserving protection by its idiosyncrasy and existence.

c. Animal Welfare Legislation

In 1964, Ruth Harrison introduced the question of animal welfare into public debate. In her book, *Animal Machines*, she described the treatment of poultry and livestock in the field of intensive production, expressing concern about welfare standards at a time when the livestock system was beginning to develop industrially.[119] The imprint and legacy left by this book are indisputable.[120]

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[114] Debbie Legge & Simon Brooman, *supra* note 77, at 41.

[115] Anne Peters, *Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeën Organisaties Provincie Antwerpen (2018)*, U. Mich. L. Sch. Scholarship Repository 269, 290 (2019); Alex Bruce, *Responsible Regulation of the Religious Slaughter of Animals*, 10 Derecho Animal 19, 21-23 (2019).

[116] *See generally* Georgina Casas Fernández, El Foie Gras. Un Alimento Controvertido (Servei de Publicacions UAB, 2020).

[117] Jorge Antonio Jiménez Carrero, *La UE y la Tauromaquia: un Problema por Resolver*, 1 DALPS 34, 48-51 (2023). https://doi.org/10.36151/DALPS.002

[118] Marita Giménez-Candela, *Culture and Animal Mistreatment*, 10 Derecho Animal 3, 11 (2019).

[119] *See generally* Ruth Harrison, Animal Machines: The New Factory Farming Industry (Vincent Stuart, ed., 1964).

[120] Janice C. Swanson, *Harrison to Rollin: Farm Animal Welfare in Transition*, J. Applied Animal Welfare Sci. 167, 168 (1998).

Since then, the science of animal welfare has developed with a clear influence on legislation as well. The scientific areas that have generated, so far, a more visible impact in the legal field, correspond to two initiatives: the three "Rs" by Russell and Burch in the field of animal experimentation,[121] and the "Five Freedoms"report by Brambell in the livestock sector.[122]

The principle of the 3Rs (replacement, reduction, refinement) is at the core of Directive 63/2010/EU, which focuses on animals used in scientific experimentations.[123]. The Directive's ultimate goal is the complete replacement of animal experimentation with alternative methods.[124] Transposed by all EU Member States, this directive takes into account the suffering of animals. However, a review is scheduled to assess the impact of this legislation, particularly on the application of the "3Rs" principle.

The Five Freedoms remain a reference for legislation, although it is not easy to define what animal welfare is.[125] The Directive 98/58/EC, which pertains to the protection of animals as livestock holdings, is based on animal welfare, although it does not provide a definition. In fact, Article 3 only provides that "Member States shall make provision[s] to ensure that the owners or keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering[,] or injury."[126] However,

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[121] The three "Rs" are: 1) Replacement, 2) Reduction, and 3) Refinement. W. M. S. Russell & R. L. Burch, The Principles of Humane Experimental Technique 64 (1959).

[122] The Five Freedoms are: 1) freedom from hunger, malnutrition, and thirst; 2) freedom from discomfort; 3) freedom from injury, pain, and disease; 4) freedom to express normal behavioral patterns; and 5) freedom from distress and fear. *The Five Freedoms of Animal Welfare*, SPANA, https://spana.org/blog/the-five-freedoms-of-animal-welfare/ (last visited Feb. 11, 2024).

[123] Directive 2010/63, of the European Parliament and of the Council of 22 Sept. 2010 on the Protection of Animals Used for Scientific Purposes, 2010 O.J. (L 276) 33, 33.

[124] *Id.*

[125] Article 7.1.1 Terrestrial Animal Health Code states that "animal welfare means the physical and mental state of an animal in relation to the conditions in which he lives and dies."; *see also Animal Welfare*, WOAH, https://www.woah.org/en/what-we-do/animal-health-and-welfare/animal-welfare/ (last visited Feb. 11, 2024); *see* X. Manteca, E. Mainau & D. Temple, *What is Animal Welfare?*, Farm Animal Welfare Educ. Ctr. (June 2012), https://www.fawec.org/media/com_lazypdf/pdf/fs1-en.pdf (stating that animal welfare includes an animal's biological functioning, its emotional state, and its ability to express normal behavior); *see also* X. Manteca & M. Salas, *Concept of Animal Welfare*, Zoo Animal Welfare Educ. Ctr. (Sept. 2015), https://www.zawec.org/media/com_lazypdf/pdf/Sheet%20ZAWEC%201.pdf ("The concept of 'animal welfare' includes the physical health, the emotional state and the behaviour [sic] of the animal[.]").

[126] Council Directive 98/58, art. 3, 1998 O.J. (L 221) 23, 24 (EC).

this legislation does not explain what is meant by "unnecessary pain, suffering or injury," leaving the door open to debate on this problem.[127] As Anne Peters explains, the fact that these terms have a broad meaning means that it can be interpreted in favor of animals, which would require the introduction of stricter criteria compared to those used to meet market requirements.[128]

Article 3 of Council Regulation (EC) No 1/2005 on the protection of animals during transport sets out what aspects of the animal welfare requirement contains: "No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them."[129] This regulation also establishes the conditions to comply with this requirement of animal welfare: that the animals have sufficient space, food, water and rest; that trucks equipped with adequate ventilation are used; that the trips are planned in advance; that the breaks are respected on the journeys that exceed 8 hours; and that controls are carried out so that the legal requirements are respected. However, long journeys often cause great suffering to animals and, at the same time, the compliance with EU welfare rules is not ensured beyond EU borders,[130] as it is difficult for competent authorities to ensure the European standards on animal protection throughout the entire itinerary. The Court of Justice of the European Union has stated that it is necessary to limit long journeys "in the interest of animals"[131] and this statement is very relevant in the field of European legislative interpretation. With this "interest" in mind, the EU should ban or reduce long journeys and, in effect, require Member States to comply with their obligations. This is precisely an issue that has already begun to find its echo and reception in some European States, so it will soon be reconsidered before the relevant bodies of the EU.[132]

Protecting the welfare of companion animals is another issue that demands change. The EU should create a legal framework for these

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[127] Teresa Villalba, *supra* note 48, at 79.

[128] Anne Peters, *Between Trade and Torture: Animals in EU Law*, 2 Zeitschrift Für Europarechtliche Studien, 173, 186 (2019).

[129] Council Regulation 1/2005, art. 3, 2005 O.J. (L 03) (EC), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32005R0001.

[130] *See, e.g.*, Julia Havenstein, *Comparative Analysis of Legal Acts Concerning the Protection of Animals of Bovine and Ovine Species During Road Transport in the European Union and in Lebanon* (Dec. 11, 2013) (TFM dissertation, Universitat Autònoma de Barcelona) (on file with author).

[131] Finanzgerichte [EFG] [Fiscal Court] July 28, 2016, 2016 4 K 105/13, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0469.

[132] Recommendation to the Council and Commission following the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union. Eur. Par. Doc., B9-0057 (2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0015_EN.html.

animals, as well as for stray animals. This is a particularly controversial issue and difficult to bring to fruition, because, on the one hand, the EU has to respect the internal legislation of each Member State - which presents many differences concerning pet animals - and, on the other hand, the EU may only legislate within its competences, which are related to the market requirements, product safety and consumer health.[133]

In short, the adoption and application of animal welfare standards in Europe is not so simple because of the complexity of the interests involved. The legislators have to fight with legal authorities, market operators, the scientific world, animal protection organizations, various lobbies, and public opinion. Therefore, the creation of the "EU Platform on Animal Welfare",[134] which brings together these bodies at a supranational level, would mean a step forward to promote an improvement in the living conditions of animals.

Conclusion

Animal Law encompasses all existing legal rules pertaining to animals, individually considered as holders of interests, as well as their changes. To assure the knowledge, application, interpretation, and the amendments of these rules, it is necessary to teach Animal Law as its own autonomous discipline. It is essential to know these rules, taking into account the specific characteristics of the animals. Otherwise, they risk to remain inapplicable. Animal Law also embraces the decisions of the courts, which show creativity in this domain. Moreover, the complexity and heterogeneity of the legal framework require a greater specialization of professionals who deal with animal issues, as well as more academic studies that contribute to find original solutions and build a specific doctrine; the goal, of which, is to contribute to and enhance the autonomy of Animal Law.

Animal Law should be included as a compulsory course in law faculty curricula, following the legislation and competencies in education matters of each country. The universities should deal not only with the labor market pressures, but also with societal requests. So, if many people understand the interests of animals are not protected enough and call for a change, the higher education system of their countries should consider designing Animal Law programs. The teaching of Animal Law, as well as the research in this area, should enable people to acquire

[133] *Areas of EU Action*, Eur. Comm. (last visited Feb 11, 2024), https://commission.europa.eu/about-european-commission/what-european-commission-does/law/areas-eu-action_en.

[134] Commission Decision 185/04, 2021 J.O. (185) 7.

knowledge and skills in this emerging field of law, which they can then use in their work and civil life. This is in line with the vision of Bologna Process,[135] according to which higher education shall give the European citizens the competences to face the challenges of the labor market, as well as to participate in society. In this context, European universities are places which allow students to acquire and develop knowledge, skills, and attitudes to engage with wider society, considering the cultural, economic, scientific, and technological changes.[136]

Unlike the United States of America, there are very few Animal Law courses in European universities. These initiatives are commendable and clearly allow for profitable exchanges between researchers and law practitioners, who are the best ambassadors of this discipline in their countries. European universities should be promoting more programs, but their reluctance in creating them is more deeply rooted in culture than mere technical or economic concerns.

The establishment of stand-alone courses of Animal Law is essential in order to secure its future. Universities should offer specific academic programs in response to the demand of the students who wish to broaden their knowledge and skills. To wholly meet the challenges of this discipline, animal law instruction requires a holistic mind and an interdisciplinary approach. This is a concrete way to educate or train a new generation of researchers and practitioners, promoting the respect for animals and their consideration under the law.

[135] *See* Eur. Higher Educ. Area [EHEA], Joint Declaration of the European Ministers of Education (Jun. 19, 1999), https://www.ehea.info/media.ehea.info/file/Ministerial_conferences/02/8/1999_Bologna_Declaration_English_553028.pdf.

[136] *See* Resolution on the Implementation of the Bologna Process – State of Play and Follow-Up, Eur. Par. Doc. B8-0190 (2018), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0190_EN.html.

Balancing the Best Interests of Animals and Human Rights in Companion Animal Rescue and Adoption Operations

Daniel W. Dylan[1] and Aurora FitzGerald[2]

Introduction

It is trite to say that provinces and territories in Canada need to comprehensively regulate operations and organizations that are involved in the care, control, and breeding of companion animals throughout their jurisdictions; most specifically, the highly exploitative operations commonly known as puppy "mills" or kitten "mills," "backyard breeders," and the like.[3] The absence of any meaningful legislation relating to these matters has enabled such breeding operations to function without any genuine regulation or governmental oversight as to the breeding environments, nourishment, health, safety, care and living conditions of non-human animals (animals)[4]—some jurisdictions are worse than others in this respect.[5] Humane Societies (and Societies for the Prevention of Cruelty to Animals (SPCAs)) throughout Canada are forced to reckon with the many social, economic and legal problems generated as a result of this legislative lacuna.[6] The number of unwanted, distressed, abandoned, neglected, injured and abused animals that must be cared for, rehomed or euthanized is a prime example of the issues the lack of oversight and regulation perpetuate.[7]

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[3] *See Canada's Puppy Mill Problem*, ANIMAL JUST., https://animaljustice.ca/issues/puppy-mills (last visited Feb. 15, 2024); *see also* Samantha Skinner, *Federalism and Animal Law in Canada: A Case for Federal Animal Welfare Legislation*, 16 Animal & Nat. Resource. L. Rev. 105, 105-14 (2020).

[4] *Id*.

[5] *See e.g., Puppy mill uncovered on a farm in Quebec's Eastern Townships*, CBS (May 23, 2014), https://www.cbc.ca/news/canada/montreal/puppy-mill-uncovered-on-a-farm-in-quebec-s-eastern-townships-1.2652607.

[6] *See* Patricia Turner et al., *Animal shelters and animal welfare: raising the bar,* 53 Can. Vet J. 893 (2012).

[7] *Humane Societies and SPCAs in Canada: A comprehensive look at the sector*, CFHS 1, 3 (2016), https://humanecanada.ca/wp-content/uploads/2020/03/CFHS-Sector_Report_-_EN_-_Final.pdf.

Furthermore, the public interest aspect of investigation and potential prosecution of criminal behavior related to these animal operations is often unrealized, yet recent scholarship has made a compelling case that incarcerating humans for crimes committed against animals is not a panacea, let alone ameliorative, for instances of animal cruelty and abuse.[8] Without specific, reinforcing licensing and/or a regulatory system to facilitate the detection of offenses, nonetheless, no penalization, rehabilitation or education of the offender can occur. Despite this legislative deficiency, however, and the absence of any readily available scholarship on the subject, little attention, it seems, is paid to the absence of regulations which govern companion animal *rescue* operations.

Within the companion animal rescue context, issues such as the failure to provide necessities to rescued animals, failure to treat them safely and ethically, extortive fostering and adoption practices, punitive contracts and exploitative *quid pro quo* arrangements, privacy violations and covert human rights discrimination all manifest a latent dark side to larger efforts that are popularly viewed as—and for a large part are—benevolent.[9] In other words, in some cases, companion animal rescue operations may recreate or prolong the problems that animals suffer in unregulated breeding operations, and may inhibit fair and equitable adoption outcomes.

In such situations, for the most part, the well-being of animals commonly remains the primary concern; however, a residual but significant issue is that an unregulated portion of the private sector is largely left in control of what is—and if it is not, what should be—an important social and public concern: deciding who, and under what circumstances, a person may adopt a pet or save an animal life.[10] While Humane Societies and their adoption processes are *somewhat* regulated, such wholly private companion animal rescue operations are *entirely* unregulated. Despite the general need for amendments to laws which ubiquitously treat animals as chattels, new provincial/territorial and municipal laws and regulations (which are also respectful of human rights) are needed to adequately govern companion animal rescue operations. So doing would precipitate and manifest better overall rescue practices and outcomes for both animals and humans.

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[8] *See* Carceral Logics: Human Incarceration and Animal Captivity (Lori Gruen & Justin Marceau eds., 2022) ; *see also* Michael Swistara, *What Comes after Defund?: Lessons from Police and Prison Abolition for the Animal Movement,* 28 Animal L. 89 (2022).

[9] Valery Giroux & Kristin Voigt, *Companion Animal Adoptions in Shelters* in The Ethics of Animal Shelters, at 248 (Valery Giroux, Kristin Voigt, and Angie Pepper eds, Oxford University Press 2023)

[10] *Promotion of Animal Welfare and Charitable Registration,* Gov't of Canada (Aug. 19, 2011), https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/promotion-animal-welfare-charitable-registration.html.

Given that animals are considered to be *property* in Canadian law, the creation of such regulations would fall squarely within the jurisdiction of the provinces and territories under section 92(13) of the *1867 Act*.[11] Consequently, this article sets out a possible tri-part regulatory regime that could realistically be implemented within the jurisdictional framework as it exists now: (1) creation of a "*Best Interests of the Companion Animal*" standard; (2) adoption and implementation of the standard within breeding facilities, rescue organizations, and the like at the provincial/territorial level; and, (3) ongoing implementation governmental regulation and enforcement of the standard. In Part I, this article sets out the status of companion animals within the Canadian legal context, and how that status translates into the statistics and data sets to describe the foundation of the argument. In Part II, this article briefly discusses the status of animals as property in Canada to further support our argument. Part III discusses the current absence of regulations in the animal breeding and adoption contexts to illustrate why our proposal is a necessary and viable one. Part IV is an exploration of what a "Best Interests of the Companion Animal" standard might mean for animals and which methods for implementing that standard should be considered, while Part V completes the analysis with a topographical but novel discussion of the intersection of human rights and that of the best interests of the companion animal standard.

I. Companion Animals in Canada

Companion animals, more commonly referred to or known as "pets," or "family pets," are undeniably a thread woven into the fabric of Canadian familial life and western society generally.[12] Many Canadians "own" and provide care for pets of all kinds or species.[13] Although detailed and systematic statistics are not readily accessible, either because they are not generated or are typically kept away from public view, some popularly generalized ones do exist and can be aggregated to illustrate a reliable portrait of human animal and companion animal relationships in Canada.[14] The statistics that we have attributed to the

[11] *See* Constitution Act 1867, 30 & 31 Vict. c 3 (UK).

[12] *Survey: 95% of Canadians Consider Pets Family*, Pawzy (Sept. 27, 2019), https://pawzy.co/blog/fun/pets-part-of-the-family-Canadian-survey; *see also* Becky Tipper, *Pets and Personal Life*, in Sociology of Pers. Life 85, (2011); David D. Blouin, *Understanding Relations between People and their Pets*, 6 Socio. Compass 856 (2012).

[13] While it is true that individuals and families "own" pets because they are at law property, it is likely that these same persons likely do not consider their animal family members to be property nor their human family members and other human animals as subject to "ownership."

[14] *See, e.g.*, Terri Perrin, *The Business of Urban Animals Survey: The Facts*

paper can be understood to show that the total Canadian pet population, which includes dogs, cats, fish, small mammals and reptiles, reached approximately 27.9 million in 2020, a figure which is expected to rise to 28.5 million by the year 2025.[15] According to Statistics Canada (StatsCan), the Canadian pet population's increase from 27.5 million pets in 2016 to 27.9 million pets in 2020 represented a compound annual growth rate (CAGR) of 0.4%; a small amount of growth, but growth nonetheless.[16]

In relation to cats and dogs, there were estimated to be around 8.5 million cats and approximately 7.9 million dogs in Canadian households in 2022.[17] Another study produced the same statistic and estimated that 38% of Canadian households own and provide care to and for cats, and 35% own and provide care to and for dogs.[18] StatsCan reported that as of October 1, 2022, there were 39,292,355 persons living in Canada, meaning that there is approximately one household pet for every two persons in Canada. Furthermore, StatsCan reported that in 2020, two years earlier, 8.5 million fish accounted for 30.5% of the Canadian pet population while 8.2 million cats and 7.2 million dogs respectively accounted for 29.3% and 25.9% of the pet population.[19]

Canadian households with children have more pets than those without children, and the percentage of dog owners that acquired their dog as a puppy increased from 52% to 56%.[20] The increase in the number of dogs acquired as puppies may support the assertion that more dogs were *purchased* rather than *adopted* during the COVID-19 pandemic.[21]

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and Statistics on Companion Animals in Canada, 50 Can. Vet J. 48 (2009); Andrew N. Rowan, *Companion Animal Statistics in the USA*, Demography and Stat. for Companion Animal Populations Collection 7 (2018).

[15] M. Shahbandeh, *Total Pet Population in Canada 2016-2025*, Statista (Jan. 12, 2024), https://www.statista.com/statistics/1255017/pet-population-canada/.

[16] Statistics Canada, *Sector Trend Analysis – Pet food trends in Canada* <https://agriculture.canada.ca/en/international-trade/market-intelligence/reports/sector-trend-analysis-pet-food-trends-canada> [hereinafter *SC Sector Trend*].

[17] Shahbandeh, *supra* note 14.

[18] Nicole Cosgrove, *10 Canada Pet Ownership Statistics in 2024: Facts & FAQ*, Pet Keen, https://petkeen.com/pet-ownership-statistics-canada/ (last visited Feb. 2, 2024).

[19] *SC Sector Trend*, *supra* note 15.

[20] Cosgrove, *supra* note 17.

[21] *See generally* Hallie Cotnam, *Year of the dog: Pandemic puppies in high demand, short supply*, CBC News (Oct. 29, 2020), https://www.cbc.ca/news/canada/ottawa/pandemic-puppies-ottawa-supply-demand-breeders-rescue-urge-caution-1.5778956; Pete Evans, *Pandemic Isolation Sees Booming Demand for Pets — And for Businesses that Cater to Them*, CBC News (Dec. 27, 2020), https://www.cbc.ca/news/business/pandemic-pet-business-1.5850051; *see also The proportion of pet owners in Canada remains unchanged from last year, though many pet owners have adopted additional pets, and many others are hoping to add a pet to their household in the future*, Narrative Rsch. (Dec. 10, 2021), https://narrativeresearch.ca/

Altogether, the number of the dogs adopted from shelters and rescue centers increased from 19% to 26% between 2014 and 2024.[22]

Similarly, another 2021 study reported that there was a 3% increase in the number of companion animal acquisitions by Canadians, and that there were almost no demographic differences in the type of pets people owned or cared for. Those under the age of 44 were as likely to own a cat or dog as those 45 and over.[23] Persons who identify as female are slightly more likely to own a pet than persons who identify as male (59% versus 54%) as well as being more likely to own a cat (36% versus 28% among persons who identify as male).[24] 98% of respondents in that study stated that their pet(s) brought joy into their lives, 94% considered their pets to be family members, 94% held that their pets had improved their quality of life, and 72% held that their pets made them more active in their daily lives.[25]

In terms of caring for companion animals, according to the Ontario Veterinary Medical Association (OVMA), in 2021 (the most recent statistics available), the annual average cost of caring for a puppy ranged from $4,589.00 to $4,666.00; for a dog, approximately $3,724.00; for a kitten, ranging from $3,091 to $3,231; and, for a cat was approximately $2,542.00.[26]

On July 13, 2022, StatsCan reported that the 2020 median after-tax income of Canadian households was $73,000, up 9.8% from 2015 five years earlier.[27] In 2019, one year before, the median after-tax income of Canadian households was $68,980.[28] Thus, caring for an animal, even at the highest end of the cost spectrum, only represented 7% of the average Canadian household after-tax income that year and 6% of the same in 2020.[29] In comparison, from the most recent statistics available (2019), Canadian households spent 29.3% of household after-tax income on housing and shelter, 18.5% on transportation, 14.9% on

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the-proportion-of-pet-owners-in-canada-remains-unchanged-from-last-year-though-many-pet-owners-have-adopted-additional-pets-and-many-others-are-hoping-to-add-a-pet-to-their-household-in-the-future.

[22] Cosgrove, *supra* note 17.

[23] David Coletto, *Pandemic Pets: Did Canada see a pandemic pet boom?*, Abacus Data (Jun. 10, 2021), https://abacusdata.ca/pets-pandemic-canada/.

[24] *Id*.

[25] *Id*.

[26] *Cost of Care 2021 Canine*, Ontario Veterinary Med. Assoc. (2021), https://www.ovma.org/assets/1/6/CostOfCare%202021%20Canine.pdf and https://www.ovma.org/assets/1/6/CostOfCare%202021%20Feline.pdf.

[27] *Income in Canada, 2020*, Stat. Can. (July 12, 2022), https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2022040-eng.htm.

[28] *Survey of Household Spending, 2019*, Stat. Can. (Jan 22, 2021), https://www150.statcan.gc.ca/n1/daily-quotidien/210122/dq210122b-eng.htm.

[29] *Id*.

food, 11.5% on household operations, furnishings and equipment, 6.7% on recreation, 6.0% on personal care, 4.8% on clothing and accessories, 2.9% on tobacco, alcohol, non-medicinal cannabis, and games of chance, and 2.7% on miscellaneous items.[30] These statistics, it should be noted, did not identify whether pet care was already included in one of these categories. If the OVMA is correct, however, then the cost of caring for an animal in Canada is relatively affordable and, given high animal ownership numbers discussed above, ostensibly ought to be (if it is not already) within the financial reach of most Canadians even if a financial sacrifice might be required in another area of household spending to make pet care-giving a reality.[31]

While the greatest number of veterinary practices are in Ontario,[32] and despite limited veterinary services in Nunavut,[33] veterinary and animal care services are available in every Canadian jurisdiction, ostensibly placing responsible companion animal or pet ownership and care-giving within the geographic reach of most Canadians.[34] However , as Humane Canada—the federation of the 42 Humane Societies and various SPCAs across Canada—reported, 15% of the animals surrendered to shelters in 2021 was because of the lack of affordable veterinary care, which in some cases sadly meant the loss of a primary family member for some Canadian households because of financial reasons.[35] Humane Canada also reported that in 2021, among the 175 shelters extant in Canada, more than 60,000 cats, 21,000 dogs and 13,000 animals of varying species, totalling 94,000 animals, were taken in by animal shelters in Canada.[36]

In terms of outcomes, Humane Canada reported that of these animals, 44% of dogs and 62% of cats were rehomed or adopted.[37] Apparently an all time low, perhaps owing to the COVID-19 pandemic but not asserted as such by Humane Canada, that organization reported

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[30] *Id*.

[31] *See, e.g.*, Arnold Arluke, *Coping with Pet Food Insecurity in Low-Income Communities*, 34 Anthrozoös 339 (2021).

[32] Statistics, Canadian Veterinary Medical Association (2023), https://www.canadianveterinarians.net/about-cvma/media-centre/statistics/.

[33] *See, e.g.*, *Nunavut's Only Vet Service Says Humane Society's Free Clinic Nips at Its Profits*, CBC News (Jan. 25, 2018, 6:00 AM), https://www.cbc.ca/news/canada/north/vet-services-nunavut-1.4502027.

[34] Statistics, Canadian Veterinary Medical Association (2023), https://www.canadianveterinarians.net/about-cvma/media-centre/statistics/.

[35] *2021 Animal Shelter Statistics*, Humane Can. 1, 7 (Dec. 20, 2022), https://humanecanada.ca/wp-content/uploads/2022/12/HC_animal_shelter_statistics_2021.pdf.

[36] *Id.* at 5.

[37] *Id.* at 8.

that only 10% of dogs and only 11% of cats were euthanized.[38] Humane Canada also indicated that 31% of dogs were reclaimed and 6.8% of cats were reclaimed.[39] While Humane Canada's report includes some statistics respecting the remaining 15% of dogs and 21% of cats that were neither euthanized, rehomed, or reclaimed,[40] it does not seem to address the possibilities that any remaining percentages may have been disposed of or sold to corporations or other entities for the purpose of research or conducting experiments upon them (sometimes referred to as "pound seizure") as permitted under Ontario law, for example.[41] It does indicate, however, that nearly 10% of both cats and dogs remained in shelters across Canada.[42]

The Canadian Council on Animal Care (CCAC), the body which is responsible for animal use in research and experimentation in Canada but which does not actually *regulate* these practices,[43] reported in its annual *Animal Data Report*—the most recent of which was published in 2022—that 3,692,479 animals were used in research, teaching, and testing in 2021.[44] Of that figure, 10,555 or 0.3% were dogs and 6,263 or 0.2% were cats.[45] The highest numbers were found in mice at 1,259,196 or 34.1%, fish at 1,251,563 or 33.9%, and birds at 444,596 or 12.0%.[46]

Unlike previous years and trends, Humane Canada also reported that less transfers of animals from one shelter to another also took place.[47] Overall, the data reported by Humane Canada only included statistics generated from the animal sheltering activities of humane societies

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[38] *Id.* at 9.

[39] *Comparison of animal shelter statistics, 1993-2021*, Humane Can. 1, 1, https://humanecanada.ca/wp-content/uploads/2022/12/HC_comparison_animal_shelter_statistics_1993_2021.pdf (last visited Feb. 15, 2024).

[40] *Id.* at 6. (Humane Canada provides such categories as "Returned to Owner, Transferred, Other Live Outcomes, Died or Lost…").

[41] *Animals for Research Act*, R.S.O 1990, c A22, § 20(6)(c) (Can.); *see also Guidelines on: Procurement of Animals Used in Science*, Canadian Council on Animal Care 1, 15 (2007), https://ccac.ca/Documents/Standards/Guidelines/Procurement.pdf.

[42] *2021 Animal Shelter Statistics*, *supra* note 32, at 6.

[43] *See, e.g.,* Gilly Griffin & Paul Locke, *Comparison of the Canadian and US Laws, Regulations, Policies, and Systems of Oversight for Animals in Research,* 57 ILAR J. 271, 275 (2016).

[44] *Explore the CCAC Animal Data Report 2021*, CCAC (Oct. 11, 2022), https://ccac.ca/en/about/news-and-media/2022/10/11/explore-the-ccac-animal-data-report-2021/ .

[45] CCAC Animal Data Report 2021, Can. Council on Animal Care 1, 4 (2023), https://ccac.ca/Documents/AUD/CCAC_Animal_Data_Report_2021.pdf.

[46] *Id*.

[47] *2021 Animal Shelter Statistics*, Humane Can. 1, 7 (Dec. 20, 2022), https://humanecanada.ca/wp-content/uploads/2022/12/HC_animal_shelter_statistics_2021.pdf at 10.

and SPCAs, not those of private shelters, rescue, or fostering groups.[48] Furthermore, the data is likely to change as the world continues its apparent (but arguably premature) exit[49] from the COVID-19 pandemic and health restrictions, i.e., more companion animals will be given up for adoption.[50] One market research company wrote: "[a]s the economy began to open up again and local consumers spent less time at home, some of them found that they lacked the time required to care for their pets, while others simply grew bored with them."[51] Owning and/or providing care to and for a pet is a life-of-the-pet long commitment, but is sometimes not realized as such by many animal purchasers or adopters.[52] While many people may consider their companion animals as persons or family members, and whether or not they may have wanted the best for their pets even if they could no longer personally care for them, federal, provincial and territorial law nevertheless simply consider these animals to be property or chattels. This raises an ethical and legal problem, the consequences of which are addressed in the next section.[53]

II. Animals as Property in Law

All animals are considered property in Canadian legal systems; more specifically, as "chattels" or "personal property."[54] Whether they be cattle, wildlife, companion animals or any other type or species of animal, they are treated in the same fashion as other forms of personal

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[48] *Id.* at 4.

[49] *See* Wafaa M El-Sadr et al., *Facing the New Covid-19 Reality*, 388 New Eng. J. Med. 385 (2023); *see also* Kai Kupferschmidt & Meredith Wadman, *End of COVID-19 Emergencies Sparks Debate,* 380 SCI. 566 (2023).

[50] *See, e.g.*, Ironbornsuck, *People who constantly adopt and then give up pets.(vent)*, Reddit, https://www.reddit.com/r/dogs/comments/1y6h0p/people_who_constantly_adopt_and_then_give_up/ (last visited Feb. 15, 2024).

[51] *See* Jeffery Ho et al., *Did the COVID-19 Pandemic Spark a Public Interest in Pet Adoption?*, 8 Front. Vet. Sci. (2021); Grace A. Carroll et al., *Companion Animal Adoption and Relinquishment During the COVID-19 Pandemic: Peri-Pandemic Pets at Greatest Risk of Relinquishment,* 9 Front. Vet. Sci. 1 (2022); Aaron D'Andrea, *Canadian Animal Shelters Facing 'Perfect Storm' as More Pets Are Being Surrendered*, Global News (July 19, 2022, 6:00 AM), https://globalnews.ca/news/8997583/canadian-animal-shelters-challenges/; *Pet Care in Canada*, EUROMONITOR INT'L (May 20, 2023), https://www.euromonitor.com/pet-care-in-canada/report#.

[52] *See* Elsie R. Shore, *Returning a Recently Adopted Companion Animal: Adopters' Reasons for and Reactions to the Failed Adoption Experience*, 8 J. Applied Animal Welfare Sci. 187 (2005).

[53] *See* Wendy A. Adams, *Human Subjects and Animal Objects: Animals as "Other" in the law*, 3 J. Animal L. & Ethics 29 (2009).

[54] *See* Nicole R. Pallotta, *Chattel or Child: The Liminal Status of Companion Animals in Society and Law*, 8 Soc. Sci. 158 (2019).

property such as smart phones, chairs, televisions, cars, and the like.[55] While it is not our present aim to make the case for a change in animals' legal status in Canada (because of space limitations, but which we support in any event), recognizing this key legal fact is critical to the analyses we undertake here and the proposals we make respecting companion animal rescue operations.[56] Stated differently, because companion animals have the legal status of property, they may be alienated and disposed of in the same manner that other forms of personal property are alienated or disposed of in Canadian society, and therefore are the subjects of private legal *transactions* irrespective of whether they are purchase or adoption ones.[57]

The survey cited earlier showed that even though they may not be able to articulate the sentiment in precise detail, most companion animal caregivers view their pets as family members—even persons—and not as moveable possessions or as entities capable of being "owned;"[58] a noticeable contrast of perspective against the backdrop of the antiquated extant legislation and the reason why an intermediary regime implementing a standard that *acknowledges* this understanding could be favorable in most jurisdictions.

A modern example of how strictly Canadian courts view animals' status as property (nearly 220 years after the (in)famous *Pierson v. Post* case[59]) is an Ontario court referring to Darwin, the monkey infamously

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[55] *See* Gary L. Francione, *Animals as Property*, 2 Animal L. Inst. 1 (1996).

[56] *See* Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 Rutgers J. L. & Pub. Pol'y 316, 317-8 (2007); Angela Fernandez, *Not Quite Property, Not Quite Persons: A Quasi Approach for Nonhuman Animals*, 5 Can. J. Comp. & Contemp. L. 155, (2019); David Favre, *Living Property: A New Status for Animals within the Legal System,* 93 Marq. L. Rev. 1021, (2010); *See generally* Gary L. Francione & Robert Garner, The Animal Rights Debate: Abolition or Regulation? (2010).

[57] *See generally* Steven White, *Companion Animals: Members of the Family or Legally Discarded Objects?*, 32 U.N.S.W. L. J. 852 (2009).

[58] *See* Deborah Rook, *For the Love of Darcie: Recognising the Human–Companion Animal Relationship in Housing Law and Policy*, 39 Liverpool L. Rev 29 (2018); *see also* William C. Root, *Man's Best Friend: Property or Family Member - An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 Vill. L. Rev. 423 (2002); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute,* 25 U. Haw. L. Rev. 481 (2003).

[59] Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (holding on an appeal made by Pierson regarding a lower court decision which had held that a wild fox which Pierson had taken while Post was in pursuit of it, was indeed Pierson's *property* not strictly because his claim to ownership through pursuit of the fox was just as valid as Post's, but because he had established *possession* of that property, unlike Post. Relying on early antecedent precedents and jurisprudence, the majority opinion held that while neither could establish a valid proprietary claim to the fox through

lost at a Toronto IKEA store, as *lost property*, not a lost *pet* or lost *family member*, writing the "…monkey is a wild animal. The concepts of a habit of returning home and immediate pursuit do not apply. [Plaintiff] lost ownership of the monkey when she lost possession."[60]

In the criminal context, Canada's *Criminal Code*, despite many historical and recent efforts at reform,[61] purports in sections 445.1 to 447.1 to make the imposition of cruelty upon animals a crime and refers to such offenses as "Wilful and Forbidden Acts in Respect of *Certain Property*."[62] As this article discusses below, it is these inadequate sections of the *Criminal Code* which provide *the only* federal regulatory or governmental oversight respecting companion animal breeding operations in Canada. In the same vein, in Ontario's *Provincial Animal Welfare Services Act* (*PAWS Act*), the statute that putatively governs the welfare of animals in that province, "animal" is left undefined, but throughout, the statute provides means for disposing of animals as if they were property.[63] Other provincial and territorial statutes follow suit. In contrast to the absence of a definition of "animal" in the *PAWS Act,* the Ontario *Animal Health Act* defines an animal as "…any creature that is not human and includes any other *thing* prescribed as animal, but does not include any *thing* prescribed as excluded," making its contemplation of animals as property obvious.[64] In another Ontario statute, the *Animals for Research Act*, 'animal' is defined simply as "…a live, non-human vertebrate," despite also making provisions for the acquisition and use of animals in research, teaching, testing and experimentation but not visibly or expressly contemplating animals as property.[65]

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pursuit alone, it was the actual taking of the fox by Pierson which brought it into his possession and established a proprietary claim to the fox over Post's).

[60] *Nakhuda v Story Book Farm Primate Sanctuary*, [2013] O.N.S.C. 5761, para. 53.

[61] *History of Criminal Code Amendments*, Humane Can., https://humanecanada.ca/our-work/focus-areas/animals-and-the-law/history-of-criminal-code-amendments/ (last visited Feb. 15, 2024).

[62] *Criminal Code*, R.S.C, 1985, c. C-46, 445.1(1) (emphasis added); *see also* Troy Bourque, *Bill C-246 Dies on House Floor*, 58 Can. Vet. J. 13 (2017).

[63] *Provincial Animal Welfare Services Act*, 2019, S.O. 2019, c 13 [hereinafter *PAWS*].

[64] *Animal Health Act*, 2009, S.O. 2009, c 31 (emphasis added).

[65] Animals for Research Act, R.S.O 1990, c A22, § 20(6)(c) (Can.) (Arguably, the very subject matter of the *Act* implicitly demonstrates the assumption that animals are *things* to be *used* for a purpose (i.e., experimentation and research), with disregard for the animal's interests – perhaps, even with an outright denial that animals *have* interests. The fact that the *Animals in Research Act* makes legal animal rescue organizations' selling of animals that *were* or *could be* companion animals to research facilities for use supports the assertion that there is little to no concern for animal's interests within the current legislative framework.).

In the seminal 2011 case of *Reece v. Edmonton (City)* (a case in which the Supreme Court of Canada refused to hear an appeal[66]), Alberta Court of Appeal Chief Justice Catherine Fraser wrote in her dissenting opinion: "…the present legal model in Alberta defining the relationship between humans and animals is an 'animal welfare' one. It is based on the concept that humans have a moral and ethical obligation to treat animals humanely [but not necessarily to provide them legal rights]. Thus, the old common law view that animals are property to be used—and sometimes abused—as humans see fit has long ago been tempered by legislative reform and the evolution of the law."[67]

Our purpose here is not to evidence the truth of Chief Justice Fraser's opinion, or to debate the merits of an animal welfare versus animal rights approach to the larger issues of animal abuse and animals' legal standing in Canada. That said, viewed from any perspective, it is clear that any provincial, territorial or federal efforts at legislative reform and the evolution of law in Canada and its provinces in territories as it relates to the interests of animals, legal or otherwise, has been feeble, paltry, laughable even, and commonly the source of international embarrassment.[68] (With, however, its inclusion of Inuit Qaujimajatuqangit, Nunavut's *Wildlife Act* stands as an anthropomorphic contrast to the prevailing views expressed in other similar legislation.[69])

This article therefore suggests that, in conjunction with the implementation of a licensing regime, the formation and application of a *Best Interests of the Companion Animal* standard in companion animal rescue situations could, to some degree, bypass the problematic nature of animals as property. It could even rely on and take advantage of that status in the companion animal adoption context to precipitate better outcomes for both animals and humans until a more cohesive view of animals as sentient beings entitled to greater legal recognition of some kind is adopted by all levels of government in Canada.[70]

Such a trend is definitely burgeoning, as in 2024 British Columbia's *Family Law Act* and the *Provincial Family Court Rules* were

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[66] *See* Peter Sankoff, *Opportunity Lost: The Supreme Court Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests,* 30 Windsor Y.B. Access Just. 129 (2012).

[67] *Reece v. Edmonton (City)* (2011), 513 A.R. 199, para. 42 (Can.).

[68] *See* James Gacek, *Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals* 42 Man. L.J. 31 (2019); Kendra Coulter & Peter Sankoff, *The Sorry State of Animal Protection in Canada*, TORONTO STAR (Aug. 20, 2021), https://www.thestar.com/opinion/contributors/2021/08/20/the-sorry-state-of-animal-protection-in-canada.html; *see also Canada*, Animal Protection Index (Oct. 3, 2020), https://api.worldanimalprotection.org/country/canada.

[69] Wildlife Act, S. Nu. 2003, c 26 (Can.).

[70] *See generally* Steve Cook, *Duties to Companion Animals,* 17 Res. Publica 261 (2011); *see generally* White, *supra* note 54.

amended to better reflect Canadian perspectives of companion animals in the context of family law litigation.[71] The amendments allow British Columbia courts to consider the animal's relationship with (human) members of the separating family, any history of violence towards the animal, and where the companion animal's needs will most likely be met;[72] essentially, the court will consider factors that all contribute to a best-interests model of the animal. This is an indication that legislation is contemplating that animals (those considered to be "pets" at least) are *more than property*, but how far that recognition will extend is yet to be seen.[73]

III. Animal Breeding and Adoption Laws

a. Companion Animal Breeding Legislation

As noted above, neither in Canada nor in any province or territory are there laws that specifically regulate the breeding and selling (commerce or transactions) of companion animals. Instead, "regulation" is administered haphazardly through an assortment of federal and provincial statutes; for example, the animal cruelty provisions in the *Criminal Code* discussed earlier.[74] Many animal advocacy organizations have for years brought this legislative deficiency to the attention of Parliament and the provincial and territorial legislatures and assemblies, and while some attempts to reduce the chasm (if not eliminate it) have been made, no substantive consequential changes have taken place.[75]

Instead, any companion animal breeding operation—an operation which is not in itself illegal—must merely ensure compliance with the *Criminal Code* so that in the process of breeding puppies and kittens (or other species), the animals therein suffer no "…unnecessary pain, suffering or injury…."[76] The obvious corollary to this provision

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[71] Family Law Amendment Act, 2023, S.B.C. 2023, c 12 (Can.), https://www.bclaws.gov.bc.ca/civix/document/id/bills/billscurrent/4th42nd:gov17-1; *see also What you need to know about family pets and the Family Law Act*, Provincial Ct. B.C. (Jan. 9, 2024), https://www.provincialcourt.bc.ca/enews/enews-09-01-2024.

[72] *British Columbia Introduces First Canadian Pet Custody Legislation*, ANIMAL JUST. (April 12, 2023), https://animaljustice.ca/blog/pet-custody-law#.

[73] Justin McElroy, *BC Wants Pets to be Treated More Like Humans and Less Like Property in Divorce Proceedings*, CBC News (March 27, 2023), https://www.cbc.ca/news/canada/british-columbia/bc-pets-divorce-law-1.6792643.

[74] *See* David Fraser et al, *Toward a Harmonized Approach to Animal Welfare Law in Canada,* 59 Can. Vet J. 293 (Mar. 2018).

[75] *See generally* Skinner, *supra* note 3; Antonio Verbora, *The Politics of Animal Anti-Cruelty Legislation in Canada: An Analysis of Parliamentary Debates on Amending the Criminal Code,* (2012) (thesis, University of Windsor).

[76] Adams, *supra* note 50, at 37.

is that some animals' "pain, suffering or injury" will in some cases be deemed *necessary*, even irrespective of the context.[77] Up to this point in time, if there has been any guidance on what constitutes either necessary or unnecessary animal pain, suffering or injury—in any context, not just the companion animal one—it has mostly come from the provincial courts, and it has been minimal.[78]

When this *Criminal Code* requirement is coupled, for example, with Ontario's relatively recently enacted *PAWS Act* (formerly the *Ontario Society for the Prevention of Cruelty to Animals Act*),[79] which does *not,* nor is it generally intended to, regulate commerce in respect of companion animals (but does at least provide some minimal standards of adequate care and prohibitions respecting the treatment of animals), the situation is made ultimately even more bleak. While *PAWS Act* section 15 prohibits: persons from causing an animal to be in distress (defined as "the state of being, in need of proper care, water, food or shelter, injured, sick, in pain or suffering, or abused or subject to undue physical or psychological hardship, privation or neglect"); *owners* or *custodians* of animals from permitting an animal to be in distress; and, persons from knowingly or recklessly causing an animal to be exposed to an undue risk of distress, the *PAWS Act* permits the kinds of activities that take place in breeding operations and the circumstances under which such operations breed animals (under certain conditions).[80]

That said, under current Ontario law, only three types of entities may take custody (and, after five days, claim) ownership of found, abandoned and unclaimed animals in accordance with section 62 of the *PAWS Act*: registered charities whose purposes include or are consistent with offering animal sheltering services; municipalities and, entities who have a contractual arrangement with a municipality to deliver animal sheltering services.[81] "Shelter" or "sheltering," however, are not defined in either the *PAWS Act* or in the regulations. Ontario, nevertheless, adopts the meaning of registered charity found in the federal *Income Tax Act* which provides that a "registered charity at any time means (a)

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[77] *See e.g.,* John Sorenson, '*Some Strange Things Happening in Our Country': Opposing Proposed Changes In Anti-Cruelty Laws in Canada,* 12 Soc. & Legal Stud. 377, 379-80 (2003); *see also* Katie Sykes & Sam Skinner, *Fake Laws: How Ag-Gag Undermines the Rule of Law in Canada,* 28 Animal L. 229 (2022).

[78] *See, e.g.*, R v. Menard [1978] 43 CCC (2d) 458 QCCA (Can.) (for an early case and for which makes unpleasant reading.).

[79] *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c O.36.

[80] Provincial Animal Welfare Services Act, 2019, S.O. 2019, c 13, §§ 15(1)-(3).

[81] *Ministerial Prescriptions*, *Animal Shelter Ownership Authority*, O. Reg. 447/19 (Can.); *see also* Stephen J. Notaro, *Disposition of Shelter Companion Animals from Nonhuman Animal Control Officers, Citizen Finders, and Relinquished by Caregivers,* 7:3 J. Applied Animal Welfare Sci. 181 (2004).

a charitable organization, private foundation or public foundation…that is resident in Canada and was either created or established in Canada, or (b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf, that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation… ."[82]

One of the obvious benefits of being a registered charity is an exemption from paying tax to the government; however "charitable" is not defined in the *Income Tax Act* and thus the common law definition is employed by the Canada Revenue Agency (CRA) to understand that term.[83] The CRA writes:

"[a]ccording to common law, a purpose is only charitable when it provides a benefit to the public (or a sufficient segment of the public). In the context of animal welfare, the courts have determined that promoting the welfare of animals provides an intangible moral benefit to humanity in general. As a result, the very act of showing kindness to animals in need of assistance or care satisfies the public benefit requirement under common law…."[84]

The CRA even states that "rescuing and holding for adoption stray, abandoned, abused, or surrendered animals" promotes the moral or ethical development of communities and therefore qualifies as a charitable purpose under the *Income Tax Act*.[85]

CRA also writes that the *Income Tax Act* "permits all registered charities to fully engage without limitation in public policy dialogue and development activities in furtherance of their stated charitable purposes,"

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[82] *Income Tax Act*, R.S.C. 1985 c. 1.

[83] *Id.* § 149(1)(f).

[84] *Promotion of Animal Welfare and Charitable Registration, supra* note 9.

[85] *Id*. (CRA's understanding of "promoting the moral and ethical development of the community" summarizes the many different ways the courts have described the intangible moral benefit that results from showing kindness to animals in need of human assistance or care by preventing or relieving their suffering, or helping animals recover from pain, injury, distress, or abuse" and cites the following cases in support of that assertion: Univ. of London v. Yarrow (1857) 44 Eng. Rep. 649, 1 De. G. & J. 72; Marsh v. Means (1857) 3 Jur. N.S. 790; Tatham v. Drummond (1864) 46 Eng. Rep. 1006; 4 De. G.J. & S. 484; *In re* Douglas, Obert v. Barrow (1887) 35 Ch D 472; *In re* Joy, Purday v. Johnson (1888) 60 LT 175; Armstrong v. Reeves (1890) 25 LR Ir. 325 (Ch); *In re* Foveaux, Cross v. London Anti-Vivisection Soc'y [1895] 2 Ch 501 (Eng.); *In re* Cranston, Webb v. Oldfield [1898] 1 Ir. R. 431; *In re* Wedgwood, Allen v. Wedgwood [1915] 1 Ch 113 (Eng.); Nat'l Anti-Vivisection Soc'y v. Inland Rev. Comm'rs [1947] 2 All ER 217; *In re* Moss, Hobrough v. Harvey [1949] 1 All ER 495; *In re* Weaver [1963] VR 257 (Austl.); *In re* Inman [1965] VR 238 (Austl.); *Re Green's Will Trusts* [1985] 3 All ER 455.

otherwise referred to as "PPDDAs" by CRA.[86] Some PPDDAs which CRA recognizes generally include: providing information, conducting research, disseminating opinions, engaging in advocacy, mobilizing others, making representations, providing forums and convening discussions, communicating on social media and obviously a broad array of activities related to animal rescue, sheltering and care.[87]

Further, Ontario's regulation, *Pounds,* enacted pursuant to the *Animals in Research Act*,[88] provides specific criteria respecting the "premises that are used for the detention, maintenance or disposal of dogs or cats that have been impounded pursuant to a by-law of a municipality or the *Dog Owners' Liability Act.*"[89] The *Animals in Research Act* specifically excludes application of the *PAWS Act* to the *Animals for Research Act,* and by extension to the *Pounds* regulation, ultimately meaning that prohibitions which cause or permit animals to experience or be exposed to distress are inoperative and of no value to animals themselves, as well the animal advocate's cause in the euphemistically described animal research, teaching, and testing contexts.[90]

Again, while we do not undertake here to further address or advocate for a change in the legal status of animals as property (but support such a change), what is glaringly apparent above all else is that in nearly all situations, animals in Ontario continue to be treated as chattel and will continue to be treated as such without legislative reform.[91] Given this reality, there is ultimately no barrier beyond cost to property/companion-animal acquisition and ownership or, as we would prefer to put it, animal *care-giving*. Cost is expensive for certain breeds of dog, cats, or exotic animals, but even adoption can be cost-prohibitive for some in various circumstances. While many companion animals are cared for their lifetimes and never fall under either the *PAWS Act* or the *Animals in Research Act*, many are abused, abandoned, and surrendered, falling victim to these statutes because they are in need of rescuing. It is for these reasons that better regulation governing the breeding of companion animals is required.

But that is, of course, not the end of the matter because many animals purchased in breeding operations end up in shelters, pounds, or in dog rescues, requiring regulation in the rescue area as well. When

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[86] *Promotion of Animal Welfare and Charitable Registration*, *supra* note 9.

[87] Canada Revenue Agency, *Public policy dialogue and development activities by charities,* Gov't of Can. (Nov. 27, 2020), https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html.

[88] Pounds, R.R.O 1990, Reg. 23 (Can.).

[89] *See id*. § 1(1).

[90] *See generally* Vaughan Black et al., *Protecting Canada's Lab Animals: The Need for Legislation*, 12 Animals 4 (Mar. 18, 2022).

[91] *See* Fernandez, *supra* note 51, at 187, 188.

considering the federal government's September 2022 ban on importing foreign companion animals for adoption, Camille Labchuk, Executive Director of Animal Justice, one of Canada's largest animal advocacy organizations, said:

> Many Canadians are eager to adopt dogs, but this blanket ban will condemn thousands of dogs to languish in the streets, or be killed in overcrowded shelters instead of finding loving homes in Canada…. And with far fewer rescued dogs available for adoption in Canada, our puppy mill problem will get worse—backyard breeders will pump out as many puppies as possible for profit, born into filthy, cramped cages. [92]

Adopting companion animals is an effective way to deter future companion animal breeding (and the associated abuse, neglect, injury, suffering, and distress). Without the financial incentive to continue such breeding operations, the practice of breeding animals may be less appealing to many.

Thus, our efforts in this article are focused on proposing a licensing regime and the implementation of *Best Interests of the Companion Animal* standard for adjudicating companion animal adoption applications. If our suggestions are heeded, they might even ultimately provide an adaptable paradigm to implement in the companion animal breeding context. Apart from noting that several jurisdictions in the United States and Canada have banned retail pet sales, which might ultimately be the best solution to deterring the operation of exploitative breeding operations, further discussion on this point is left for another day.[93]

b. Companion Animal Adoption Legislation

Similar to companion animal breeding operations, there are no laws or regulations which directly regulate private animal rescue operations beyond those which create humane societies and/or provide means by which companion animals may be surrendered to such societies (or "pounds") for later adoption, hopefully. However, such a lacuna simultaneously means that there are no regulations as to who can operate a private dog rescue operation and/or who may adopt a companion animal. As discussed below, due to current circumstances, there are barriers to companion animal adoption which go beyond

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[92] *Animal Rescue Groups Upset with Federal Decision to Ban Dogs from Countries at Risk of Canine Rabies*, CBC News (July 3, 2022, 6:06 PM), https://www.cbc.ca/news/canada/toronto/dog-rescue-groups-canadian-food-inspection-agency-1.6509301.

[93] *See States with Humane Pet Sales Laws*, Best Friends Animal Soc'y, https://bestfriends.org/advocacy/ending-puppy-mills/states-humane-pet-sales-laws (last visited Apr. 13, 2024)

mere cost, and these problems are exacerbated—if not created—by the absence of any regulation in this field. Similarly, our article looks at issues which predate the additional problems that are compounded by post-adoption, not specifically the regulation of animals and adoption practices.[94]

IV. "Best Interests of the Companion Animal Standard"

a. Developing the Standard

We argue that modeling the new *Best Interests of the Companion Animal* standard after the family law *Best Interests of the Child* standard is an accessible and familiar starting point for implementing a framework to regulate companion animal adoptions.[95] This standard would set a clear standard for how animal rescue operations should adjudicate upon potential adoption applications and provide more certainty surrounding adoption outcomes in these organizations – perhaps even Humane Societies. Nearly all family related legislation in Ontario sets out contemplation of the *Best Interests of the Child* standard as being paramount in deciding family law cases. The criteria include consideration of a child's views, age, background, physical, mental, and emotional needs, amongst other concerns.[96]

We are not, however, suggesting that applying the identical criteria for *Best Interests of the Child* found in the family law legislation is appropriate, nor even possible, in this context; what we are suggesting, is that the purpose underlying the standard will mirror the paramount intent and purpose of protecting vulnerable beings. In *Kanthasamy v Canada,* the Supreme Court of Canada held that "[p]rotecting children through the 'best interests of the child' principle is widely understood and accepted in Canada's legal system…[i]t means '[d]eciding what... appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention…'"[97] By changing one word in

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[94] *See e.g.*, A.M. Toohey & T.M. Krahn, *'Simply to Be Let in': Opening the Doors to Lower-Income Older Adults and their Companion Animals*, 40:3 J. Pub. Health 661 (2017); Erica Natividad & Michael Talbot, *'Cash grab': Man Refuses to Pay Legal Fee to Keep Service Dog in Etobicoke Condo*, CityNews Toronto (Feb. 20, 2023, 12:58 PM), https://toronto.citynews.ca/2023/02/20/legal-fee-service-dog-etobicoke-condo/.

[95] *See, e.g.,* Tammy McLain, *Adapting the Child's Best Interest Model to Custody Determination of Companion Animals*, 6 J. Animal L. 151, 162 (2010).

[96] *Child, Youth and Family Services Act,* 2017, S.O. 2017, c. 14, Sched. 1 § 179(2) (Ont.).

[97] *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, [2015] 3 S.C.R. 909 (Can.) (quoting MacGyver v. Richards (1995), 22 O.R. 3d 481 (Can.)) (citation omitted).

this decision (i.e. "child" to "animal"), the following outcome might become the ethos that companion animal rescue operations are *formally* guided bywhat appears most likely in the circumstances to be conducive to the kind of environment in which a particular animal has the best opportunity for receiving the needed care and attention.

Defining the best interests of the animal standard would need to be articulated, and we would suggest the creation of an objective standard but one in which the best interests of the animal in terms of the person's readiness, willingness, and ability to care for the animal are subjectively determined through answers provided in provincially standardized questions. Coupled with a licensing regime and discrimination in rescue operations' adoption policies, contracts and adjudicative processes may then be legally justifiable if a "Best Interests of the Companion Animal" standard (or specific factors) is clearly articulated and applied by the companion animal rescue operation and, perhaps later, by the courts.

Some of the work has already been done for this concept, in terms of the development of a "*Best Interests of the Companion Animal*" standard and the criteria with which it may come along. As a starting point, we suggest looking at existing voluntary practices and codes that were developed with animals' best interests in mind (perhaps not to the extent we would like to see, however). The Canadian Veterinary Medical Association (CMVA) has developed codes of practice for operations involving the breeding, shelter and care of animals, however, these are nothing more than "recommendations"[98] that may be adopted should the facility/operation choose to implement them. Despite setting out *ideal* care standards, the foundation of these codes of practice is one of welfarism and is limited by regulations or a lack thereof. This voluntary set of guidelines could very well form the basis for the requirements that every animal operation shall abide by, if reformed to fit our purposes.

Another source that may be looked to for inspiration in developing a framework is "Helping Homeless Pets" (HHP), a Canadian organization that "works to support legitimate and ethical Canadian pet rescue organizations, by assisting them with fundraising for medical care,

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[98] Canadian Veterinary Medical Association, *A Code of Practice for Canadian Kennel Operations,* 3 CVMA 23 (2018), https://www.canadianveterinarians.net/media/xgel3jhp/cvma-2018-kennel-code-eng-rev-january-2023.pdf ("The CVMA is a national organization of veterinarians. It is a non-governing body in that it can make recommendations and develop position statements and guidelines; however, these are not enforceable under the law. In some cases, veterinary or provincial/territorial statutory bodies may decide to adopt CVMA recommendations by encoding or referencing them in their regulations. For example, the CVMA is formally opposed to cosmetic surgeries such as ear cropping, tail docking, and dewclaw removal by veterinarians unless they are done for therapeutic reasons. Not all provincial/territorial statutory bodies or veterinary licensing bodies, however, have enshrined this position into their regulations and/or professional standards.").

public awareness and education…[allowing them]…to better focus on the care and finding of a suitable home for the pets they have rescued" requires that their members observe a Code of Conduct, abide by HHP's standards and ethics, carry out their rescue activities in a professional, positive and considerate manner, operate strictly in a charitable capacity and ensure that any personal or confidential information pertaining to HHP, any HHP member(s), or any third party or parties, remains strictly confidential other than with the express prior written consent of that member or members to share, a point we will return to below.[99] Though simple, the HHP voluntary code of conduct is the only body to provide any normative legal or ethical guidance to rescue operations in Canada, a situation which, based on our suggestions here, could easily be improved, especially by developing a "Best Interests of the Companion Animal*"* standard, particularly given that, by our count, HHP has only 27 members across Canada.[100]

b. Implementation of The Standard

Whether it is better to develop regulations using those existing guidelines for the best interests of the animal or to develop regulations to mandate adoption of those guidelines, is debatable. However, regulations could codify the private adoption process and the adjudicative standard along with setting the appropriate criteria for operations licensure and hopefully alleviate some of the concerns we have expressed in this article. Either way, to implement these policies/regulations, it is our view that a licensing regime should be developed to ensure basic compliance with the proposed standard and require reporting by the organizations to determine reliable statistics surrounding this area, which may then be used to enhance the system's ability to benefit humans and animals alike.

Most companion animal rescue operations in Canada function as registered charities, but are not provincially (or federally, even) licensed in any way. Provincial licensure, as a matter under section 92(13) (property and civil right) or of a local and private nature, would be a way to ensure that certain standards are being adhered to**.** The only Canadian comparator is provided by Ontario's regime governing the licensing of private adoption agencies in respect of children; it is also worth noting that it is not a historical coincidence or accident that in the early twentieth century Humane Societies cared for both animals and children.[101]

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[99] *About Us*, Helping Homeless Pets, https://helpinghomelesspets.com/about-us (last visited Feb. 16, 2024); *Code of Conduct,* Helping Homeless Pets, https://helpinghomelesspets.com/member-code-of-conduct (last visited Feb. 16, 2024).

[100] *Our Members*, Helping Homeless Pets, https://helpinghomelesspets.com/our-members (last visited Feb. 16, 2024).

[101] Lesli Bisgould, Animals and the Law*,* 97-98 (Toronto: Irwin Law 2011).

The Ontario *Child, Youth and Family Services Act, 2017* (CYFSA) provides that licences to operate private adoption agencies shall only be issued to an individual or a non-profit agency.[102] The CYFSA defines a non-profit agency as "a corporation without share capital that has objects of a charitable nature and, (a) to which [Ontario corporate law] applies, or (b) that is incorporated by or under a general or special Act of the Parliament of Canada."[103] Irrespective of whether a companion animal rescue operation functions as an individual or a provincial/territorial or federal non-profit agency, as a model regime, the CYFSA child adoption licensing paradigm could work in the companion animal adoption context because of the similar—not the same—vulnerabilities and needs children and animals share.[104] Moreover, the necessary oversight as to who is creating and operating such private animal rescue charities, organizations or groups would be generated and would ensure that certain standards about persons qualified to set up and operate these organizations were established and maintained, similarly just as they are in the child context.

However, going beyond Canadian jurisdictions, we have noted a comprehensive regime that exists in Colorado, United States. Colorado's *Pet Animal Care and Facilities Act* (PACFA)[105] "requires any facility used to keep pet animals for the purpose of adoption, breeding, boarding, grooming, handling, selling, sheltering, trading or otherwise transferring such animals [understood to include dogs, cats, rabbits, guinea pigs, hamsters, mice, rats, gerbils, ferrets, birds, fish, reptiles, amphibians and invertebrates] to *obtain a license* from the Commissioner of Agriculture (Commissioner)."[106] In order to become licensed, and subsequently maintain a license, PACFA requires facilities to comply with set standards regarding recordkeeping and animal safety and welfare.[107] Through the licensing regime, PACFA authorizes

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[102] Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1 § 229(3) (Can.).

[103] *Id.* at §s 229(7).

[104] *See, e.g.,* Sue Donaldson & Will Kymlicka, *Children and animals, in* The Routledge Handbook of the Philosophy of Childhood and Children (Anca Gheaus et al. eds., 2018); Beverly McEwen, *Eternally Vulnerable: The Pathology of Abuse in Domestic Animals,* Veterinary Forensic Pathology 353 (2017); Joanne Faulkner, *Negotiating vulnerability through "animal" and "child",* 16:4 Angelaki 73 (2011).

[105] Colo. Rev. Stat. §35-80-101 - §35-80-117 (through Chapter 1 of the 2024 Reg. Sess.).

[106] Colorado Office of Policy, Research & Regulatory Reform, *2018 Sunset Review: Pet Animal Care and Facilities Act,* Colo. Dep't Regul. Agencies 1, 3 (Oct. 15, 2018), www.theanimalcouncil.com/files/Colorado_Sunset_Review_2018PetAnimalCareFacilities.pdf.

[107] Amy Zimmer, *Colorado's Pet Animal Care and Facilities Act,* Colo. Virtual Libr. (Sept.13, 2019), https://www.coloradovirtuallibrary.org/resource-sharing/state-pubs-blog/colorados-pet-animal-care-and-facilities-act-pacfa/.

ongoing inspections of facilities, thereby enforcing a certain level of ongoing protection for animals within these facilities. PACFA also requires licensees to participate in qualifying and ongoing education to assist in providing licensees with knowledge of why meeting (at least) a baseline of expected conduct and care is necessary.[108] Importantly, the data of licensees are made accessible to the public.[109] Such disclosure would ostensibly add another layer of accountability for facilities that shelter and/or breed companion animals—failure to comply with the standards would not only result in loss of licensure, but of the public's ability to confirm whether a facility is licensed—knowledge that could affect income or funding, depending on the facility type.

Animal advocates may debate whether the standards that licensees must abide by under the PACFA are onerous, too onerous or truly in the best interests of the animal; either way, however, it is a durable model to which jurisdictions can look to develop similar legislation and licensing requirements in Canadian jurisdictions. Currently in Ontario, for example, dog licensing for individual pet owners is in effect through municipal by-laws, and we argue that even a comprehensive expansion of those municipal regimes into a more robust and provincially cohesive set of regulations that pertain more towards private organizations that claim to exist as shelters, breeders, or kennels and the like to ensure compliance and oversight, and useful data being reported which would enable a more accurate picture of Canada's companion animal populations. Amending legislation like the *PAWS Act* to incorporate the above discussed may allow for a straightforward course of action to achieve the goals as set out.

c. Ongoing Enforcement/Regulatory Oversight

Altogether then, private companion animal rescue operations are fully legal and are designed, at least according to the federal government, to promote the moral or ethical development of communities in Canada by rescuing and holding for adoption stray, abandoned, abused, or surrendered animals. The fact that the CRA places "no limitations" on the kinds of PPDDAs that companion animal rescue operation can undertake is not a problem in itself, and really only serves to highlight the much larger problem, in a much larger context, of the absence of

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[108] PACFA, *Qualifying and Continuing Education*, Colo. Dep't of Agric., https://ag.colorado.gov/ics/pet-animal-care-facilities-act-pacfa/pacfa-qualifying-and-continuing-education (last visited Feb. 5, 2023).

[109] *July 2019 – Active PACFA Facilities,* Colo. Info. Marketplace (July 19, 2019), https://data.colorado.gov/Agriculture/July-2019-Active-PACFA-Facilities/rvhr-4n2f#; *see also Active PACFA Facilities*, Colo. Dep't of Agric. (2023), https://ag.colorado.gov/ics/pet-animal-care-facilities-act-pacfa/active-pacfa-facilities.

any regulation to ensure that safe, secure, ethical, equitable, transparent and legal adoption outcomes are precipitated for both human animals and companion animals—our major concern in this article. A simple licensing regime could go quite far to address some of these concerns. In considering the statistics provided by Humane Canada, we noted, as did they, that those statistics were generated from the animal sheltering activities of humane societies and SPCAs, not those of private shelters, rescue or fostering groups. As a consequence, and perhaps in addition to the absence of licensing, it is not known how many animals pass through these types of groups, what conditions the animals are kept in, and these organizations' adoption, rehoming, euthanization, disposal and other practices.

Any information submitted to CRA by registered charities operating as companion animal rescue operations which might provide such insight into these numbers is kept confidential, for privacy or other reasons. Moreover, while these statistics might indicate similar or different outcomes as did the Humane Canada ones, these are private operations which are not subject to any veritable government oversight in the way that Humane Societies might be respecting these outcomes. In other words, we have no true or accurate way of knowing how the dissimilar adoption practices in these operations work. Licensing might contribute to the solution to this problem, as would the implementation of a best interests of the animal adjudicative standard respecting adoption applications, but human rights, equality, and privacy law problems remain which we briefly canvass in the next section such as the legal and potentially discriminatory impacts on potential adopters of these rescued animals.[110]

V. Human Rights, Equality and Privacy Law

While we have highlighted some concerns around the manner in which companion animal rescue operations process adoptions, it is also important to remember that the interests of the animal are critical, and applicants should fully understand the commitments they are making and undertaking when adopting a companion animal from a rescue operation.[111] Rescue operations may but do not necessarily or always provide proper education in this respect, but ensuring that applicants understand the nature of the commitment they are making and to provide

[110] *See* Dominique Clément, Human Rights in Canada: A History (Waterloo: Wilfrid Laurier Univ. Press 2016) (for a discussion on the history of human rights in Canada).

[111] *See* Rachel O'Connor et al., *Effect of Adopters' Lifestyles and Animal-Care Knowledge on Their Expectations Prior to Companion-Animal Guardianship,* 19:2 J. Applied Animal Welfare Sci. 157 (2016).

certain binding assurances in respect thereof is something else that any best interest of the animal standard could address as well.[112]

This brings us to companion animal adoption practices and the kinds of potential discriminatory questions adoption applicants might, in the absence of any uniform standards or regulations, be asked when seeking to adopt companion animals from a private rescue organization as well as some of the additional legal impacts an applicant might experience as a consequence of seeking to adopt a companion animal from a private operation or organization. While many of the questions seem innocuous and may indeed be related to drawing a portrait of the home in which an animal in need of rehoming and care might find itself and whether such a home is suitable for the animal, some of the questions may be discriminatory and reveal conscious or unconscious biases towards historically marginalized or disadvantaged individuals and their communities. Moreover, the manner in which answers to these questions inform outcomes of adoption applications and what happens to this highly sensitive data provided by applicants, irrespective of whether the adoption application is successful, concerns us too.

A desktop review of several private adoption rescue operations revealed that the types of questions most frequently asked of private adoption applicants relate to: occupation and/or their spouse's occupation; age and their spouse's age; annual income and spouse's annual income; the type of dwelling in which the applicant(s) and/or their spouse live(s); with whom else the applicant(s) live; how long the applicant(s) has been resident there; whether the applicant(s) owns the residence in which they live or rents it, and if the latter, the name and contact information of the landlord as well as consent to contact the landlord; the household or residence setting, (e.g. urban, suburban, rural); activity levels in home (e.g. frequent visitors, busy, quiet); whether the applicant(s) or their spouse suffer from any allergies or other medical conditions; information on any companion animals for which the applicant(s) are currently providing care; information on any companion animals for which the applicant(s) previously provided care; information pertaining to the applicant(s)'s veterinary clinic or veterinarian and consent for the release of all medical records; whether the applicant(s)'s residence is a house and if so, the square footage of the house, and whether it has a fully fenced-in backyard; consent to enter the applicant'(s) home to inspect it, as well as to enter it to conduct ongoing routinized inspections; and a willingness to pay an adoption fee and/or medical expenses in respect of the companion animal which the applicant seeks to adopt, which often may be several hundreds (if not

[112] *See* Laura Neidhart & Renee Boyd, *Companion Animal Adoption Study,* 5:3 J. Applied Animal Welfare Sci. 175 (2010).

thousands) of dollars.[113] Below we address our concerns regarding these kinds of questions and their legal impacts.

a. Human Rights Law

While many of the sample questions above seem harmless and related to ensuring that the animal which the applicant seeks to adopt will be given a suitable home (and may in fact achieve this outcome), several of them are problematic not only for the substantive answers they might produce, but because the substantive answers themselves may be the product of applicants' historical or ongoing social, political and/or economic marginalization generated outside the present context. Stated differently, adopting a companion animal may raise intersectional human rights issues. Questions focussing on an applicant's occupation, size of dwelling, marital status, income, and medical conditions are all obvious examples of rescue operations wading into areas which hold the potential to form the basis for human rights discrimination. Members of different genders and races may have historically been excluded from medium-to-high income professions and occupations, or safer suburban neighborhoods with fully fenced-in backyards that rescue operations may believe are more conducive to providing care to a dog, for example.[114]

Others may not (or may indeed) have had the opportunity to afford treatment for medical conditions or ailments not covered by public health insurance and which have (nevertheless) severely impacted the applicant's ability status or quality of life, often viewed from exclusionary ableist perspectives, when in reality the person has adapted to their situation and may be able to provide care to a level equal to or greater than what ordinarily passes as a cisnormative level and status of ability. Relatedly, some potential adopters might even be willing to care for special-needs animals, ones who are often overlooked by cisnormative individuals *because* they are special-needs animals.[115] Moreover, animal care-givers—especially elderly ones,

[113] *See* Freedom Dog Rescue, http://form.jotform.ca/form/21315357345248 (last visited Feb. 5, 2024); *Homeward Bound Rescue Dog Adoption Application*, Homeward Bound Rescue, https://www.emailmeform.com/builder/form/YM7oNeGjh3 (last visited Feb. 5, 2024); *Adoption Application*, Marshall's Dog Rescue, https://www.marshallsdogrescue.com/adoption-application/ (last visited Feb. 5, 2024).

[114] *See* Kate H. Choi & Sagi Ramaj, *Ethno-racial and Nativity Differences in the Likelihood of Living in Affordable Housing in Canada*, Housing Stud. (2023); Sandeep Agrawal, *Human Rights and the City: A View From Canada*, 87:1 J. Am. Plan. Ass'n 1, 3-10 (2021).

[115] *See* Nathan Katz & Keri B. Burchfield, *Special-Needs Companion Animals and Those Who Care for Them*, 28:1 Soc'y & Animals 21-40 (July 19, 2018); Amanda Leonard, *The Plight of "Big Black Dogs" in American Animal Shelters: Color-Based*

another marginalized demographic—experience enormous health and therapeutic benefits by caring for a pet.[116]

Coupling this assertion with some of the statistics cited above, the concerns we have identified and seek to address here are important because the "demand for pet adoption in Canada is on the rise while shelter deaths are on the decline…. Within the next five years, animal adoption may reach an all-time high in Canada. Many pet owners are choosing to adopt a pet from a shelter rather than buying from a breeder."[117] Despite the successes cited earlier regarding adopting animals from shelters, the importance of a licensing regime in the private context could mitigate some of the potentially discriminatory effects these questions pose and the outcomes they produce because of what one hopes will be the equalizing effect these two measures facilitate in these adoptions upon all applicants.

Moreover, Ontario Human Rights law protects against discrimination in many areas and in the formation and performance of *all* types of contracts.[118] Given that companion animals are property or chattels at common law in Canada, meaning they are within the jurisdiction of the provinces and territories under section 92(13) of the *1867 Act* (which deals with "property and civil rights"), and thus may be the subject of contracts, specifically adoption contracts in Ontario. The Ontario *Human Rights Code* provides that "[e]very person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability."[119] Even though the questions frequently asked of potential applicants by rescue operations may not *per se* be related to any of these prohibited grounds and may, in good faith, be directed to ensuring the companion animal which the applicant seeks to adopt has a safe and suitable home, the questions themselves and the answers given by specific persons seeking to adopt may *result* in discrimination on these *bases* even though the *purpose* to asking such questions is not a *prima facie* discriminatory one.

As aforementioned, historically and ongoing marginalized and disadvantaged groups may not have the occupation, living situation, sexual orientation, gender identity, putative income, and/or real property

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Canine Discrimination, 99 Kroeber Anthropological Soc'y 168-183 (2011).

[116] *See* Genieve Zhe Hui Gan, et al., *Pet Ownership and Its Influence on Mental Health in Older Adults*, 24:10 Aging & Mental Health 1605, 1609 (2020); Boris M. Levinson, Pets and Human Development (Charles C. Thomas ed., 1972).

[117] Cosgrove, *supra* note 17.

[118] *Contracts*, Ontario Hum. Rights Comm'n, https://www.ohrc.on.ca/en/social_areas/contracts (last visited Feb. 16, 2024).

[119] Human Rights Code, R.S.O. 1990, ch.. 19, § 3 (Can.).

ownership status preferred by the rescues organization *because* these persons have been historically and/or continue to be marginalized by larger society. And yet, here they are once again placed at a disadvantage and may again suffer discrimination.[120] Unlike Ontario, however, Alberta's *Human Rights Act*, for example, specifically prohibits discrimination based on "source of income" in several contexts,[121] income and financial ability, of course, being a prime consideration in caring for an animal.

Ontario, however, permits seeking and using information pertaining to one's income to obtain information about the individual's credit history in order to determine whether they are a suitable tenant for occupancy purposes but does not speak to discrimination based on *source* of income.[122] Adoption applications are sometimes denied because the applicant is on social assistance of some sort—the Ontario Disability Support Program (ODSP), for example—and, in the proverbial mind of the rescue operation, be below a certain income threshold that would ostensibly permit them to suitably provide care to the animal they seek to adopt.[123] Such a result is a curious one given that the person may be willing to make financial sacrifices to care for the animal,[124] just like anyone else,[125] or be able simply to *purchase* a companion animal on the open market if denied adoption by the rescue operation. Additionally, it has been observed that there is no direct link between the cost of the animal, the level of attachment a care-giver has to that animal, and whether the animal receives a high quality of care—rather, it appears that the care-giver's characteristics are more indicative of animal care.[126] Another study, however, did show that cost did, in fact, play an important factor in the level of care provided,[127] and yet another that showed people prioritize their pets' food quality over their own.[128] Either way, as we saw earlier, pet care, while certainly expensive, may be generally within the reach of most Canadians.

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[120] *See e.g.*, Erin McCabe et al., *Does Fido Have a Foot in the Door? Social Housing Companion Animal Policies and Policy Decision-Making in a Canadian City,* 48:3 Hous. Soc'y 292 (2021).

[121] Alberta Human Rights Act, R.S.A. 2000, c A-25. 5 (Can.).

[122] Residential Tenancies Act, 2006, S.O. 2006, c 17 s 10 (Can.).

[123] *See also* Tracy Smith-Carrier et al., *Erosion of Social Support for Disabled People in Ontario: An Appraisal of the Ontario Disability Support Program (ODSP) Using a Human Rights Framework*, 9. 1 Canadian J. Disability Stud. 1–30 (Jan. 2020).

[124] Casey Bond & Arnold Arluke, *Coping with Companion Animal Food Insecurity,* Faunalytics (Apr. 26, 2022), https://faunalytics.org/coping-with-companion-animal-food-insecurity/.

[125] *See* Molly Schleicher et al., *Determinants of Pet Food Purchasing Decisions,* 60:6 Canadian Veterinary J. 644-650 (Jun. 2019).

[126] Angela Cora Garcia, *The Place of the Dog in the Family: A Comparative Case Study of Dog Adoption*, 24(3) Soc'y & Animals (2016).

[127] *See* Bond & Arluke, *supra* note 121.

[128] *See* Schleicher, *supra* note 122.

Adoption applications, however, may legally be denied based on arbitrary, subjective, and/or biased perceptions. Because an applicant with a physical disability does not conform to ableist social norms, such as being able to throw a ball for a dog, their application to adopt a companion animal may be denied. Presumptions rooted in ageist perceptions, such that an elderly applicant cannot walk long distances with a dog or will not be alive for the duration of the pet's lifetime[129] is another aspect that can be used to discriminate against a potential adopter. Because of generalized and misinformed conceptions of behavior associated with certain types of mental health conditions, organizations have been known to deny families seeking to adopt a pet if a member of the family is autistic, as seen in Ontario where a dog rescue operation refused a dog to a potential adoptive family.[130] Such outcomes demonstrate how problematic a result can be when unregulated operations develop their own discretionary policies to screen applicants. In another example, a rescue operation refused to allow a family with an autistic child to adopt a dog, citing the group's concern for the dog's safety, should the child have violent outbursts.[131] This speculation as to the child's future behavior toward the dog was the product of biases formed from events that did not involve the subject family. An older case, but one that highlights the potential for biases to emerge in the struggle to balance interests, reports[132] that an indigenous family's application for adoption was denied because the founder of the organization deemed the community in which they resided as 'high risk' for dogs. This again demonstrates the subjective nature of decisions arising from companion animal rescues and adoption agencies, and provides a clear example of how a standardized "best interests" examination could remove the subjectivity and implicit biases found within animal adoption processes.

That said, due to the importance of finding a balance among equity, inclusion, and diversity, non-discriminatory questions and the companion animal's best interests can weigh heavily on shelter volunteers, employees, and managers—and for good reason; the effect

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[129] *See* Amanda Ferguson, *Whitby Woman, 60, Denied Pet Adoption Because of Her Age*, CityNews (Sept. 12, 2018, 11:23 AM), https://toronto.citynews.ca/2017/08/30/whitby-woman-60-denied-pet-adoption-age/ ("A Whitby woman says she experienced discrimination at a PetSmart…when she was turned away from adopting a kitten because of her age.").

[130] *See* Rebecca Zandbergen, *This Ontario Couple Tried to Adopt a Dog. The Rescue Group Said No Because Their Son Has Autism*, CBC News (Mar. 24 2022, 5:00 AM), https://www.cbc.ca/news/canada/london/family-dog-adoption-rejected-1.6394521.

[131] *Id*.

[132] Robin Burridge, *M'Chigeeng Family Claims Denied Pet Save Puppy Adoption Based Where They Live*, Manitoulin Expositor (Nov. 24, 2014), https://www.manitoulin.com/mchigeeng-family-claims-denied-pet-save-puppy-adoption-based-live/&gt.

of a decision that is perceived to be less than well-balanced, even if well intended, may cause damage the organization's reputation.[133] Taken a step further, it could be contemplated that public, reputational damage through media (both mainstream and social media platforms) may result in less overall community support and funding, ultimately having a negative impact on the animals in that organization's care.

> An additional layer of unlimited discretion in the adoption process arises through the use of animal care fostering systems. Temporarily fostering a companion animal serves benevolent purposes by creating space for incoming surrenders at shelters, socializing the animal, and providing an opportunity for people to volunteer and experience animal companionship without the high level of commitment that comes with outright animal "ownership." However, the meeting of a potential adopter and a companion animal in foster care will oftentimes be facilitated by a foster guardian, and organizations often rely on the foster guardian's interpretation of the fitness of a potential adopter, thereby adding yet another filter through which subjectivity, bias or discrimination in the adoption process may arise.[134]

Moreover, an organization could potentially use the foster guardian as a "scapegoat" for its decision to deny a person's adoption application by citing the foster guardian's privacy as a means to stifle investigation into the matter. Compounding this with rescue organization's reliance on volunteers, especially where volunteer interactions are public-facing, as with foster guardians, the risk of discrimination towards potential adopters is heightened. This is not an argument against organizations employment of foster guardians or reliance on volunteers in the community. Rather, this argument is meant to stress the necessity of a balanced, best interest standard for evaluating adoption applications and for regulating that standard. In the event that a potential adopter feels that his or her adoption application was denied due to discriminatory questions or perceptions, the lack of regulations results in a dispute with conflicting statements[135] with no adjudicative process for determining whether discrimination formed the basis of the rejection.

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[133] Zandbergen, *supra* note 127.

[134] *Foster*, Animal Rescue Found., https://www.arfontario.com/foster/ (last visited Jan. 27, 2024).

[135] *See* Jack Landau, *Toronto Family Claims They Were Turned Down for Pet Adoption Over Race and Income*, BlogTO (Sept. 16, 2022), https://www.blogto.com/city/2022/09/toronto-family-claims-they-were-turned-down-pet-adoption-over-race-and-income/.

In short, there are several ways that a person seeking to adopt from private organizations may lawfully or unlawfully be prevented from doing so. Again, we suggest that licensure and application of an objective "Best Interests of the Companion Animal" standard could alleviate some of these problems and, as a result, precipitate better outcomes for humans and animals. Procedurally, then, it is necessary to have a corresponding adjudicative body that will hear claims arising out of the adoption process, as well as licensing requirement violations. In Ontario, the Animal Care Review Board (ACRB) is the tribunal body responsible for hearing appeals following decisions of the Chief Animal Welfare Inspector pursuant to the *PAWS Act*,[136] and may be an appropriate body under which to place such adjudicative review powers. Funding for such adjudicative bodies may be generated through the proposed licensing regime itself, paralleling many of the Ontario municipal dog licensing schemes, where licensing fees are used to support animal shelters, veterinary services, dog parks, and complaint investigations.[137]

An auxiliary benefit to implementing the *Best Interests of the Companion Animal* standard alongside licensing, regulation and adjudication is that the enforced standard will reduce the need for individual rescue operations to develop and enforce policies and navigate disputes over decisions on their own. By employing a system under which rescue organizations implement generally the same standard(s), the organization and those associated with it will be less out of the "firing line," so to speak. The unsuccessful applicant may proceed through the adjudicative body to seek appeal of the decision, and the adjudicative body will have the jurisdiction and the framework to determine whether the decision was balanced. Not only will this reduce the organization's peripheral workload—that is, focusing time and energy on matters not relating to shelter animal's care—but it may be that the licensing fees could be redistributed back to the organizations based on need demonstrated need through reported statistics (although, how that may precisely be facilitated is beyond the scope of the paper). Overall, this would benefit the organizations by relieving financial burden, which in turn, may reduce, what has been termed, "compassion fatigue" that the organization's employees/volunteers will likely experience through

[136] *ACRB: Frequently Asked Questions*, Tribunals Ont., https://tribunalsontario.ca/acrb/faqs/ (last visited Jan. 27, 2024).

[137] *See Where the Money Goes*, City of Toronto, https://www.toronto.ca/community-people/animals-pets/pet-licensing/where-the-money-goes/ (last visited Jan. 27, 2024); *see also Animal & Pet Control FAQ's*, City of Kingston, https://www.cityofkingston.ca/residents/licenses-and-registration/pet-license/faq (last visited Feb. 7, 2024); *see also Dog License*, City of Hamilton, https://www.hamilton.ca/home-neighbourhood/animals-pets/dogs/dog-licence (last visited Feb. 7, 2024).

the course of their work. A 2022 Canadian study[138] demonstrates how compassion fatigue is prevalent in those who work within animal protection organizations and animal shelters, where frequent exposure to suffering is just an expected part of the job.[139] As mentioned previously in the discussion of Colorado's PACFA, ongoing education is a component of the licensing regime; if Canadian provinces and territories adopt a similar regime or one with similar principles,[140] it may be appropriate to incorporate education on trauma informed practices to improve the mental health and well-being of rescue-organization employees and volunteers.[141]

b. Equality Law

In the absence of licensure and perhaps even in that context, section 15 of the Canadian *Charter of Rights and Freedoms* is unlikely to be of assistance to unsuccessful applicants, however, because these private rescue-cum-adoption operations are not state actors nor are they actors delivering state-based programs.[142] The situation would clearly be different in the humane society or pound context, however—but that is not our focus here.

If a successful claim of discrimination could nevertheless be made out on any of the human rights bases described above, the situation would dramatically change if animals ceased to be property under Canadian law. Given that any legislation changing the status of animals from property to something else currently appears nowhere on Canadian legal landscapes or horizons, except perhaps, British Columbia, as mentioned above.[143] Our suggestions might ensure more rescued animals find homes than those who do not, and that, at least, is a better outcome for everyone. Given that *Charter* Section 15 is likely to be unhelpful to potential companion animal adoption applicants, animal rescue operations should at least conduct themselves in a manner that promotes diversity, equity, and inclusion (DEI).[144] The point, ultimately,

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[138] Rochelle Stevenson & Celeste Morales, *Trauma in Animal Protection and Welfare Work: The Potential of Trauma-Informed Practice,* 12 Animals 852 (Mar. 29, 2022), https://doi.org/10.3390/ani12070852.

[139] *Id.* at 5.

[140] *See, e.g.*, Kristen Pariser, *Detailed Discussion of the Laws Regulating Rescue and Foster Care Programs for Companion Animals,* Mich. State Univ. Coll. L. Animal Legal & Hist. Ctr. (2014), https://www.animallaw.info/article/detailed-discussion-laws-regulating-rescue-and-foster-care-programs-companion-animals#id-4.

[141] Stevenson & Morales, *supra* note 135, at 14.

[142] *See Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (Can.).

[143] *See* Fernandez, *supra* note 51, at 187.

[144] *See* Richard Wagner, *How Do Judges Think About Identity? The Impact of*

is that rescue operations and their adoption policies may—perhaps unwittingly—perpetuate biases against typically underserved and marginalized communities and may deny safe and happy homes to many animals, the very outcome they are seeking to avoid.[145] But, ultimately, what happens to adoption applicants' data irrespective of whether the application is approved?

c. Privacy Law & Ethical Practices

As seen above, the kinds of questions that these applications generally pose end up generating a complete and detailed personal and financial portrait of the applicant(s). While companion animal rescue operations may state that any information remains confidential, Ontario does not regulate the privacy policies of charitable organizations. Further, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) also does not typically apply because rescue operations are not *per se* involved in commercial activities, and moreover because applicants willingly disclose this information to these operations. This means that in the hope of successfully adopting a companion animal, applicants reveal private and confidential information of the highest order and have no assurances that such information will remain protected or be appropriately destroyed.

Nevertheless, adopting structured procedures and codes of conduct, like the one set out by HHP,[146] would provide a starting point on which regulations and further standards could be developed. As discussed above, although the HHP voluntary code of conduct is the only body to provide any normative legal or ethical guidance to rescue operations in Canada, a situation which, based on our suggestions here, could easily be improved, especially by developing a "Best Interests of the Companion Animal standard".[147]

35 Years of Charter Adjudication, 49 Ottawa L. Rev. 43, 54 (2018).

[145] Lexis H. Ly et al., *Inequitable Flow of Animals in and Out of Shelters: Comparison of Community-Level Vulnerability for Owner-Surrendered and Subsequently Adopted Animal*s, Frontiers Veterinary Sci. J. 8 (Nov. 11, 2021), https://www.frontiersin.org/articles/10.3389/fvets.2021.784389/full.

[146] *See About Us*, Helping Homeless Pets, https://helpinghomelesspets.com/about-us (last visited Feb. 16, 2024); *Code of Conduct*, Helping Homeless Pets, https://helpinghomelesspets.com/member-code-of-conduct (last visited Feb. 16, 2024).

[147] *See generally Our Members*, Helping Homeless Pets, https://helpinghomelesspets.com/our-members (last visited Feb. 16, 2024).

Conclusion

In this article we have not identified specific factors or criteria that might comprise the standard we have advocated for, and recognize that once such criteria were articulated, the need for a "Best Interests of the Companion Animal" standard might be obviated. Ultimately, the concerns we have identified in this article seek to achieve an appropriate interim balance between protecting the interests of adoptable companion animals and those human individuals seeking to adopt them from private rescue operations. In the absence of legislation or courts defining, articulating and rescue operations applying either model, the "specific factors" or "best interests" are ultimately being decided upon by unregulated private actors potentially foreclosing worthy applicants from adopting a rescue animal.

Thus, we would also caution that while forming and applying a new "Best Interests of the Companion Animal" standard may advance the interests of companion animals, this position should not be used as a smokescreen to deflect unjustified discriminatory practices towards the capable, competent, and earnest humans seeking to adopt them. Stated differently, DEIneeds to be (better) woven into the culture and fabric of the Canadian animal adoption zeitgeist. As a part of DEI, forming or applying a "Best Interests of the Companion Animal" standard, specifically articulated by legislation, in this context may compel adoption of the standard in other animal contexts and ameliorate the notable situations that animals awaiting adoption and their future care-givers find themselves.

As we noted at the outset of this article, while better regulation of companion breeding and selling operations are needed in Canada, comprehensive regulation of private rescue operations is also needed in order to address the issues discussed throughout. We hope that this article brings Canadian society closer to this reality, as the whole point in an adoption endeavor is to help animals find safe and happy homes and to provide human animals with a form of companionship—outcomes which neither human animals nor non-human animals ought to be deprived.

Happy To Be Included: Rethinking Our Rejection of Habeas Corpus Rights for Nonhuman Animals Through the Framework of *Nonhuman Rights Project, Inc. v. Breheny*

Jessica Mansbacher Kibbe

Introduction

Under the Constitution of the United States of America, nonhuman animals do not have fundamental rights. While Congress and state legislatures have passed laws protecting nonhuman animals from cruel treatment by humans, no court in this country has yet recognized an animal's right to bodily autonomy and liberty through the writ of habeas corpus.[1] This is despite animal rights groups repeatedly seeking such rights for animals in captivity.[2]

The Nonhuman Rights Project (NhRP) has brought a series of cases in New York and Connecticut seeking habeas corpus protections for chimpanzees and elephants.[3] While these petitioners and their amici have laid out extensive proof of these animals' ability to feel fear and pain and to suffer in captivity, the judiciary refuses to utilize the Great Writ as a tool for animals to be freed from wrongful incarceration.[4] The courts have repeatedly and consistently refused to extend habeas corpus rights to nonhuman animals simply because they are not human.[5] Because animals are not humans, they say, animals cannot "assume legal duties and social responsibilities," and do not deserve to participate in our legal system.[6] For courts in New York and Connecticut, the fact that habeas corpus rights have never been extended to nonhuman animals before is ample justification to continue the trend.[7]

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[1] Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555, 570-71 (2022) ("[D]espite the awesome power of the writ of habeas corpus and its enduring use throughout the centuries, no court of this State—or any other—has ever held the writ applicable to a nonhuman animal.")

[2] *Id.* at 566. ("[P]etitioner has commenced myriad proceedings in New York and other states on behalf of chimpanzees and elephants, arguing that these nonhuman animals are legal "persons" being unlawfully confined and, as such, they are entitled to the remedy of habeas corpus.")

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Breheny*, 38 N.Y.3d at 572.

[7] Nonhuman Rts. Project Inc. v. Stanley, 16 N.Y.S.3d 898, 911 (N.Y. Sup. Ct.

While this common law approach to nonhuman animal habeas corpus petitions creates a way out of the problem of what to do with highly intelligent and sentient nonhuman animals suffering in captivity, it is inherently flawed and should be subject to critique. In this paper, I will make a case for extending the legal right of habeas corpus to nonhuman animals by exploring the ways in which they do assume legal duties and social responsibilities within human society, whether or not they understand them.

I will explain the function and historical context of the writ of habeas corpus and explore the line of cases brought by NhRP in New York and Connecticut, with a focus on the most recent of these cases, *NhRP v. Breheny*, decided in 2022.[8] In *Breheny*, the dissenting justices make a stronger case for habeas corpus rights for nonhuman animals than the courts have ever seen before.[9] While these dissenters fashion a strong case for allowing nonhuman animals to participate in the legal system, they do not go far enough. They brush aside the central argument U.S. courts have raised thus far to deny elephants and chimpanzees their day in court, namely that nonhuman animals do not bear legal duties or social responsibilities in human society.[10] In this paper, I will focus on the ways animals do participate in, benefit from, and are punished by human society, both legally and socially. I will argue for nonhuman animals to be granted the basic liberty rights required under the law to receive habeas corpus protection.

The dissents in *Breheny* mark a shift in legal thinking, signaling a growing flexibility in our legal constructs of personhood and our moral

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2015) ("Courts thus far have refused to employ the legal fiction that animals can enjoy "legal personhood" even though they are, obviously, not human beings. ""Person" is not defined in CPLR article 70, or by the common law of habeas corpus. Petitioner agrees that there exists no legal precedent for defining "person" under article 70 or the common law to include chimpanzees or any other nonhuman animals, or that a writ of habeas corpus has ever been granted to any being other than a human being.").

[8] *See generally Breheny*, 38 N.Y.3d at 555.

[9] Nicholas Goldberg, *Are Animals Entitled to Basic Legal Rights Just Like People?*, L.A. Times (July 11, 2022), https://www.latimes.com/opinion/story/2022-07-11/elephants-nonhuman-rights-court-case ("Then came Happy's case. This time there were *two* sympathetic judges — an enormous step forward. In his dissent, Judge Rowan D. Wilson noted that "the rights we confer on others define who we are as a society.")

[10] *Breheny*, 38 N.Y.3d at 572 ("As these courts have aptly observed, legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities (see R.W. Commerford and Sons, Inc., 192 Conn App at 46; Lavery, 152 AD3d at 78; Lavery, 124 AD3d at 151; Black's Law Dictionary [11th ed 2019], person). Unlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law.").

obligations to all living creatures.[11] It is a necessary step forward, which this paper seeks to underscore, emphasize, and propel into legal reality.

> The issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing.[12]

In this paper, the term "animal" will refer to nonhuman animals specifically, and will not include human animals.

I. Courts Deny Habeas Corpus Rights to Animals because they are not Humans

a. History of the Writ of Habeas Corpus

Habeas corpus protection has existed under the common law since before the founding of the United States.[13] It was made explicit in the Bill of Rights, which states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[14] U.S. Supreme Court Chief Justice Marshall mentioned the writ in an 1830 opinion, describing it as "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause."[15] Even when no law exists to make one's incarceration unlawful, the writ of habeas corpus can be used to challenge that captivity when it is inherently unjust.[16]

The writ of habeas corpus has been used by state and federal courts to ensure individual freedoms against wrongful imprisonment of any kind, whether it be by the state or federal government or by a private individual or entity.[17] The writ allows the judiciary great flexibility in

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[11] *See generally id.* at 577-641 (Wilson, J., Rivera, J., dissenting).

[12] People v. Gordon, 85 N.Y.S.3d 725, 729–30 (N.Y. Crim. Ct. 2018).

[13] *Breheny*, 38 N.Y.3d at 569 ("The centuries-old writ originated in English law and has been a steadfast pillar of our common law").

[14] U.S. Const. art. I, § 9, cl. 2.

[15] *Ex parte* Watkins, 28 U.S. 193, 202 (1830).

[16] *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting) ("Even when positive (statutory or common) law renders a confinement lawful, the writ may be used to challenge a particular confinement as unjust based on the particular circumstances.").

[17] *Id.* ("Habeas petitions were not limited to detainment orchestrated or managed by the government; habeas equally reached private confinements. It

challenging detentions that may not violate any given statute but are still unjust.[18] That flexibility has made the writ an essential tool for those marginalized humans who were not extended rights under the Constitution.[19]

b. The Nonhuman Rights Project Seeks Habeas Corpus Protections for Animals

Because of its innate flexibility and its historical use as a tool against laws that fail to prevent unjust incarceration, animal rights groups have sought to utilize the writ of habeas corpus to seek freedom for certain chimpanzees and elephants held in captivity by private individuals and zoological institutions.[20] The Nonhuman Rights Project has brought many such legal actions, mainly in New York and Connecticut, but has been rebuffed every time[21].

In 2017, NhRP sought a writ of habeas corpus for three elephants owned and on display at the Commerford Zoo in Goshen, Connecticut[22]. Connecticut's Appeals Court denied the elephants that relief, seemingly appalled that NhRP would suggest animals are worthy of liberty rights.[23] The court asked:

> Does the petitioner's theory that an elephant is a legal person entitled to those same liberties extended to you and I have a possibility or probability of victory? The petitioner is unable to point to any authority which has held so, but instead relies on basic *human* rights of freedom and equality, and points to expert averments of similarities between elephants and human beings as

was common for third parties to file habeas petitions on behalf of others who were confined.").

[18] *Id*. at 579 ("Historically, the Great Writ of habeas corpus was used to challenge detentions that violated no statutory right and were otherwise legal but, in a given case, unjust.").

[19] *Id*. at 602 ("Running throughout these qualities of the Great Writ is the maxim that habeas corpus is an innovative writ—one used to advocate for relief that was slightly or significantly ahead of the statutory and common law of the time.").

[20] *Id.* at 571 ("the writ of habeas corpus is flexible and has long existed as a mechanism to secure recognition of the liberty interests of human beings—even those whose rights had not yet been properly acknowledged through established law.")

[21] *Id.* at 566 ("Petitioner's efforts have been unsuccessful, with no court granting such petitions and most of these courts dismissing the proceedings on the basis that nonhuman animals are not legal "persons" with liberty rights protected by the writ of habeas corpus")

[22] Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 65 Conn. L. Rptr. 647 (Conn. Super. Ct. 2017).

[23] *Id.*

> evidence that this court must forge new law. Based on the law as it stands today, this court cannot so find.[24]

The petition was denied based on the simple fact that animals are not humans.[25] The court was unwilling to extend liberty rights to an animal when no court had ever done so before.[26]

The Nonhuman Rights Project has sought habeas corpus protections for chimpanzees, as well.[27] In 2015, NhRP sought the release of Hercules and Leo, who were being held in a research facility at the State University of New York at Stony Brook.[28] In a ruling we would hear echoed repeatedly in subsequent years, the court held that:

> [U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.[29]

Again the courts relied on the arbitrary and ill-defined threshold of legal duties and social responsibilities to deny intelligent and sentient animals, proven to be suffering, the right to be free from unjust captivity.

In 2017, NhRP filed two petitions for habeas corpus relief on behalf of two more chimpanzees, Tommy and Kiko, in New York.[30] These chimps were being held by private citizens. The Supreme Court of New York rejected those petitions as well, holding that "human-like characteristics of chimpanzees did not render them "persons" for

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[24] Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 2017 Conn. Super. LEXIS 5181, at 14 (Conn. Super. Ct.).

[25] Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 192 Conn. App. 36, 45 (Conn. App. Ct. 2019) ("Our examination of our habeas corpus jurisprudence, which is in accord with the federal habeas statutes and English common law; *see Johnson* v. *Commissioner of Correction* , 258 Conn. 804, 815, 786 A.2d 1091 (2002) ; reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics.")

[26] *Id.* at 48 ("in addition to the lack of precedent recognizing that animals can possess their own legal rights, we stay our hand as a matter of common law with respect to disturbing who can seek habeas corpus relief. ")

[27] Nonhuman Rts. Project, Inc. *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015)

[28] *Id.* at 900.

[29] Nonhuman Rts. Project, Inc. *ex rel.* Tommy v. Lavery, 152 A.D.3d 73, 76 (N.Y. App. Div. 2017).

[30] *Id.*

purposes of habeas corpus relief."[31] Every time NhRP attempts to utilize this legal tool, its efforts are waved away by a suspicious and exasperated judiciary.[32] NhRP's legal arguments are summarily dismissed based on the inherently flawed idea that animals cannot and do not bear legal duties and social responsibilities within human society.

c. NhRP's Habeas Petition for Happy the Elephant is Dismissed

In its most recent attempt to request habeas corpus protections for a wrongly imprisoned animal, NhRP brought suit in New York once again, this time petitioning for the release of Happy the Elephant, who has been kept in isolated captivity in the Bronx Zoo in New York City.[33] This case, *The Matter of Nonhuman Rights Project, Inc. v. Breheny*, signals a shift in judicial attitudes that bears noting. While Happy's petition was dismissed in a 5-2 opinion by the New York Court of Appeals, the conversation is changing; a tiny sliver of light has broken through the once-impenetrable doorway to acknowledging that animals have liberty rights.[34]

In *Breheny*, NhRP sought the release of Happy from the Bronx Zoo to an elephant sanctuary where she would have more space in which to roam and where she could enjoy the companionship of other elephants.[35] The zoo argued that Happy's current living arrangements violate no state or federal laws, and that is true.[36] While her captivity is essentially not unlawful, NhRP argues, it is inherently unjust because Happy suffers as a result of her limited mobility and isolation from other animals.[37]

Here, as before, the court could not envision the possibility of extending habeas corpus protection to a nonhuman animal. Like in prior cases, the rationale for such a decision was the simple, binary reasoning that rights are for humans only.[38] According to Chief Judge DiFiore of the New York Court of Appeals, "habeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals."[39] Simply because we have never done so before, she reasons, there is no reason to extend habeas protections

[31] *Id*. at 54.

[32] *Id.*

[33] Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (2022).

[34] *Id.*

[35] *Breheny*, 38 N.Y.3d at 565.

[36] *Id*. at 567.

[37] *Id.* ("petitioner contended that Happy does not have sufficient direct social contact with other elephants as a consequence of her current living situation")

[38] *Id.* at 569.

[39] *Id*.

to animals now.[40] The court struggles to identify a source for such liberty rights for animals,[41] bolstering the existing framework of judicial reasoning that humans' liberty rights spring from our participation in human society. Because we bear social responsibilities and legal duties to one another, we, in turn, get fundamental liberty rights.[42]

The logic behind the denial of Happy the Elephants' habeas corpus petition is consistent with all other cases seeking to acknowledge the bodily liberty rights of animals.[43] In *Breheny*, the court found that "[u]nlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law."[44]

These narrow-mindedly dismissive opinions boil down to animals not being humans, and as such, they cannot and do not bear legal duties and social responsibilities to human society.

d. The Groundbreaking Dissents of Breheny

While *Breheny* was another failure for NhRP, in a long line of failures, the dissents in this case mark a shift in legal thinking that suggests that we are closer now than we ever have been to acknowledging certain animals' fundamental right to bodily liberty.

In his 19,000-word dissent, Judge Wilson assertively advocates for the liberty interests of nonhuman animals. The core of his argument is the inherent flexibility of the writ of habeas corpus, and the idea that the law cannot remain stagnant and also serve modern society.[45] Because our collective understanding of animals' internal lives, biology, and social structures has advanced due to scientific research, we cannot continue to treat animals the same way under the law. Our evolving knowledge and sentiments toward nonhuman animals must be reflected within the law, and one step in that direction is acknowledging that animals deserve more rights than they currently are afforded by the courts. Judge Wilson writes,

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[40] *Id*. at 570-71 ("However, despite the awesome power of the writ of habeas corpus and its enduring use throughout the centuries, no court of this state—or any other—has ever held the writ applicable to a nonhuman animal. AND significantly, courts have consistently determined that rights and responsibilities associated with legal personhood cannot be bestowed on nonhuman animals.").

[41] *See id*.

[42] *Id.* at 572.

[43] *E.g.*, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 192 Conn. App. 36, 45 (Conn. App. Ct. 2019)

[44] *Breheny*, 38 N.Y.3d at 572.

[45] *Id*. at 584 ("Times change and the laws change with them.").

> [s]ociety's determination as to whether elephants have a right to be free of oppressive confinement, which they may test through habeas corpus, is not likely to be the same today as it was 100 years ago. At its core, this case is about whether society's norms have evolved such that elephants like Happy should be able to file habeas petitions to challenge unjust confinements.[46]

Judge Wilson argues that the writ of habeas corpus is the right tool to use to explore this evolving area of the law.[47]

Wilson dismisses as irrelevant the majority's central claim that animals do not have any inherent rights because they do not bear social responsibilities and legal duties to humans.[48] According to Wilson, "the holder of a right need not have a duty at all. Humans can create a legal system that confers rights on animals even if animals cannot bear duties, and even if animals are unaware of the rights they have been granted."[49] The dissent lists off the rights that we have allowed animals to enjoy under the law thus far, such as the right to be free from cruel treatment by humans.[50]

To Wilson, it does not matter what social or legal duties animals bear because our legal system already grants fundamental liberty rights to humans who, themselves, bear no legal or social duties to society.[51] "If the proposition that no rights may be awarded to a being who cannot shoulder responsibilities were based on social contract theory, we could not explain why children or profoundly disabled adults—who have no capacity to enter into a social contract—can be granted rights."[52] Millions of human beings are unable to bear legal duties and social responsibilities at any given time due to age, illness, or incapacity.[53] "Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant…or a parent suffering from dementia."[54] A human infant bears no one any social responsibilities; it does not change itself or adapt its

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[46] *Id*. at 588.

[47] *Id.*

[48] *Id* ("It is not about whether Happy is a person or whether Happy can bear responsibilities or enter into a social contract.").

[49] *Id*. at 586.

[50] *Id.* at 586-87.

[51] *Id*. at 587 ("The point is that we can, and constantly do, grant rights to living beings who bear no responsibilities and may never be able to do so.").

[52] *Id.*

[53] *See id.*

[54] Nonhuman Rts. Project, Inc., *ex rel.* Tommy v. Lavery, 31 N.Y.3d 1054, 1056–57 (2018).

behavior to the benefit of anyone else. It has a limited sense of self and others. Still, the court considers human infants to be legal persons merely because they belong to the same species as human adults, who do bear legal duties and social responsibilities to each other.[55] The court uses this faulty logic to cover up an inflexible hierarchy in which human beings reign superior merely because we make the rules.

It is the flexibility and innovation of the writ that renders the social responsibility/legal duty argument ineffectual to Wilson.[56] Wilson's dissent explores how habeas corpus petitions have been used since before the Founding to free parties who were not deemed to be legal persons with any rights under the laws of the time.[57] The importance of the flexible writ is that it enables the judiciary to propel social progress by granting rights to the populations that deserve them and have been barred from them unjustly.[58]

> The writ may be invoked on behalf of chattel (enslaved persons) or persons with negligible rights and no independent legal existence (women and children); third, it is a proper judicial use of the writ to employ it to challenge conventional laws and norms that have become outmoded or recognized to be of dubious or contested ethical soundness.[59]

To Wilson, the writ of habeas corpus is the natural tool to question the lawfulness of an elephant's confinement, regardless of Happy's species, or the duties or responsibilities she bears to her human counterparts.[60]

When the law upholds antiquated norms, and modern society calls into question the ethical soundness of that old judicial reasoning, the writ of habeas corpus is an inherently powerful and appropriate tool to spur change.[61] It has been used as such to great success in the past, and there is no reason why it can and should not be used as such today.[62] If "courts can use habeas corpus to grant rights to anyone regardless of their legal status as a person, even when positive law says otherwise," why hold back now?[63] Wilson's dissent faintly echoes past majority opinions in NhRP cases; judges have at times acknowledged

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[55] Brief for Laurence H. Tribe as Amicus Curiae Supporting Petitioner-Appellant at 14-16, Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (2022).

[56] *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *Id*.

the writ's flexibility without succumbing to the logical ending of that line of thought.[64] In Lavery, a habeas corpus case where NhRP sought to free a chimpanzee from unlawful captivity, the court held that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'"[65] The writ of habeas corpus is a versatile tool that is primed and worthy of performing the task it has been taken up by NhRP to accomplish. All they require is for one judge to be willing to try it out, and Judge Wilson vehemently advocates for that possibility.[66]

Lastly, Wilson rejects the majority's specious slippery slope argument, refuting the idea that allowing an elephant to petition for release from unjust captivity will end in the destruction of modern civilization[67]. Habeas corpus petitions are inherently case-by-case evaluations.[68] Wilson assures his colleagues that granting Happy's habeas petition will not compel the courts to release all elephants from captivity.[69] Wilson notes that,

> allowing Happy to have a habeas corpus hearing does not mean that any other elephant would automatically be entitled to file a habeas petition and receive a full merits hearing or would prevail at one. Unlike changes to common-law doctrines wrought through civil cases, habeas corpus is inherently a case-by-case process.[70]

The slippery slope argument has no place in this opinion at all, Wilson argues, because Happy's petition came before the court on a motion to dismiss.[71] As such, the court was not compelled to rule on the merits of the case and should not have done so.[72] They were only tasked with determining whether Happy had put forward a prima facie case of possible unjust confinement.[73] By ruling that no animals can ever bring habeas petitions merely because they are not humans, the court has unfairly overstepped its bounds and denied Happy a chance at a full hearing to prove the merits of her petition.[74]

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[64] *See* People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 250 (App. Div. 3rd Dept.) (citing People *ex rel*. Keitt v McMann, 18 N.Y.2d at 263).

[65] *Id.*

[66] *See Breheny*, 38 N.Y.3d at 623 (Wilson, J., dissenting).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id*.

[71] *Id*. at 617.

[72] *See id.*

[73] *Id.*

[74] *Id*. at 620 ("[G]iven what the information Happy has submitted reveals

In the second dissent to the *Breheny* majority opinion, Judge Rivera puts forth a less expansive argument, but one that is compelling in its simplicity.[75] Rivera writes:

> The majority's argument boils down to a claim that animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. But, of course, humans are animals. And glaringly absent is any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not.[76]

Here again, a dissenting judge gives no credence to the majority's simplistic logic.[77] To Rivera, we are all animals, and we are all deserving of a chance at justice[78].

e. What the Breheny Dissents Fail to Address

While Judges Wilson and Rivera forge new boundaries in the conversation about liberty rights for animals, they do not go far enough. In combatting the majority's logic, they fail to address the central pillar that has propped it up since animal rights groups filed their first habeas petition —that animals do not bear legal duties and social responsibilities within human society. If that is the majority's basis for denying animals liberty rights, then that should be the basis for forging those rights. One does not have to engage in mental or legal gymnastics to reach that equitable end, either.

Let's consider what legal duties and social responsibilities are comprised of; how do they manifest in our daily human experience? How does the average person bear a legal duty? Is it just that they pay taxes, vote in elections, and obey the speed limit? How does the average person bear a social responsibility? Is it just that they take care of their dependent family members, give to charity, and buy electric vehicles? It is a broad and nuanced thought exercise that is summarily used by the courts to dismiss habeas corpus petitions for animals without any satisfying explanation.

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about how she experiences the world as an elephant and about her environment at the Bronx Zoo, has Happy made a prima facie showing of possible unjust confinement that grants her a full hearing to decide the merits of her habeas petition? She has.").

[75] *Id*. at 633 (Rivera, J., dissenting).

[76] *Id*.

[77] *See id.*

[78] *See id.* at 631.

I propose that legal duties be defined thus: One bears legal duties when one is bound to the confines of the legal system. In other words, the structure of human society will dictate the consequences you suffer when your behavior does not conform to human standards. Whether you understand those rules or agree to live by them, they will impact the quality of your life, your lived experiences, and your freedom.

I propose that social responsibilities be defined thus: One bears social responsibility when one recognizes the experience of others, and one changes or adapts one's behavior in response to the influence of others. Whether or not you agree to it or you understand it, if you live in a complex social system, and it influences your behavior in any way, you have borne a social responsibility.

Within that logical framework, it is the undeniable truth that animals and humans live inextricably on the planet, together. The lived experience of animals and humans are deeply intertwined. Humans are dependent on animals for many aspects of our survival.[79] Most modern advancements in human civilization were spurred by the presence and work of animals.[80] Animals were integral in the development of modern agriculture,[81] transportation,[82] and the U.S. postal system,[83] for example. Humans are reliant on animals, even today, for our food supply, both because they provide us with meat and dairy products with their bodies[84] and because they pollinate our edible plants.[85] We rely on animal experimentation to make advancements in science and medicine.[86] Many

[79] *Why Bees Are Essential to People and Planet*, U.N.: Env'tl Program (May 8, 2022), https://www.unep.org/news-and-stories/story/why-bees-are-essential-people-and-planet#:~:text=Bees%20are%20part%20of%20the,propolis%20and%20honey%20bee%20venom.

[80] Ann Norton Greene, *Overview: Animal Power*, Energy History Online (2023), https://energyhistory.yale.edu/animal-power/#:~:text=The%20lasting%20significance%20of%20animal,the%20newer%20kinds%20of%20power.

[81] *See The Development of Agriculture*, Nat'l Geo.: Ed. (Jan. 5, 2024), https://education.nationalgeographic.org/resource/development-agriculture/.

[82] *E.g.*, *Pack Animal*, Encyclopedia Britannica, https://www.britannica.com/technology/pack-animal (last visited Jan. 6, 2024).

[83] Nancy A. Pope, *Transportation: Animal Powered*, Nat'l Postal Museum, https://postalmuseum.si.edu/exhibition/about-postal-operations-transportation/animal-powered#:~:text=Some%20rural%20carriers%20have%20even,U.S.%20states%20and%20Alaskan%20territory(last visited Jan. 6, 2024).

[84] *See generally*, Frederic Leroy et. al, *The Role of Meat in the Human Diet: Evolutionary Aspects and Nutritional Value*, 13(2) Animal Frontiers 12 (April 2023) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10105836/ (discussing the significance of consuming meat in human societies over time).

[85] *Why Bees Are Essential to People and Plant*, *supra* note 79.

[86] Nat'l Acad. of Sciences, Science, Medicine, and Animals 5-7 (1991) (ebook), https://nap.nationalacademies.org/read/10089/chapter/4#6.

humans rely on companion animals for emotional support.[87] In short, a human civilization that evolved without contributions and practical benefits bestowed upon it by animals would be unrecognizable to us today.

In the coming sections, I will explore the ways in which animals bear social responsibilities within their own communities and within ours. I will also look at the ways animals have borne legal duties, historically and in modern times, whether they were aware of it or not. My argument hinges on the idea that animals can and do bear these duties and responsibilities regardless of whether they understand or recognize that fact. A duty can be born without knowledge of that duty. A responsibility can be carried out without understanding it to be such in explicit terms. The results are the same for the humans involved: We benefit from animals' involvement in our lives. We impose our rules upon them, and they comply.

In his amicus curiae brief on behalf of Happy the Elephant, Harvard law professor Laurence H. Tribe agrees that animals can bear legal duties regardless of whether they understand them.[88] What is a legal duty but an obligation to follow the rules or suffer the consequences? Humans force animals to obey in many varied contexts, and that animals obey is an incontrovertible fact.[89] As Tribe points out, "the ability to comprehend a duty…is not conceptually necessary for *bearing* duties: To bear a legal obligation is simply to be placed under it."[90] Let's set aside the question of what animals do and do not understand about their roles in human society. Let's instead consider how our interactions with animals result in their bearing of duties and responsibilities, and let's question whether that should be enough to allow them to participate in our legal system.

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[87] Helen Louise Brooks et. al., *The Power of Support from Companion Animals for People Living with Mental Health Problems: A Systematic Review and Narrative Synthesis of the Evidence*, BMC Psychiatry (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5800290/.

[88] Brief for Laurence H. Tribe as Amicus Curiae Supporting Petitioner-Appellant at 13-14, Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (2022).

[89] *Id*. at 14 ("'[D]eterrence-oriented punishments' can be used to convey to animals that a certain type of conduct is prohibited.").

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

II. Legal Duties of Nonhuman Animals

a. History of Animal Participation in the Legal System

The rights of animals have been contemplated by the courts since the inception of the justice system.[91] In 1805, "In the famous case of *Pierson v. Post,* the Supreme Court…twice noted that wild animals ("*ferae naturae* ") have "natural liberty" (3 Cai. R. at 178, 179)."[92] Before the founding of the United States, animals had rights under the law, and they were active participants in the justice system.[93]

In Medieval times, it was common practice to put animals on trial to prosecute them for their alleged crimes against humans.[94] While that seems anathema to modern judicial attitudes, at the time it was the logical result of a perceived infraction. "When determining whether a creature warranted a trial, the question was merely whether the creature had the requisite mental states or volitional powers that could affect whether the animal should be punished. The question was about the capabilities of the animal…not what species it belongs to."[95] It was a given that animals bore legal duties within human society, and they suffered the consequences when their actions deviated from what humans deemed acceptable.[96]

One famous case of this nature took place in 1457 in Savigny, France, after a 5-year-old boy was attacked and killed by a sow and her six piglets.[97] The animals were prosecuted through a proper trial in which they had legal representation and over which a judge presided.[98] Evidence was presented by each party.[99] The local villagers came to witness the proceedings.[100] "[I]n a court of law, [animals] were treated as persons. These somber affairs, which always adhered to the strictest legal procedures, reveal a bygone mentality according to which some animals possessed moral agency."[101] In this case, the sow was found guilty and was publicly hanged for her crime.[102] Her piglets were found

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[91] *E.g.*, Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (2022)

[92] *Id.* at 584.

[93] Sonya Vatmosky, *When Societies Put Animals on Trial*, JSTOR Daily (Sept. 13, 2017), https://daily.jstor.org/when-societies-put-animals-on-trial/.

[94] *Id.*

[95] Alexis Dyschkant, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. Ill. L. Rev. 2075, 2105 (2015).

[96] *See id.* at 2106.

[97] *Id*. at 2104.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id*.

[102] *Id.*

innocent, however, as there was no evidence that they had participated in the attack. Justice was served through the official legal channels.

Edmund P. Evans, who wrote the defining tract on the subject, cites 189 examples of animals put on trial from the 13th until the 18th century.[103] "Bulls, horses, donkeys and especially pigs were put on trial in civil courts for a variety of crimes, from murder to property destruction, and then often executed."[104] "Evans argues that in 'ancient and medieval times domestic animals were regarded as members of the household and entitled to the same legal protection as human vassals,' concluding that, before the Enlightenment, animals were 'invested with human rights and inferentially endowed with human responsibilities.'"[105] It is evident, then, that the notion of nonhuman animals participating in the human legal system is not an anomaly.[106] It is not beyond the bounds of possibility, and it should not be written off as unreasonable by the modern American judiciary.

b. Animals Have Standing in Federal Court

Today's courts still allow animals to participate; that practice has not fallen entirely by the wayside. The United States' highest courts have allowed animals to bring cases as parties, holding that they have standing under Article III of the U.S. Constitution.[107] With the ability to bring cases, animals bear legal duties in that they must and do live with the results of those proceedings. Their participation concludes in their obedience to human laws.

Animals have been plaintiffs in a few landmark cases.[108] While it may have chafed the human judges presiding over them at the time, the courts were unable to stop these legal actions because the Constitution does not forbid animals from initiating a legal case or controversy.[109] "As commentators have observed, nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans."[110] In *Cetacean v. Bush*, the world's whales, dolphins, and porpoises were the plaintiffs, alleging that they suffered harm due to the U.S. Navy's use

[103] Ed Simon, *If Animals are Persons, Should They Bear Criminal Responsibility?*, Psyche (Dec. 21, 2022), https://psyche.co/ideas/if-animals-are-persons-should-they-bear-criminal-responsibility.

[104] *Id.*

[105] *Id*.

[106] *Id*.

[107] *See* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1176 (9th Cir. 2004); *see* U.S. Const. art. III.

[108] *E.g.*, *Cetacean Cmty.*, 386 F.3d at 1169.

[109] *See id.* at 1176..

[110] *Id.* at 1175.

of sonar in their habitats.[111] "The Ninth Circuit made clear that the 'sole plaintiff in this case" is the Cetaceans and did not discuss 'next friend' or third-party standing."[112] The Ninth Circuit affirmed the district court's dismissal of the cetacean's case because the animals lacked statutory standing but upheld the notion that a case brought by an animal can indeed be a "case or controversy" per Article III.[113]

For the court in *Cetacean*, finding that animals had standing was not such a drastic departure from the norm.[114] As they acknowledged in their opinion, at least two district courts had already held that nonhuman animals have standing to bring suits under the Endangered Species Act.[115] Likewise, we have since seen the federal courts hold similarly in cases brought by animals. Federal courts have ruled on cases in which plaintiffs were red squirrels,[116] birds,[117] and dolphins.[118] In *Naruto v. Slater*, a crested macaque brought suit under the Federal Copyright Act against a photographer who was taking credit for a photograph that Naruto had taken of himself.[119] While the court found that Naruto could not prevail under the Act, they could not deny that he was entitled to his day in court.[120] The court acknowledged, "Our court's precedent requires us to conclude that the monkey's claim has standing under Article III of the United States Constitution."[121]

c. Animals Bear Duty of Legal Personhood in Some States

Animals have enjoyed something akin to legal personhood within many aspects of our justice system. This ability to participate and be recognized through formal legal channels again fosters a legal duty for the animal populations to be subject to the results of those proceedings.

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[111] *Id.* at 1172.

[112] *Id.* at 1171.

[113] *See id*. at 1175-76.

[114] *See id.* at 1176.

[115] *Id.* at 1173("However, at least two district courts, relying on our statements in *Palila IV,* have held that the ESA grants standing to animals.").

[116] *E.g.*, Mount Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1448 n.13 (9th Cir. 1992) ("No party has mentioned and, notwithstanding our normal rules, we do not consider, the standing of the first-named party [Mount Graham Red Squirrel] to bring this action.").

[117] *E.g.*, Palila v. Hawaii Dep't of Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988) ("As an endangered species…the bird… also has legal status and wings its way into federal court *as a plaintiff in its own right*.") (emphasis added).

[118] Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F.Supp. 45, 50 (D. Mass. 1993).

[119] Naruto v. Slater, 888 F.3d 418, 435–36 (9th Cir. 2018).

[120] *Id.*

[121] *Id*. at 420.

The animals comply, they obey, and their lives are altered by the legal findings of the courts. The animals, while they may be unaware of the intricacies of the legal proceedings, are nonetheless impacted by them. As such, they bear the duty of acquiescence, compliance, and obedience.

In many states in the U.S., animals enjoy some legal rights akin to legal personhood. In Oregon, for example, admittedly a pioneer in the area, horses and goats were deemed victims in *State v. Nix*, a distinction previously preserved for humans alone. *Nix* was a criminal case in which the defendant was found guilty of 20 counts of second-degree animal neglect.[122] When it came time to sentence the man, the court looked to Oregon's "anti-merger" statute, which provided that "when the same conduct or criminal episode violates only one statute but involves more than one 'victim,' there are 'as many separately punishable offenses as there are victims.'"[123] For the defendant to be held guilty of 20 separate offenses, the court had to find that each animal could be deemed an individual 'victim' under the statute. The trial court concluded that, because only people can be victims within the meaning of that statute, the defendant had committed only one punishable offense. The court merged the 20 counts into a single conviction for second-degree animal neglect.[124] The Court of Appeals reversed that ruling, however, finding that animals can be victims within the meaning of the anti-merger statute and that the lower court should sentence the offender for 20 separate counts of the crime.[125] Here, the horses and goats bore the legal duty of being counted, having their existence and suffering matter in a real way that impacted the life and freedom of a human person.

Similarly, animals are included in the Emergency Aid doctrines of some states in the U.S. The Emergency Aid doctrine allows the police to enter a home without a warrant, sidestepping questions of constitutionality of doing so, when they believe there may be an injured animal inside or one that is in imminent danger of injury.[126] This rule exists for animals in Massachusetts and Oregon. In these states, animals bear the legal duty of counting, once again, such that their existence can overcome constitutional norms.

State of Oregon v. Fessenden is another striking expression of the legal duty of animals to be counted in their suffering. In this case, the Oregon Supreme Court held that a horse was a 'person' under a statute permitting warrantless searches of property where there was a reasonable belief that a person was suffering serious injury or harm.[127]

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[122] Or. Rev. Stat. Ann. § 167.325 (2023).
[123] Or. Rev. Stat. Ann. § 161.067 (2023).
[124] State v. Nix*,* 283 P.3d 442, 443 (2012).
[125] *See id*. at 449.
[126] *See* Com. v. Duncan, 7 N.E.3d 469, 471 (2014).
[127] State of Oregon v Fessenden, 333 P.3d 278, 287-88 (2014).

In *Fessenden*, a police officer's seizure of the horse from its owner was being called into question.[128] The police officer had entered the property and seized the horse, which appeared emaciated and malnourished, to protect the animal from further harm.[129] The officer insisted that this conduct was permissible under the state's Emergency Aid Exception, which until then had only applied to humans.[130] The horse was allowed the status of legal personhood in this case, and the legal system was a helpful tool in protecting the horse's right to be free from bodily harm.[131]

In many states in the nation, companion animals enjoy rights akin to those of human children when the custody of those animals is in dispute.[132] In these cases, animals evince this duty with their compliance. Illinois was the second state to adopt a more progressive approach to animal custody, following Alaska's lead.[133] New York, where Happy the Elephant resides, followed suit. "A recent New York law,[134] for example, requires that a court managing a couple's separation, 'in awarding the possession of a companion animal…consider the best interest of such animal.'"[135] The law in Illinois is similar.[136] Courts are mandated to consider the best interests of the companion animal when determining which party should be charged with that animal's care.[137]

These duties are often mirrored in state laws dealing with trusts and probate.[138] "In many states, people can leave behind money for their pets or domesticated animals in trusts after they die."[139] Within estate law, animals have long been deemed legal persons capable of being the beneficiaries of trusts. In Connecticut, for example, nonhuman animals have the "rights of a true beneficiary, and therefore personhood."[140] In

[128] *Id.* at 279.

[129] *Id.* at 280.

[130] *Id*. at 288.

[131] *See id.*

[132] Melissa Chan, *Pets Are Part of Our Families. Now They're Part of Our Divorces, Too*, Time (Jan. 22, 2020; 6:31 PM), https://time.com/5763775/pet-custody-divorce-laws-dogs/.

[133] *Id.*

[134] N.Y. Dom. Rel. Law § 236 (2023).

[135] Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555, 606 (2022) (Wilson, J. dissenting).

[136] 750 Ill. Comp. Stat. 5/503(n) (2023).

[137] *Id.* ("If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties. In issuing an order under this subsection, the court shall take into consideration the well-being of the companion animal.")

[138] *See Breheny*, 38 N.Y.3d at606 (2022) (Wilson, J. dissenting).

[139] *Id.*

[140] Petition for Habeas Corpus at 5, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., (Conn. Super. Ct., June 7, 2018); Conn. Gen. Stat. § 45a-489a (2023).

New York, as well, section 7-8.1 ("Trusts for pets") of the Estates, Powers and Trusts Law, "permits a 'domestic or pet animal' to be designated as a beneficiary of a trust." [141] These laws and regulations distill a legal equation recognizing that the relationship between humans and their companion animals is so strong that those animals have the right to be counted as a beneficiary of their human companions. Since these animals bear the duty of participating in the legal process, the system is obligated to not shut them out solely because they are not human.

d. Animals are Punished When They Break the Law

Whether they are aware of it or not, animals are subject to punishment when their conduct does not conform to the standards established by the human legal system.[142] Animals bear the duty to obey the law, and they are punished when they deviate from conduct that humans deem acceptable. While this does not necessarily involve hauling an offending animal into a courtroom in modern American society, errant animals are still forced to endure punishment for their crimes. The following are some examples of animals being forced to conform to a human standard of lawful behavior and being punished when they fail, whether they are punished by humans within the official legal system or outside of it.

In Connecticut, it has been a crime for a human to commit bestiality since 1642.[143] While the statute has since been updated to spare the animal victim from the punishment of death, in the early 1800s, the state statute provided "[t]hat if any man or woman shall lie with any beast or brute creature, by carnal copulation, such person shall be put to death; and the beast shall be slain and buried."[144] In this country, it was a crime for a nonhuman animal to participate in the act of bestiality, just as it was a crime for a human.[145] Death is the ultimate penalty for any crime, and the nonhuman victim of bestiality bore that legal duty, regardless of whether they were aware of it.[146]

Animals in the U.S. are subject to punishment for violating the law even today. Modern dog bite statutes often provide for some

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[141] Nonhuman Rts. Project, Inc. v Stanley**,** 16 N.Y.S.3d 898, 901 (N.Y. Sup. Ct. 2015).

[142] *E.g.*, *Rabies - What to do with an Animal that Has Bitten a Person*, CDC (April 22, 2011), https://www.cdc.gov/rabies/specific_groups/veterinarians/person_bitten.html.

[143] State v. Hoetzl, No. LLICR190180569T, 2020 Conn. Super. LEXIS 400, at *5 (Super. Ct. Mar. 2, 2020).

[144] Statutes of Connecticut, Title LXVI, Chap. 1 § 1 (1808).

[145] *See id.*

[146] *See id.*

punishment of a dog that has attacked humans or other animals.[147] While punishing an offending dog with death has fallen out of favor in recent years, other punishments under the law have become commonplace.[148] In a New York Case from 2007, a dog that repeatedly attacked other dogs in its neighborhood was subjected to neutering and microchipping as a punishment.[149] While this fate is arguably preferred to a death sentence, the offending dog was forced to undergo a physical alteration of its body as a result of its legally non-conforming, violent behavior.

Both throughout history and today, animals are punished by humans outside of the official legal system for their perceived illegal acts.[150] While these animal killings are not a result of a sentence from a judge, they still constitute a legal duty borne by the animal victims. Our collective notion of behavior worthy of punishment, as well as what punishments are appropriate for certain crimes, is formed by our knowledge and participation in the human legal system. We are obligated to abide by the law, and we impose that duty on the animals with whom we share a planet.

There have been many high-profile instances of animals being put to death for their alleged infractions against humans.[151] While these scenarios often play out outside of the courtroom, the animals are nonetheless forced to succumb to a punishment inflicted upon them by a person or group of people who deem them deserving of punishment. The punishment is meted out, often publicly, sometimes impulsively, and the human executioner does not face any legal ramifications for taking the "law" into their own hands.[152] In these scenarios, of which there are many, the animals involved bear real and momentous legal duties, even though their executions are carried out in the public square rather than a prison death chamber. Their punishments are the manifestation of collective humanity ruling on their guilt or innocence and meting out justice as humans understand it. The animals involved have no choice but to bear that duty silently and comply.

During the heyday of P.T. Barnum and the traveling circus, public animal executions were forms of entertainment. "At least 36

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[147] *E.g.*, Charlotte Walden, *State Dangerous Dog Laws*, Mich. State Coll. L.: Animal Legal & Hist. Soc'y (2019), https://www.animallaw.info/topic/state-dangerous-dog-laws.

[148] *See* Cuozzo v. Loccisano, 832 N.Y.S.2d 744, 745 (N.Y. App. Term 2007).

[149] *Id.*

[150] *E.g.*, Jill Lepore, *The Elephant Who Could Be a Person*, Atlantic (Nov. 16, 2021), https://www.theatlantic.com/ideas/archive/2021/11/happy-elephant-bronx-zoo-nhrp-lawsuit/620672/.

[151] *E.g.*, Mike McPhate, *Gorilla Killed After Child Enters Enclosure at Cincinnati Zoo*, N.Y. Times (May 29, 2016), https://www.nytimes.com/2016/05/30/us/gorilla-killed-after-child-enters-enclosure-at-cincinnati-zoo.html.

[152] *E.g.*, *id*.

American-owned elephants were sentenced to execution between 1880 and 1930."[153] These elephants had often been tortured by circus trainers, chained, whipped, and pierced with bullhooks, causing them to turn violent and lash out against their human handlers. These "[e]lephant insurrections were put down with elephant executions,"[154] and these executions were turned into huge public spectacles.

P.T. Barnum orchestrated public executions of many of his allegedly criminal and deviant elephants. In 1885, Barnum had an elephant "chained to four trees in Keene, New Hampshire, and executed by firing squad in front of 2,000 spectators."[155] "In 1894, Tip, exhibited in Central Park, was indicted, "tried and convicted" for murder, and then publicly poisoned."[156] This trial was a farce, of course, staged for public entertainment, but Tip's death was as real and final as it would have been had a judge ordered it. In 1903, Topsy, an elephant who had killed three men, "was executed; electrodes were strapped to her feet and a noose around her neck was tied to a steam engine after she had been fed carrots loaded with cyanide."[157] This public execution was filmed by Thomas Edison and preserved for posterity.[158]

In 1916, an elephant at Sparks World Famous Shows, a traveling circus, killed a trainer who hit her over the head with a stick in front of spectators in Tennessee.[159] In response, "the circus's publicist decided to stage a public execution by hanging."[160] Meting out justice to animals by death sentence was not only widely accepted by humans, but it was a popular form of entertainment. The elephants and other animals put to death for their crimes bore a duty to human society and made the ultimate sacrifice in their fulfillment of that duty.

A century later, public executions of animal offenders are still happening, although in a less grotesque fashion. In 2009, Travis the chimp was shot by law enforcement after he attacked a woman in front of his home.[161] In 2016, Harambe the gorilla was shot to death at the Cincinnati Zoo after a young boy got into his enclosure. While the zoo staff could have elected to tranquilize Harambe, they instead shot the

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[153] Lepore, *supra* note 150.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] Tony Long, *Jan. 4, 1903: Edison Fries an Elephant to Prove His Point*, Wired (Jan. 4, 2008, 12:00 PM),https://www.wired.com/2008/01/dayintech-0104/.

[159] Lepore, *supra* note 150.

[160] Id.

[161] Stephanie Gallman, *Chimp attack 911 call: 'He's ripping her apart'*, CNN (Feb. 17, 2009), http://www.cnn.com/2009/US/02/17/chimpanzee.attack/index.html?iref=24hours.

gorilla to death within 10 minutes of the boy's entry into the animal's habitat.[162] The humans who inflict these death sentences upon animals who break the law or are perceived to be harming others face no legal repercussions for their actions. If it is not illegal to punish animals in this way, then by all accounts, it is legal, and as such endorsed by our human legal infrastructure.

III. Social Responsibilities of Nonhuman Animals

The many court opinions that relegate animals to a lower tier of legal rights explain it away by claiming that nonhuman animals do not bear social responsibilities within human society.[163] Social responsibility is a nebulous idea that the judiciary never defines, however. Humans are social animals, admittedly; we live together in societies, and as a result of that shared living space, we bear social responsibilities. We interact with each other, and we adjust our behavior in response to other humans in our proximity. We also care for one another and rely on each other for survival.

The social structures of many animal communities reflect our own, and by the definition laid out above, animals bear social responsibilities to each other within those groups. The social responsibilities that animals bear to humans are obvious, as well. Animals and humans interact every day. Animals share human living space, as well – every inch of it. Animals adjust their behavior in response to their proximity to us and the influence we exert over our shared habitat. I struggle to find a definition of social responsibility into which animals do not comfortably fit. The following is a study of a few ways animals bear social responsibilities, both within their nonhuman communities and within the framework of human society.

a. Animals Live in Complex Societies and Bear Each Other Social Responsibilities

Many animal species, extensively studied by human scientists, are understood to be highly intelligent beings that function within complex social structures.[164] This paper explores this idea in the context of elephants, but that species is far from the only example. Many of the animals scientists have studied show similar sociological patterns, and our human knowledge is limited by the extent of scientific research

[162] McPhate, *supra* note 151.

[163] *E.g.*, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 192 Conn. App. 36, 45 (Conn. App. Ct. 2019)

[164] Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 Pace Envtl. L. Rev. 517, 526 (2016).

conducted to date. Considering that we have yet to discover all the animal species currently in existence on the planet,[165] there has to be much that we have yet to discover about the animal species of which we are already aware.

Elephants like Happy have voices and speak with one another. Their vocalizations "are not merely reflexive; they have distinct meanings to listeners and communicate in a manner similar to the way humans use language."[166] Elephants coordinate their actions with others in their group, using this language. For example, elephants have been found to "use specific calls and gestures to plan and discuss a course of action" such as "planning and discussing where, when and how to move to a new location."[167] They have been observed celebrating after successfully evading a threat.[168] "These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific aims in mind, then work together to achieve those goals. Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy."[169]

These communication signals or language include vocalization, body postures, and gestures.[170] Elephants use their methods of communication to convey many complicated ideas to one another.[171] They coordinate to evade threats, certainly, but they also "display empathy in the form of protection, comfort and consolation"[172] of one another. Elephants can comprehend each other's sensory experiences, as they have been "seen to react when anticipating the pain of others by wincing when a nearby elephant stretched her trunk toward a live wire."[173]

Elephants have been observed caring for and helping each other, as well.[174] They have been seen "assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks."[175] Elephants "defend family members or close allies from (potential)

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[165] Laura Tangley, *How Many Species Exist?*, Nat'l Wildlife Fed'n (Dec. 1, 1998), https://www.nwf.org/Magazines/National-Wildlife/1999/How-Many-Species-Exist.

[166] Petition for Habeas Corpus, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., (Super. Ct. , Nov. 13, 2017).

[167] *Id*. at 22.

[168] *Id*.

[169] *Id*. at 32.

[170] *Id*. at 14.

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

[172] *Id*. at 27.

[173] *Id*. at 28.

[174] *Id.* at 31.

[175] *Id*. at 27.

attacks by outsiders."[176] When these behaviors are displayed, they are "generally preceded by gestural and vocal signals, typically given by the matriarch and acted upon by family members, and are based on one elephant understanding the emotions and goals of a coalition partner."[177] The human study of elephants has repeatedly proven that elephants live within social structures that are complex and that the animals bear the social responsibilities of caring for and protecting one another.

b. Animals Species Have Unique Cultures

Elephants live in a coordinated society, communicate, work together, evince empathy, and care for one another.[178] As such, it is not a stretch to posit that elephant societies develop unique cultures. What recent scientific studies have discovered more broadly is that many animal species have unique cultures, from the most intelligent elephants down to the lowliest insects.[179] In this context, culture is loosely defined as a collection of learned behaviors that are socially passed on to other members of a species and across generations.[180] To elucidate this point, consider a recent research study involving bumblebees.

In this study, researchers built a puzzle box petri dish.[181] To access the nectar hidden in the dish, a bumblebee would have to push either a red tab clockwise or a blue tab counterclockwise.[182] Both actions would reveal the hidden nectar and provide the payoff.[183] Researchers divided the bumblebees into three colonies; they taught one colony to push the red tab, one colony to push the blue, and did not teach the third, control colony anything at all.[184] They then released the bees back into their respective habitats and observed their behavior.[185]

The scientists found that the behaviors they had taught the bumblebees spread throughout their respective colonies.[186] When they

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[176] *Id*. at 31.

[177] *Id*.

[178] *Id.* at 14, 22, 24, 31-32

[179] Thibaud Gruber et al., *Cultural Change in Animals: A Flexible Behavioural Adaptation to Human Disturbance*, Palgrave Commc'ns 1, 6 (2019), https://doi.org/10.1057/s41599-019-0271-4.

[180] *Id*. at 2, 4 ("A cultural species displays patterns of behaviour (or 'traditions') acquired in part through socially aided learning processes.").

[181] Ari Daniel, *Can Insects Have Culture? Puzzle-Solving Bumblebees Show it's Possible*, NPR (Mar. 7, 2023, 2:05 PM), https://www.npr.org/2023/03/07/1161627795/can-insects-have-culture-puzzle-solving-bumblebees-show-its-possible

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

subsequently tested new bees from the red colony, for example, those bees already knew to push the red tab to get the nectar.[187] The same thing was true of the bees from the blue colony when they were placed in the puzzle petri dish – they all knew to push the blue tab to find the nectar.[188] Even when a member of the red tab colony was subsequently shown that it could access the nectar by pushing the blue tab, it still chose to push the red tab. The bees that had not been taught anything never consistently showed an ability to solve the puzzle box petri dish.[189]

This study shows that even bumblebees share knowledge within their social living groups.[190] A socially learned behavior adopted throughout a community is nothing more than a tradition, and when you add up those shared traditions, you get culture. The research subjects were able to pass on something they learned to benefit others in their communities. Pushing a red or blue tab is not something a bumblebee knows to do on instinct, nor did they evolve or adapt over the span of generations. The only way knowledge about the red and blue tabs was passed throughout the hives was through communication and social interaction.[191] An animal species that learns and shares knowledge to provide for the general welfare of all exists within a complex social system.

The more scientists study these animals, the more social capabilities they will discover in them. Animals are not limited in their abilities; we are just limited in our understanding of how their lives are lived and how their societies function.

c. Animal Culture is Influenced by Proximity to Humans

Having established that a broad range of animal species can share social knowledge for their collective benefit, let's consider how animals utilize that ability to adapt and conform to the human-influenced world in which they live. Humans evidence their social responsibility to each other by adjusting their behavior in response to the presence or behavior of others. Animals adjust their behavior in response to the presence of humans and human influence, as well.

Human influence has made many formerly wild areas no longer habitable to nonhuman animals. "Habitat loss and fragmentation have been shown to reduce movements in numerous mammal species worldwide," leading them to modify their behavior to avoid contact

[187] *Id.*.
[188] *Id.*
[189] *Id.*
[190] *See id.*
[191] *Id.*

with humans.[192] When animals do live in proximity to humans, they alter their behavior in response to that perceived threat. For example, in West Africa, scientists observed wild chimpanzees' behavior when foraging for food and found that when the animals foraged for human crops, their groups were more cohesive than they were when foraging in wild areas.[193] This was "likely due to the need to survey potential threats from humans."[194]

Animals adapt their socially learned behaviors in response to human influence in other ways as well. Sometimes human influence provides an opportunity to an animal species, rather than a threat. "[H]uman impact often leads wild animals to be exposed to novel stimuli, which is a potent catalyst of inovations [sic]…."[195] For example, humans recently introduced oil palm, which produces large nuts, into the Indonesian habitat of long-tailed macaques.[196] This "provided the 'opportunity' for long-tailed macaques…to develop nut-cracking behaviour [sic] from habitual cracking of hard-shelled marine invertebrates within roughly a decade."[197] This was not a novel behavior that evolved in the species over generations, this was a learned behavior that was shared socially among the macaques.[198] Human influence provided an opportunity for the long-tailed macaques to utilize their existing skill of cracking open oysters in a brand-new way.[199] Once one macaque discovered that it could crack the nuts and access food, it shared that knowledge with the others.[200] They adapted their culture to include eating this novel food as a result of the influence of the humans with whom they share a habitat.[201]

One final illustration of how an animal species has adapted its behavior to utilize the promise of human influence and capitalize on newfound opportunity is the human-honeyguide relationship.[202] This example is striking because the human participants in the relationship also glean a tangible reward.[203] The humans and honeyguides work together for mutual benefit,[204] illustrating cooperation and symbiosis.

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[192] Gruber, *supra* note 179 at 1, 2.

[193] *Id.*

[194] *Id.* at 4.

[195] *Id.* at 3.

[196] *Id.*

[197] *Id.*

[198] *See id.*

[199] *Id.*

[200] *Id.*

[201] *See id.*

[202] *See* Brian M. Wood et al., *Mutualism and Manipulation in Hadza-Honeyguide Interactions*, 35 Evolution & Hum. Behav. 540 (2014).

[203] *See id.* at 542-43.

[204] *Id.* at 544.

By working in concert to procure food, it is undeniable that the social responsibility borne by both animals and humans is real and mutual.

Honeyguides are a species of birds living in Tanzania and elsewhere in Africa.[205] Honeyguides survive by eating the eggs, larvae, and beeswax contained in bees' nests.[206] To access this food source, honeyguides partner with other species that eat honey, such as humans. One example of this relationship is practiced by the Hadza people of Tanzania.[207] When a honeyguide finds a bees' nest that it wants to break into, it makes a certain call, which the humans recognize and understand.[208] "The honey-hunting humans reply with calls passed down through generations and follow the bird" to the nest.[209] The humans do the work of subduing the bees and breaking open the nest to harvest the honey inside. The birds then eat the left-behind beeswax, eggs, and larvae.[210] This is not just a fun game the two species engage in together; rather this is a meaningful relationship that aids in the sustenance of the human and animal species. "It has been estimated that up to 10% of the [Hadza people's] diet is acquired with the help of the birds." [211]

While this is a striking example of a human-animal connection and collaboration, it is a microcosm of the greater interdependence of human and nonhuman species. Human existence depends on the existence of animals, full stop. For this reason, it seems ludicrous to claim that animals bear us no social responsibilities. The majority opinion in *Breheny* belies this fact with its vehement reliance on a slippery slope argument. With a smattering of fearmongering, the majority asks, if we allow Happy the Elephant to bring forth a habeas corpus petition, then what comes next? Will our entire farming system collapse? Will everyone's companion animal demand to be freed? The court proclaims that "[g]ranting legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts. Indeed, followed to its logical conclusion, such a determination would call into question the very premises underlying pet ownership, the use of service animals, and the enlistment of animals in other forms of work."[212]

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[205] *See About*, African Afr. Honeyguides, https://africanhoneyguides.com/ (last visited Apr. 8, 2024).

[206] *See* Emily Osterloff, *Mutualism: Eight Examples of Species That Work Together to Get Ahead,* Nat. Hist. Museum, https://www.nhm.ac.uk/discover/mutualism-examples-of-species-that-work-together.html (last visited Apr. 7, 2024).

[207] *Id.*

[208] Wood, *supra* note 202 at 546

[209] *See* Osterloff, *supra* note 206.

[210] *Id*.

[211] *Id*.

[212] Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555, 573-74 (2022.)

In making its slippery slope argument, the court echoes and bolsters the reasoning that is central to my argument above - the profound nature and extent of the interdependence of human and nonhuman animals. The *Breheny* court frets that allowing Happy the right to bring her habeas corpus petition would have "an enormous destabilizing impact on modern society,"[213] which is an explicit acknowledgment of all the ways animals do, in fact, matter within structured human life.

One wonders how on the one hand the court can assert that animals bear us no social responsibilities, and on the other, wax alarmist about the important and all-encompassing interactions between our species that touch all aspects of our lives. The court goes on to enumerate the many important ways in which our species relies on nonhuman animals, including "property rights, the agricultural industry,…medical research efforts…pet ownership, the use of service animals, and the enlistment of animals in other forms of work."[214] The court acknowledges how reliant humans are on the current social framework, in which we live and work with our nonhuman animals.[215]

And the *Breheny* majority is correct. You cannot have human civilization without animals. There is no aspect of human life that animals do not touch or impact in some way. They have allowed us to advance at every stage of our history. Modern farming, medicine, transportation, the post office, communication, law enforcement, military, and advancements in energy production – none of those would have advanced to modern levels without the influence and assistance of animals. Our human animal species relies on nonhuman animals for food production – and not just in providing the meat we eat with their very bodies, but in pollinating our plant species and enabling food production to continue. Considering all of the above, it seems callous and delusional to claim that animals bear humans no social responsibility. They do, in fact, allow modern human society to exist and function.

[213] *Id.* at 573.
[214] *Id*., at 574-74.
[215] *See generally id.*

Conclusion

Human courts have yet to extend to animals the legal rights that humans enjoy. That will, I predict, change within the next 50 years. The knee-jerk justification for this anthropocentrism is fading into history. "Animals are not humans" has been a reductive, yet effective, excuse for denying animal liberty rights thus far, but cracks are forming in that judicial façade.

As evidenced by the predictable opinion and historic dissents in *NhRrP v. Breheny*, animals deserve more rights than we are currently allowing them. It is ignorant for us to keep harping on the idea that animals do not bear social responsibilities or legal duties to humans. Animals do both and have done since before the United States or its Constitution existed. Nonhuman animals share this world with us and interact with us every day. We use them, and sometimes they use us. We provide each other with many benefits, and we hurt each other, too. When animals hurt humans, they suffer the ultimate punishment. When we hurt them through wrongful incarceration, we suffer nothing, even when the science shows that their hurt is real.

"If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[216] Having done something a certain way for a certain period is no real justification for continuing to do it. Science shows us that there is a better way. Allowing Happy the Elephant to bring a habeas corpus claim will not end human civilization as we know it. It will not grant legal personhood to every nonhuman animal, but it will open the door to acknowledging the duties borne by animals and the mutual responsibilities we have to each other. There is no real reason to leave the animals out. We cannot rely on the specious and antiquated logic our courts have been spouting for decades. We know animals are not humans, but that does not mean that animals deserve nothing. They deserve our compassion and consideration within the legal system and without.

[216] Obergefell v. Hodges, 576 U.S. 644 (2015).

Expanding Legal Protections for Victims of Domestic Violence and Animal Cruelty: Including Pets in 18 U.S.C. § 2261

Alexis Wooldridge*

Introduction

Mona, a small Chihuahua-and-Dachshund-mixed dog, lost her life to domestic violence.[1] Her owner, Julie Fairbanks, dated Charmarke Abdi-Issa, an abusive man who constantly threatened both Julie and Mona's lives.[2] Abdi-Issa took Mona on a walk one night against Julie's wishes.[3] He called Julie to tell her that Mona had escaped her harness, but Julie heard pained yelps from Mona in the background.[4] At the same time, two passersby heard Mona making "a sound of great distress" and "saw Abdi-Issa beating and making 'brutal stabbing' motions toward Mona."[5] Then, Abdi-Issa kicked Mona so hard that she flew up into the air and landed in the bushes.[6] Every time Abdi-Issa struck Mona, "she made a 'screeching[,] screaming[,] pained[,] awful sound' that was at last followed by silence."[7] One of the passersby called the police and Mona was taken to an emergency veterinarian "nearly comatose" where she died from "multiple instances of blunt force trauma" with "severe swelling in her brain, bruising on her chest, and a wound to the top of her head."[8]

The egregious facts of this case led the Washington Supreme Court to set the precedent that "animal cruelty could be designated a crime of domestic violence, and that an animal's guardian could be

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[1] State v. Abdi-Issa, 504 P.3d 223, 227 (Wash. 2022).

[2] *Id.* at 225.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 226.

considered a victim of the crime"[9] in early 2022.[10]

In a similar case in the same year, the Attorney General of Michigan charged a man under MCL 750.50b(3) where "a person that tortures or kills a pet with the intent to cause mental suffering or distress to a person, or to exert control over a person, is guilty of a felony punishable by up to 10 years in prison."[11] The perpetrator broke into his ex-girlfriend's apartment to steal her dog and later sent her videos of him beating and torturing the animal.[12]

The specific impact of animal cruelty on victims of domestic violence is now being explicitly documented in various legal capacities both nationally and in several states.[13] As pets can now be included in protective orders and animal cruelty can be designated as a crime of domestic violence in certain states, a statutory amendment that allows interstate animal cruelty to be federally charged as a crime of domestic violence is necessary because it provides victims with more comprehensive legal recourse.

First, the connection between animal cruelty and domestic violence is reviewed by considering the co-occurrence of animal abuse and interpersonal violence, the emotional importance of animals in interpersonal violence situations, and the impact of companion animal abuse on interpersonal violence victims. Next, current state and federal laws on animal cruelty, domestic violence, and jurisprudence addressing both crimes are compiled and compared through the lens of impact on the proposed amendment. Then, existing solutions to the legal challenge of combating animal cruelty as domestic violence are described, including cross-reporting mandates, abuser registries, safe haven shelters, and the inclusion of animals in protective orders. Last, an alternative solution is proposed as the amendment to the federal criminal code's statute criminalizing interstate domestic violence through an analysis of the proposal's explanation, challenges, rebuttal to the challenges, and implementation.

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[9] *Washington State Supreme Court Rules Animal Cruelty Can Be a Crime of Domestic Violence*, Animal Legal Def. Fund (Mar. 9, 2022), https://aldf.org/article/washington-state-supreme-court-rules-animal-cruelty-can-be-a-crime-of-domestic-violence/#:~:text=The%20Washington%20Supreme%20Court's%20decision,-animal%20cruelty%20and%20domestic%20violence.

[10] *Abdi-Issa*, 504 P.3d at 227.

[11] AG Press, *AG Nessel Announces Charges in Animal Abuse and Domestic Violence Case*, Mich. Dep't Atty. Gen. (Nov. 4, 2022), https://www.michigan.gov/ag/news/press-releases/2022/11/04/ag-nessel-announces-charges-in-animal-abuse-and-domestic-violence-case; Mich. Comp. Laws § 750.50b(3) (2024).

[12] *Id.*

[13] *Id.*; *see* Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

I. 'The Link' Between Domestic Violence and Animal Cruelty

The Department of Justice's Office on Violence Against Women defines domestic violence as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[14] This abuse "can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship."[15] Domestic violence is also known as interpersonal violence but has been distinguished as interpersonal violence that occurs between people in the same household.[16] This Note uses the terms interchangeably.

The Animal Welfare Institute generally defines animal cruelty as "gratuitously inflicting harm, injuring, or killing an animal. The cruelty can be intentional, such as kicking, burning, stabbing, beating, or shooting; or it can involve neglect, such as depriving an animal of water, shelter, food, and necessary medical treatment."[17]

Animal cruelty has been recognized as a crime in the United States since the early 19th century[18] and domestic violence since the late 19th century;[19] however, the empirical correlation between the two crimes has only been purposefully studied since the late 20th century.[20] The major factor that contributed to the relatively recent acknowledgment of the correlation between these two crimes is the separation of how these issues were addressed in the early 20th century: the government took jurisdiction of the welfare of people and private humane societies

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[14] *Domestic Violence*, U.S. Dep't of Just. Off. on Violence Against Women, https://www.justice.gov/ovw/domestic-violence (last visited Mar. 9, 2023).

[15] *Id.*

[16] Olivia Moorer, *Intimate Partner Violence vs. Domestic Violence*, Young Women's Christian Ass'n of Spokane (Jan. 5, 2021), https://ywcaspokane.org/what-is-intimate-partner-domestic-violence/.

[17] *Frequently Asked Questions About Reporting Animal Cruelty*, Animal Welfare Inst., https://awionline.org/content/frequently-asked-questions-about-reporting-animal-cruelty (last visited Mar. 9, 2023).

[18] N.Y. Rev. Stat. part IV, ch. 1, tit. 6, § 26 (1829).

[19] Fulgham v. State, 46 Ala. 143, 147 (1873).

[20] *See* Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 Soc'y & Animals 205, 206 (1997); *see also* Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. Emotional Abuse 119, 120 (1997); *see also* Clifton P. Flynn, *Battered Women and Their Animal Companions: Symbolic Interaction Between Human and Nonhuman Animals*, 8 Soc'y & Animals 99, 105 (2000); *see also* Brinda Jegatheesan et al., *Understanding the Link between Animal Cruelty and Family Violence: The Bioecological Systems Model,* 17 Int'l J. Env't Rsch. & Pub. Health 1 (Apr. 30, 2020).

oversaw animal welfare.[21] This institutional division delayed the attention to these issues and the 'links' between them that offer insight into why they occur and their reciprocal impact.[22]

a. Co-occurrence of Animal Abuse and Interpersonal Violence

From published research, patterns have emerged on the interconnectedness of these crimes since their connection's reasonable establishment in academia.[23] The colloquial naming of these 'links' between animal cruelty and interpersonal violence perpetuates a simplified attitude toward complex dynamic connections between various antisocial behaviors, different categories of human and animal victims, and diverse patterns of temporal order judgment,[24] which gauges how one's brain orders and processes rapid and concurrent stimuli.[25] One significant emerging pattern across interdisciplinary studies is the progression or escalation of abuse from family members, children, or partners to pets,[26] and more recently, vice versa: those whose partners mistreat their pets first are at a higher risk of abuse themselves.[27]

A majority, if not all, of the samples in studies on the co-occurrence of interpersonal violence and animal abuse are comprised of reports from women in domestic violence shelters.[28] Out of thirty-eight women seeking assistance at a domestic violence shelter in northern Utah in 1998, 71% reported that their male partner had threatened to or

[21] Charlie Robinson & Victoria Clausen, *The Link Between Animal Cruelty and Human Violence*, FBI L. Enf't Bull. (Aug. 10, 2021), https://leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence; Catherine A. Faver & Elizabeth B. Strand, *Domestic Violence and Animal Cruelty: Untangling the Web of Abuse*, 39 J. Soc. Work Educ. 237, 239 (2003).

[22] Faver & Strand, *supra* note 21, at 239.

[23] *See* Amy J. Fitzgerald et al., *The Co-occurrence of Animal Abuse and Intimate Partner Violence Among a Nationally Representative Sample: Evidence of "The Link" in the General Population*, 36 Violence & Victims 770, 771 (2021); *see also* Betty Jo Barrett et al., *Animal Maltreatment as a Risk Marker of More Frequent and Severe Forms of Intimate Partner Violence*, 35 J. Interpersonal Violence 5131, 5132 (2017); *see also* Clifton P. Flynn, *Woman's Best Friend: Pet Abuse and the Role of Companion Animals in the Lives Of Battered Women*, 6 Violence Against Women 162, 163 (2000).

[24] Fitzgerald, *supra* note 23, at 771.

[25] Leah Fostick & Harvey Babkoff, *The Role of Tone Duration in Dichotic Temporal Order Judgment II: Extending the Boundaries of Duration and Age*, 17 PLOS ONE 1 (Mar. 30, 2022).

[26] Fitzgerald, *supra* note 23, at 771; Flynn, *supra* note 23, at 171.

[27] Barrett, *supra* note 23, at 5151.

[28] Ascione, *supra* note 20, at 123; Catherine A. Simmons & Peter Lehmann, *Exploring the Link Between Pet Abuse and Controlling Behaviors in Violent Relationships*, 22 J. Interpersonal Violence 1211, 1215 (2007); Fitzgerald, *supra* note 23, at 772; Barrett, *supra* note 23, at 5138.

actually harmed or maimed a pet in the household.[29] Fifty-seven percent reported that their pets were harmed or maimed.[30] Comparatively, in a 2007 study of 1,283 women with pets in Texas domestic violence shelters, 25% reported that the batterer they were seeking shelter from abused the pet.[31] The same study also found that the men who abused the household pets additionally "demonstrated sexual violence, marital rape, emotional violence, and stalking" behaviors compared to batterers whose victims did not report pet abuse.[32] Further, a 2007 study in Utah compared the experiences of animal abuse between two groups of women: the first group was made up of 101 women who had been battered, owned pets, and sought shelter at one of five different Utah refuges; the second was 120 local women who owned pets and had not experienced domestic violence as adults.[33] Concerningly, the study found that "[w]omen residing at domestic violence shelters were nearly eleven times more likely to report that their partner had hurt or killed pets" than the non-abused group.[34]

This reciprocal correlation of violence against one group of victims as a risk factor of the same or potentially higher severity of aggression towards another is prevalent in available research,[35] but not thoroughly studied enough to establish causation one way or another.[36] One six-year study of 3,637 women across eleven U.S. cities found that "threats toward or abuse of companion animals was one of the most significant risk factors for perpetrating [interpersonal violence] against women (other factors identified include substance abuse, mental health problems, and low levels of education)." [37] Similarly, the 2007 Utah study found that "severe physical violence perpetrated by the batterer was a significant predictor of pet abuse, even when other variables (e.g., age, marital status, race/ethnicity, presence of children) were statistically controlled." [38] Additionally, a study of eighty-six women in sixteen different domestic violence shelters across Canada concluded

[29] Ascione, *supra* note 20, at 125.

[30] *Id.*

[31] Simmons & Lehmann, *supra* note 28, at 1215.

[32] *Id.* at 1218.

[33] Frank R. Ascione et al., *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women*, 13 Violence Against Women 354, 358 (2007).

[34] *Id.* at 365.

[35] *Id.* at 358; Fitzgerald, *supra* note 23, at 773; Benita J. Walton-Moss et al., *Risk Factors for Intimate Partner Violence and Associated Injury Among Urban Women*, 30 J. Cmty. Health 377, 385 (2005); Simmons & Lehmann, *supra* note 28, at 1219.

[36] Fitzgerald, *supra* note 23, at 775.

[37] Fitzgerald, *supra* note 23 at 773 (citing Walton-Moss, *supra* note 35 at 385).

[38] Ascione et al., *supra* note 33, at 358.

that "women whose pets were more frequently and severely abused reported greater levels of physical, sexual, and psychological abuse directed at them by their partners than those who reported little or no maltreatment of their pets by their partner."[39]

b. The Emotional Importance of Animals in Interpersonal Violence Situations

Another key facet of the correlation between animal abuse and interpersonal violence is the purposeful emotional harm to humans through the abuse of their companion animals and the effect on the victim's ability to cope and seek help or safety.[40] Pets, although traditionally viewed as property under the law,[41] are often considered companions or even members of the family.[42] In a 1998 study of 107 women seeking services at a domestic violence shelter in South Carolina that spanned five months, 75% of the women surveyed–and 90% of the women with pets abused by their batterer–indicated that "their pets were at least somewhat important as a source of emotional support."[43] In 2000, another smaller survey by the same author in South Carolina was conducted on ten women seeking shelter from interpersonal violence, the various women surveyed referred to their pets as "babies," calling them their "children," and stating that they were "one of the family."[44]

One reason the bond with pets is especially important to victims of interpersonal violence could be attributed to the victims' emotional attachments to animals as surrogates for roles usually filled by humans.[45] Because abusers often use isolation as a tactic of social abuse,[46] a pet in the home may take on a "companionship role" that friends or family would normally fill.[47] Two of the ten women in the 2000 South Carolina survey attributed the high emotional significance of their pets to an absence of children in their nuclear family.[48] In the 2007 Utah study comparing

[39] Barrett, *supra* note 23, at 5139.

[40] Fitzgerald, *supra* note 23, at 774.

[41] *See* Gary L. Francione, *Animals as Property*, 2 Animal L. i, ii (1996).

[42] Flynn, *supra* note 20, at 101; Ascione, supra note 11, at 355.

[43] Flynn, *supra* note 20, at 103 (citing Flynn, *supra* note 23, at 165).

[44] *Id.* at 105.

[45] *Id.* at 101 (citing Jean E. Veevers, *The Social Meanings of Pets: Alternative Roles for Companion Animals*, 8 Marriage & Fam. Rev. 11 (1985)); Vivek Upadhya, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 Emory L. J. 1163, 1175 (2014).

[46] Amanda M. Stylianou, *Economic Abuse Within Intimate Partner Violence: A Review of the Literature*, 33 Violence & Victims 3, 3 (2018).

[47] Jennifer Robbins, Note, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature*, 16 Tex. J. Women & L. 129, 132 (2006); Upadhya, *supra* note 45, at 1175.

[48] Flynn, *supra* note 20, at 105.

the experiences of battered women with pets to women with pets who did not experience intimate partner violence, 86.4% of battered women reported that they were 'very close' (over 'liked but not close' or 'not close at all') to the animal hurt or threatened."[49] Further, 85.7% of the same group of battered women reported they felt 'terrible' (over 'mildly upset' or 'didn't bother me') after the animal was hurt.[50] As feelings of reciprocated empathy between the victim and the companion animal grow, victims sometimes feel guilty or responsible for the animal's concurrent abuse.[51]

c. The Impact of Companion Animal Abuse on Interpersonal Violence Victims

Unfortunately, the close emotional bond between companion animals and victims of domestic abuse is exploited by abusers and used to further perpetrate the abuse against the victim in a dangerous cycle.[52] One motivation for the transference of abuse from a partner or family member to the victim's or family's pet is the abuser's jealousy of the bond with the pet or resentment towards the attention it receives from the victim.[53] Another major motivation for abuse is control.[54] In the study of 1,283 women with pets in Texas domestic violence shelters,[55] the women who reported that their abuser also abused their pets were "more likely to also report that their abuser used multiple forms of violence against them and exhibited more controlling behaviors."[56] Whatever the motivation may be for abusers to harm a victim's pet or companion animal, the impact of such abuse on interpersonal violence victims is especially weighty given the animals' deep emotional significance to their human counterparts.[57]

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[49] Ascione et al., *supra* note 33, at 361.

[50] *Id.*

[51] Upadhya, *supra* note 45, at 1177 (citing Carol J. Adams, *Woman-Battering and Harm to Animals*, Animals & Women: Feminist Theoretical Explorations 55, 72 (Carol J. Adams & Josephine Donovan eds.,1995)).

[52] Flynn, *supra* note 20, at 169; Upadhya, *supra* note 45, at 1177.

[53] Flynn, *supra* note 20, at 172; Upadhya, *supra* note 45, at 1177 n.98; Flynn, *supra* note 20, at 103.

[54] *See* Peter Lehmann et al., *The Validation of the Checklist of Controlling Behaviors (CCB): Assessing Coercive Control in Abusive Relationships*, 18 Violence Against Women 913, 914 (2012); *see also* Simmons & Lehmann, *supra* note 28, at 1219; *see also* Fitzgerald, *supra* note 23, at 776; *see also* Walton-Moss, *supra* note 35, at 383; *see also* Barrett, *supra* note 23, at 5136.

[55] Simmons & Lehmann, *supra* note 28, at 1214.

[56] Fitzgerald, *supra* note 23, at 773 (citing Simmons & Lehmann, *supra* note 28, at 1211-1222).

[57] *See* Upadhya, *supra* note 45, at 1177.

The impact of companion animal abuse on interpersonal violence victims affects their ability to cope with their own abuse and to seek help or safety.[58] Concerningly, from the 107 women in the 2000 South Carolina survey, 20% of the women with pets, and 40% of the women with pets who had been harmed, reported that "they delayed seeking shelter out of concern for their pet."[59] Moreover, in a study of sixty-one women receiving services at domestic violence shelters across the same region of a southeastern U.S. state,[60] "women whose partners had threatened their pets were approximately seven times…more likely to report that concern for their pets had affected their decision about leaving or staying with their batterer."[61] Women whose pets were actually harmed or killed, "were almost eight times…more likely to report that concern for their pets had affected their decision" to stay or leave.[62] Further, in the Canadian study of eighty-six women in sixteen shelters, "the women most likely to report that they delayed leaving their partner due to their companion animals [were] also significantly more likely to report that they themselves were exposed to chronic and severe [interpersonal violence]."[63] In the same study, 56% "reported that they delayed leaving their abusive partner due to concern for their pet's safety and 60% left their pets with their abusive partner once they did flee to the shelter."[64] Beyond the detriment of a delay in seeking help, one 2001 study evaluated 251 victim-perpetrators to "explore the role of abuse as a coercive technique leading to illegal behavior on the part of victims"[65] with a finding that threats to hurt or kill pets "may be used to coerce women who are battered into committing illegal acts at the behest of the batterer."[66]

The Canadian study noted the forms of animal abuse the victims reported their abusers used and how often each was reported with the most common being "threats by a partner to get rid of a pet" at 65.5%

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[58] Fitzgerald, *supra* note 23, at 774.

[59] Flynn, *supra* note 20, at 103.

[60] Catherine A. Faver & Elizabeth B. Strand, *To Leave or to Stay? Battered Women's Concern for Vulnerable Pets*, 18 J. Interpersonal Violence 1367, 1374 (2003). The specific state was not explicitly mentioned in the article for the safety of the study participants, but the sixty-one women were from both rural and urban areas of the same region in the same southeastern U.S. state.

[61] *Id.*

[62] *Id.*

[63] Fitzgerald, *supra* note 23, at 774 (citing Betty Jo Barrett et al., *Help-Seeking Among Abused Women with Pets: Evidence from a Canadian Sample,* 33 Violence & Victims 604, 609 (2018)).

[64] Barrett, *supra* note 23, at 5152.

[65] Marti Tamm Loring & Pati Beaudoin, *Battered Women as Coerced Victim-Perpetrators*, 2 J. Emotional Abuse 3, 3 (2001).

[66] Ascione et al., *supra* note 33, at 355 (citing *id.*).

of the sample of eighty-six women.[67] The next most prevalent form of abuse was purposeful intimidation or scaring of a pet at 60%.[68] The rest of the hierarchy is in descending order as follows: "smacking a pet (56.4%), throwing an object at a pet (50.9%), threatening to harm a pet (47.3%), chasing a pet with the intent of harm but not catching the pet (43.6%), refusing to feed a pet (41.8%), and kicking a pet (41.8%)."[69]

Due to the co-occurrence of animal abuse and interpersonal violence, the emotional importance of animals in interpersonal violence situations, and the impact of companion animal abuse on interpersonal violence victims, laws addressing the 'link' between these crimes have developed in modern jurisprudence.[70]

II. Current Law

Laws on animal cruelty and domestic violence as separate crimes have existed since the 19th century;[71] however, recently, laws and cases have addressed these two topics and their interconnected relationship as one concept.[72] The following sections are a review of current laws on animal cruelty and domestic violence separately along with state and federal laws that have addressed the 'link' together.

a. Animal Cruelty

i. State Laws

Every state in the United States has criminalized animal cruelty[73] in some form in varying levels of degree and detail from provisions as strict as mandatory post-conviction animal possession bans[74] to as bare as non-existing felony neglect or abandonment provisions.[75] Notably, New Mexico and West Virginia are the only two states in the country

[67] Barrett, *supra* note 23, at 5153.

[68] *Id.*

[69] *Id.* at 5143-44.

[70] *See infra* Section II.C.

[71] *See supra* Part I.

[72] State v. Abdi-Issa, 504 P.3d 223, 227 (Wash. 2022); Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

[73] U.S. Department of Agriculture, *State and Local Laws and Guidelines*, Nat'l Agric. Libr., https://www.nal.usda.gov/legacy/awic/state-and-local#:~:text=Since%20then%2C%20all%20states%20have,farm%20animal%20confinement%2C%20and%20more (last visited Nov. 14, 2022).

[74] Me. Rev. Stat. Ann. tit. 17, § 1031(3-B)(LEXIS through 2024 Legis. Sess.).

[75] *See New Mexico*, Animal Legal Def. Fund, https://aldf.org/state/new-mexico/ (last visited Nov. 14, 2022).

that do not have a prohibition of sexual assault on animals.[76] Moreover, Iowa is the only state where animal torture is not automatically a felony; however, a bill was introduced into the Iowa House of Representatives at the beginning of 2022 to amend this.[77] The strength and comprehensiveness of each state's set of animal cruelty laws greatly vary, which is why further federal animal law, such as the amendment to the interstate domestic violence statute that explicitly protects pets, is of great importance.

ii. Federal Laws

1. Humane Methods of Livestock Slaughter Act of 1958

The Humane Methods of Livestock Slaughter Act of 1958,[78] while not necessarily involving pets, was the first federal legislation enacted in the United States concerning animal welfare and protection.[79] Twenty years later, the Act was amended to allow United States Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) inspectors "to stop slaughter activities if they think an animal is being handled inhumanely."[80] However, this Act "protects all livestock except poultry."[81] This statute also gives the USDA authority to implement and enforce the Act through regulations,[82] specifically in 9 C.F.R. §313,[83] which provides guidance and standards for implementation and enforcement.[84]

[76] *See id.*; *see also West Virginia*, Animal Legal Def. Fund, https://aldf.org/state/west-virginia/ (last visited Nov. 14, 2022).

[77] H.F. 2104, 89 Gen. Assemb., Reg. Sess. (Iowa 2022).

[78] Humane Methods of Livestock Slaughter Act of 1958, 7 U.S.C. §§ 1901-1906 (1958).

[79] Alyssa S. Robinson, *Animal Cruelty Legislation, Part I*, N.C. State Univ. Libs. (Feb. 26, 2019), https://www.lib.ncsu.edu/news/special-collections/animal-cruelty-legislation-part-i#:~:text=The%20Humane%20Slaughter%20Act%20was,enacted%20in%20the%20United%20States.

[80] U.S. Department of Agriculture, *Humane Methods of Slaughter Act*, Nat'l Agric. Libr., https://www.nal.usda.gov/animal-health-and-welfare/humane-methods-slaughter-act#:~:text=The%20Humane%20Methods%20of%20Slaughter,and%20Inspection%20Service%20 (last visited Nov. 15, 2022).

[81] *Id.*

[82] *Id.*

[83] Humane Slaughter of Livestock, 9 C.F.R. § 313 (1979).

[84] U.S. Department of Agriculture, *supra* note 80.

2. Animal Welfare Act of 1966

The Animal Welfare Act of 1966[85] is the only federal law in the United States regulating animals in "research, teaching, testing, exhibition, transport, and by dealers."[86] Further, this legislation "sets minimum standards of care that must be provided for animals—including housing, handling, sanitation, food, water, veterinary care and protection from weather extremes."[87] Warm-blooded species are covered by the statute "with the exception of birds, rats of the genus *Rattus*, and mice of the genus *Mus*-bred for use in research."[88] Again, while this legislation is not necessarily geared toward pets or companion animals, it is another major stepping stone in federal animal cruelty legislation further supporting Congress' interest in animal safety regulation.

A notable recent amendment to the Animal Welfare Act was codified[89] by language in the Agriculture Improvement Act of 2018[90] from the introduced Parity in Animal Cruelty Enforcement (PACE) Act.[91] The PACE Act language extended the existing federal ban on animal fighting to United States territories.[92]

3. The Preventing Animal Cruelty and Torture (PACT) Act of 2019

The Preventing Animal Cruelty and Torture (PACT) Act of 2019[93] was enacted to close the leftover loopholes remaining from the Animal Crush Video Prohibition Act of 2010,[94] which "criminalizes the creation, sale, and marketing of"[95] 'crush videos' that depict "small

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[85] Animal Welfare Act of 1966, 7 U.S.C. §§ 2131-2156 (LEXIS through Pub. L. No.118-40).

[86] U.S. Department of Agriculture, *Animal Welfare Act*, Nat'l Agric. Libr., https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act (last visited Nov. 15, 2022).

[87] *Animal Welfare Act*, Animal Welfare Inst., https://awionline.org/content/animal-welfare-act (last visited Nov. 15, 2022).

[88] *Id.*

[89] 7 U.S.C. § 2156.

[90] Agriculture Improvement Act, Pub. L. No. 115-334, § 12616, 132 Stat. 5015 (2018).

[91] Parity in Animal Cruelty Enforcement Act, H.R. 4202, 115th Cong. (2017).

[92] *Id.*

[93] Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, § 2, 133 Stat. 1151 (2019).

[94] Animal Crush Video Prohibition Act of 2010, Pub L. No. 111-294, § 3, 124 Stat. 3177 (2010).

[95] Bill Mears, *Obama Signs Law Banning 'Crush Videos' Depicting Animal Cruelty*, CNN, Dec. 10, 2010, http://www.cnn.com/2010/POLITICS/12/10/animal.cruelty/index.html.

animals being tortured to death by humans"[96] but does "not cover the underlying acts of animal abuse."[97] A major motivation for enacting the Animal Crush Video Prohibition Act was that online content transcends state boundaries;[98] moreover, the PACT Act "enables federal intervention when the cruelty extends beyond the reach or resources of state prosecutors."[99] This motivation is similar to an incentive for enacting the proposed amendment[100] as including pets in the interstate domestic violence statute also allows for access to federal resources for victims.

b. Domestic Violence

i. State Laws

State domestic violence laws, similar to state animal cruelty laws, significantly vary between jurisdictions.[101] For example, in Alaska, if an "officer has probable cause to believe [a] person has, either in or outside the presence of the officer, within the previous 12 hours," committed domestic violence, violated protective orders, or violated conditions of release, the state requires a mandatory arrest.[102] Comparatively, Texas' domestic violence firearm prohibition "generally does not apply to people convicted of violent assaults against a current or former dating partner, unless the defendant has been married or lived with the victim; and it does not apply to people convicted of threatening a family or household member with imminent violent injury."[103]

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[96] *Id.*

[97] *Preventing Animal Cruelty and Torture (PACT) Act*, Animal Welfare Inst., https://awionline.org/content/preventing-animal-cruelty-and-torture-pact-act (last visited Nov. 15, 2022).

[98] Hannah Knowles & Katie Mettler, *Trump Signs a Sweeping Federal Ban on Animal Cruelty*, Wash. Post, Nov. 25, 2019, https://www.washingtonpost.com/science/2019/11/25/most-animal-cruelty-isnt-federal-crime-that-changes-monday-when-bipartisan-bill-becomes-law/.

[99] Animal Welfare Inst., *supra* note 97.

[100] *See infra* Section III.B.

[101] *Compare* Alaska Stat. § 18.65.530(a), *with* Tex. Code Ann. § 22.01(a), (b).

[102] Alaska Stat. § 18.65.530(a).

[103] *Domestic Violence & Firearms in Texas*, Giffords Law Ctr., https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-texas/#footnote_0_16052 (last updated Sep. 15, 2021) (citing Tex. Code Ann. § 46.04(b); Tex. Code Ann. § 22.01(a), (b)).

Many states restrict the possession of guns for convicted domestic violence abusers.[104] Thirty-three states and the District of Columbia ban abusers convicted of domestic violence misdemeanors from having guns for a certain period of time.[105] The periods of time vary: in South Dakota, a person convicted of a misdemeanor involving domestic violence cannot "possess or have control of a firearm" for a year from their conviction date;[106] in Arizona, the gun possession ban only lasts for the duration of the abuser's probation;[107] in South Carolina, the length of the prohibition of possession depends on the degree of the criminal conviction.[108]

ii Federal Laws

1. Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence, 18 U.S.C. § 922(g)(9)

The codification[109] of the Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence (also known as the Lautenberg Amendment)[110] amended the federal Gun Control Act of 1968[111] by prohibiting the possession of a firearm by an individual convicted of a "misdemeanor crime of domestic violence."[112] A provision[113] was added to the U.S. Code in 2022 under the Bipartisan Safer Communities Act[114] in further support of this amendment to define the types of relationships covered under a "misdemeanor crime of domestic violence," which notably includes the addition of a "dating relationship" definition[115] to the spouse- or cohabitor-level relationships previously covered under the statute.

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[104] *Domestic Violence & Firearms*, Giffords Law Ctr., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/#footnote_32_5621 (last visited Nov. 15, 2022).

[105] *Id.*; Jennifer Gollan, *How the U.S. Fails to Take Away Guns from Domestic Abusers: 'These Deaths Are Preventable,'* Guardian (Oct. 26, 2021), https://www.theguardian.com/us-news/2021/oct/26/domestic-abuse-gun-violence-reveal.

[106] S.D. Codified Laws § 22-14-15.2 (2022); Gollan, *supra* note 105.

[107] Ariz. Rev. Stat. § 13-3101(A)(7)(d) (2022); Ariz. Rev. Stat. § 13-3102(A)(4) (2022); Gollan, *supra* note 105.

[108] S.C. Code Ann. § 16-25-30 (2021); Gollan, *supra* note 105.

[109] 18 U.S.C. § 922(g)(9).

[110] U.S. Dep't of Just., Just. Manual § 9-60.1112 (2018).

[111] Federal Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213 (1968).

[112] U.S. Dep't of Just., Just. Manual § 9-60.1112 (2018) (citing 18 U.S.C. § 921(a)(33)).

[113] 18 U.S.C. § 921(a)(33).

[114] Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005, 136 Stat. 1313, 1332-33 (2022).

[115] 18 U.S.C. § 921(a)(37).

2. The Violence Against Women Act (VAWA)

The Violence Against Women Act[116] is the 2022 reauthorization of the Violence Against Women Act of 1994,[117] enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994,[118] which was the first federal legislation acknowledging domestic violence as a federal crime.[119] This legislation also created grants to "assist States, Indian tribal governments, and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services" in violent crimes against women.[120] The overall goal of the legislation was to "improve services for victims of domestic violence, dating violence, sexual assault, and stalking, and improve the criminal justice system's response to these acts."[121] The Office on Violence Against Women was established the following year in 1995 to provide "federal leadership in developing the national capacity to reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking."[122]

3. Interstate Travel to Commit Domestic Violence—18 U.S.C. § 2261

18 U.S.C. § 2261 criminalizes crossing state lines to commit domestic violence as the offender or causing a victim to travel interstate for the purpose of committing or attempting to commit domestic violence against them.[123] This is the definition that will be proposed to be amended to include pets.[124]

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[116] Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 2, 136 Stat. 840 (2022).

[117] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40001, 108 Stat. 1902, 1903 (1994).

[118] *Id.*

[119] *History of VAWA*, Legal Momentum, https://www.legalmomentum.org/history-vawa (last visited Nov. 16, 2022).

[120] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40121, 108 Stat. 1902, 1903 (1994).

[121] Angela R. Gover & Angela M. Moore, *The 1994 Violence Against Women Act: A Historic Response to Gender Violence*, 27 Violence Against Women 8, 9 (2021).

[122] *Our Mission*, U.S. Dep't of Just.'s Off. on Violence Against Women, https://www.justice.gov/ovw/about-office#Mission (last visited Nov. 16, 2022).

[123] 18 U.S.C. § 2261.

[124] *See infra* Section III.B.

c. Animal Cruelty and Domestic Violence

i. State Laws

Contrary to the wide variation in state animal cruelty and domestic violence laws, when addressing the crimes together, most states either have the same statutory provisions acknowledging the correlation or do not have any law addressing the issues together on the books at all.[125] One way that states have addressed the interconnectedness of the issues is by permitting the inclusion of pets in domestic violence protective orders.[126] Thirty-eight states allow for pets to be specifically included in domestic violence protective orders.[127]

Outside of legislation, state court cases have also contributed to legally addressing the 'link' between these crimes. Most recently, the Washington Supreme Court set a precedent when it ruled that "animal cruelty could be designated a crime of domestic violence, and that an animal's guardian could be considered a victim of the crime"[128] in *State v. Abdi Issa* in early 2022.[129]

The defendant took the victim's dog, a "small Chihuahua and Dachshund mix" named Mona, on a walk despite the victim's protests.[130] The defendant was abusive towards the victim and Mona in the past.[131] Over the phone, the defendant told the victim that Mona had gotten out of her harness and ran away, but the victim heard Mona yelp in the background.[132] Two witnesses heard Mona's yelps and saw the defendant "beating and making brutal stabbing motions" at the dog.[133] The witnesses saw the defendant kick Mona so hard that she "flew into the bushes."[134] After the witnesses called the police, Mona was rushed to an emergency veterinary clinic where she arrived "nearly comatose"

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[125] *See* Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders,* Mich. State Univ. Coll. L. Animal Legal & Hist. Ctr. (2022), https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders; *see also* Ky. Rev. Stat. Ann. § 403.740(1)(e)(4) (West 2022); *see also* Utah Code Ann. § 78B-7-105 (West 2022).

[126] Wisch, *supra* note 125.

[127] *Id.*

[128] *Washington State Supreme Court Rules Animal Cruelty Can Be a Crime of Domestic Violence*, Animal Legal Def. Fund (Mar. 9, 2022), https://aldf.org/article/washington-state-supreme-court-rules-animal-cruelty-can-be-a-crime-of-domestic-violence/#:~:text=The%20Washington%20Supreme%20Court's%20decision,-animal%20cruelty%20and%20domestic%20violence.

[129] State v. Abdi-Issa, 504 P.3d 223, 227 (Wash. 2022); *see supra* Introduction.

[130] *Abdi-Issa*, 504 P.3d at 225.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

with severe brain swelling.[135] Mona died of "multiple instances of blunt force trauma."[136]

The court held that the defendant's charge of animal cruelty could be designated as a crime of domestic violence under the Washington domestic violence statute[137] because the crime of animal cruelty was "sufficiently similar"[138] to the non-exhaustive enumerated crimes in the statute, such as assault, unlawful imprisonment, and kidnapping.[139] When applying a sentence-enhancing factor[140] because the offense involved a "destructive and foreseeable impact on persons other than the victim,"[141] the court had to consider the state's statutory definition of a victim.[142] The statute defined a victim as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged."[143] The court held that because of the close bond between the victim and Mona, Mona's owner could be considered a victim of the crime.[144]

Another state case, *Brown v. Brown*[145] in Michigan, similarly addressed the correlation between animal cruelty and domestic violence charges. The court reasoned that although a pet cannot be considered a "family or household member" under the definition codified Michigan Domestic Violence Prevention and Treatment Act,[146] "intentionally harming an animal with whom a child…has a significant emotional bond could…constitute domestic abuse directed at the child" under the same Act.[147] Further, "[d]irecting such activity toward a minor child…for the purpose of compelling [their] obedience…often, if not invariably, is also an act of intimidation that would place the minor child in reasonable fear of mental harm"[148] and "could constitute domestic abuse under the act as well."[149] Moreover, "harmful or abusive conduct toward a pet can constitute domestic violence under either [statute],[150] if done for the purpose of distressing or coercing a person emotionally bonded to that pet."[151]

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[135] *Id.*
[136] *Id.*
[137] Wash. Rev. Code § 10.99.020(4) (2022).
[138] *Abdi-Issa*, 504 P.3d at 227.
[139] Wash. Rev. Code § 10.99.020(4).
[140] *Abdi-Issa*, 504 P.3d at 229.
[141] Wash. Rev. Code § 9.94A.535(3)(r) (2019).
[142] Wash. Rev. Code § 9.94A.030(54) (2022).
[143] *Id.*
[144] *Abdi-Issa*, 504 P.3d at 229.
[145] Brown v. Brown, 955 N.W.2d 515, 523 (Mich. Ct. App. 2020).
[146] Mich. Comp. Laws § 400.1501(e) (2024).
[147] *Brown*, 955 N.W.2d at 523 (citing Mich. Comp. Laws § 400.1501(d)(iv) (2024)).
[148] *Id.* (citing Mich. Comp. Laws § 400.1501(d)(i) (2024)).
[149] *Brown*, 955 N.W.2d at 523.
[150] *See* Mich. Comp. Laws § § 400.1501(d)(i), (iv) (2024).
[151] *Brown*, 955 N.W.2d at 523 (citing *id.*).

ii. Federal Laws

Besides the PACE Act amendment, the Agriculture Improvement Act of 2018[152] also included language from the Pet and Women Safety (PAWS) Act,[153] which establishes a grant for entities that provide shelter and housing assistance for domestic violence survivors to better meet the housing needs of survivors with pets.[154] This federal legislation also protected pets, service animals, emotional support animals, and horses via laws pertaining to interstate stalking, protection order violations, and restitution.[155] Moreover, this legislation provides law enforcement with more tools for protecting domestic violence victims.[156] In one provision of the Act specifically, it "broadens the definition of stalking under the criminal code 'to include conduct that causes a person to experience a reasonable fear of death or serious bodily injury to his or her pet.'"[157]

This legislation attempted to close the gap on the issues that interpersonal violence victims with pets must face in order to receive social or financial services through federal recognition.[158]

III. Proposed Solutions

The various methods of legally addressing the 'link' between animal cruelty and domestic violence through legislation, statutes, and case law have put the current status of the issue on the minds of legal professionals and voters alike in recent years.[159] Despite this recently reclaimed notoriety, gaps in the law–both federal and state-level–still exist.[160]

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[152] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

[153] Pet and Women Safety Act, H.R. 909, 115th Cong. (2017).

[154] 34 U.S.C. § 20127.

[155] Agriculture Improvement Act, § 12502.

[156] *Id.*; *Pet and Women Safety (PAWS) Act*, Animal Welfare Inst., https://awionline.org/content/pet-and-women-safety-paws-act#_edn6 (last visited Nov. 15, 2022).

[157] Nicole Pallotta, *Federal Farm Bill Includes Important Protections for Animals*, Animal Legal Def. Fund (Mar. 11, 2019), https://aldf.org/article/federal-farm-bill-includes-important-protections-for-animals/ (quoting Agriculture Improvement Act, Pub. L. No. 115-334, §12502, 132 Stat. 4982 (2018)).

[158] Animal Welfare Inst., *supra* note 156.

[159] Megan Senatori, *More Than a Link: Animal Cruelty Is Domestic Violence*, Ctr. for Animal L. Stud. Lewis & Clark L. Sch. (Mar. 3, 2022), https://law.lclark.edu/live/news/48038-more-than-a-link-animal-cruelty-is-domestic.

[160] Emilie B. Ridge, *Detailed Discussion - Protecting Animals: Domestic Abuse and Animal Abuse Linked*, Mich. State Univ. Coll. L. Animal Legal & Hist. Ctr. (2008), https://www.animallaw.info/article/detailed-discussion-protecting-animals-domestic-abuse-and-animal-abuse-linked.

For example, although the PAWS Act established a grant to provide funds for organizations to better assist victims of domestic violence and their pets, only about fifteen to nineteen percent of domestic violence shelters in the United States accept pets.[161] This percentage must increase so more victims and their companion animals can have the resources they need to seek help.

As another example of a gap in current law, the federal definition of interstate domestic violence, as codified in 18 U.S. Code § 2261, does not include pets; however, the federal criminal code definition for stalking does include pets under the PAWS Act.[162] The proposal of this Note addresses this issue below.[163]

Next, the traditional notion in the legal community that pets and companion animals are solely considered 'property,' owned by their human counterparts, is losing traction as animals are being recognized as beneficiaries of trusts through 'pet trust laws'[164] and pets are being specifically named in protection orders, outside of being included in 'personal property.'[165] However, the issue of co-ownership of the pet under property terms still exists between a victim and their abuser if a pet or companion animal is not specifically accounted for in a protection order.[166]

a. Solutions Posed Thus Far

i. Cross-Reporting Mandates

One proposition to provide more assistance to domestic violence and animal cruelty victims is to establish cross-reporting mandates.[167] These laws would require reports between agencies like child protective

[161] *About the Purple Leash Project*, Purina, https://www.purina.com/purple-leash-project/about (last visited Nov. 21, 2022); Nicole Forsyth, *For the Love of Pets: Domestic Violence Survivors Need Their Pets*, Mercury News (Oct. 7, 2022, 6:30 AM), https://www.mercurynews.com/2022/10/07/for-the-love-of-pets-domestic-violence-victims-need-their-pets/.

[162] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4490, 4982-87 (2018).

[163] *See infra* Section III.B.

[164] *Pet Trust Primer*, Am. Soc'y for Prevention of Cruelty to Animals, https://www.aspca.org/pet-care/pet-planning/pet-trust-primer (last visited Jan. 12, 2023).

[165] *See* Ridge, *supra* note 160.

[166] *Id.*

[167] Tarun Bishop, *Detailed Discussion of Cross-Reporting Laws for Child Abuse and Animal Abuse*, Mich. State Univ. Coll. L. Animal Legal & Hist. Ctr. (2021), https://www.animallaw.info/article/detailed-discussion-cross-reporting-laws#:~:text=Cross%2Dreporting%20refers%20to%20reporting,to%20an%20animal%20protection%20group.

services and humane societies.[168] For instance, "if an animal protection employee suspects child abuse, they may report it to a child protection group, and if a child protection employee suspects animal abuse, they may report it to an animal protection group."[169] This type of cross-reporting mandate aims "to catch patterns of abuse"[170] to "help fulfill the statutory purpose of mandatory reporting laws."[171]

ii. Registries

Another proposed solution is to establish a registry for domestic violence and animal cruelty convictions that can be cross-checked.[172] Both national domestic violence[173] and animal cruelty[174] registries have been advocated for with no success, but county-level registries have had more success in implementation.[175] Tennessee was the first state to enact a state-wide animal abuse registry.[176] There is pending legislation in Indiana to enact a state-wide domestic violence registry.[177] The arguments against having a nationwide registry for domestic violence include that the identity of the victims could be revealed and that it could put victims in danger by giving them "a false sense of security."[178]

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[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] Emerald Sheay, Note, *People Who Hurt Animals Don't Stop with Animals: The Use of Cross-Checking Domestic Violence and Animal Abuse Registries in New Jersey to Protect the Vulnerable*, 26 Animal L. 445, 445 (2020).

[173] Hollie McKay, *Why There Is No National Domestic Assault Offender Registry – Yet*, Fox News (Nov. 30, 2019, 8:02 AM), https://www.foxnews.com/us/national-domestic-assault-offender-registry-nicole-montalvo.

[174] Kaleigh M. Gorman, Note, *National Animal Abuse Registry Reform: To Be Effective and Provide Prospective, a National Animal Abuse Registry Must Be the Next Directive*, 36 Touro L. Rev. 1135, 1149 (2021).

[175] *Animal Abuser Registry*, Cook Cnty. Sheriff's Off., https://www.cookcountysheriff.org/animal-abuser-registry/ (last visited Nov. 21, 2022); *Animal Abuser Registry*, Hillsborough Cnty., Fla., https://www.hillsboroughcounty.org/en/residents/animals-and-pets/animal-abuser-registry (last visited Nov. 21, 2022).

[176] *Tennessee Animal Abuse Registry*, Tenn. Bureau Investigation, https://www.tn.gov/tbi/tennessee-animal-abuse-registry.html (last visited Nov. 21, 2022).

[177] *See* H.B. 1370, 122nd Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

178 Tracy Baxter, *Tracy Baxter Reports: Domestic Violence Registry Has Pros, Cons*, Times Herald-Rec. (Apr. 26, 2011, 2:00 AM), https://www.recordonline.com/story/news/2011/04/26/tracy-baxter-reports-domestic-violence/50077309007/.

iii. Safe Haven Shelters

A network of 'safe haven' shelters is another solution that has been implemented.[179] In addition to state-contracted shelters,[180] private organizations also work together to provide a network of safe haven facilities for domestic violence victims and their pets.[181] The Animal Welfare Institute established the Safe Haven Mapping Project in 2011, which offers an interactive map of United States entities "that either provide sheltering services for the animals of domestic violence victims, have a relationship with an entity that does, or provide referrals to such facilities" on its website.[182]

iv. Inclusion of Animals in Protective Orders

A recent popular mechanism for states to protect animals involved in domestic violence is the passing of legislation that allows for animals to be included in protection orders.[183] As of 2023, forty states have laws that allow for the inclusion of animals and pets in protection orders.[184] Georgia is not included in the total; however, its 'Family Violence Ex Parte Protective Order' and 'Family Violence Twelve Month Protective Order' forms each include a provision that specifically accounts for pets, stating: either party "is ordered not to sell, encumber, trade, damage, contract to sell, or otherwise dispose of or remove from the jurisdiction…any of the property or pets of the Petitioner or joint property or pets of the parties except in the ordinary course of business."[185]

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[179] *See Safe Havens for Pets*, Animal Welfare Inst., https://awionline.org/content/safe-havens-mapping-project-pets-domestic-violence-victims (last visited Nov. 22, 2022).

[180] *See Major Grant Programs for Victim Services*, Michigan.gov, https://www.michigan.gov/mdhhs/safety-injury-prev/publicsafety/crimevictims/grants-and-funding/applying-for-funding (last visited Nov. 22, 2022).

[181] Animal Welfare Inst., *supra* note 179.

[182] *New Website Offers Shelter Resources for Domestic Violence Survivors with Pets*, Animal Welfare Inst. (Oct. 8, 2020) https://awionline.org/press-releases/new-website-offers-shelter-resources-domestic-violence-survivors-pets.

[183] Wisch, *supra* note 125; *see supra* Subsection II.C.1.

[184] *See Including Pets in Protection Orders: A State-by-State Guide*, Animal Welfare Inst., https://awionline.org/content/including-pets-protection-orders (last visited Jan. 12, 2023); *see also* Utah Code Ann. § 78B-7-105 (West 2022); *see also* Ky. Rev. Stat. Ann. § 403.740(1)(e)(4) (West 2022).

[185] Family Violence Ex Parte Protective Order, Ga. Superior Ct. Clerks' Coop. Auth., https://www.gsccca.org/docs/family-violence-documents/sc-15_family_violence_ex_parte_protective_order.pdf?sfvrsn=2 (last visited Jan. 12, 2023); Family Violence Twelve Month Protective Order, Ga. Superior Ct. Clerks' Coop. Auth., https://www.gsccca.org/docs/family-violence-documents/sc-16_family_violence_

The inclusion of companion animals and pets in protection orders allows for both victims and those in their household who are also affected by the abuse, including children and pets, to be protected by the same document in the same instance.[186]

Further, even the federal government has an interest in the inclusion of animals in protection orders as the language of the sense of Congress in the PAWS Act asserts, "States should encourage the inclusion of protections against violent or threatening acts against the pet, service animal, emotional support animal, or horse of a person in domestic violence protection orders."[187]

b. Amending Federal Law—A Better Solution

i. Introduction to Proposed Solution

Similar to the PAWS Act language that expands the definition of stalking in the federal criminal code to include pets,[188] this Note proposes a mirror-image amendment to the federal criminal code's definition of interstate domestic violence[189] to include pets. Specifically, the proposal emulates the language used in the PAWS Act as well as models the amendment based on the wording and language of other successful federal legislation. The proposal considers the impact of the specific language used in the legislation to demonstrate due diligence in ensuring against future revocation.

Title 18 U.S.C. § 2261 was specifically chosen for the proposal because, without language addressing the inclusion of companion animals or pets in the statute, § 2261 allows for a gap in federal domestic violence and animal cruelty laws that cannot be addressed by state law due to its interstate nature.[190] Using the power to regulate activities that affect interstate commerce afforded to Congress under the Commerce Clause of the United States Constitution,[191] the proposed amendment to § 2261 would directly and efficiently address the inclusion of harm to companion animals and pets as a method of domestic abuse across state lines in the statute. Because not every state in the country has laws recognizing animal cruelty as a method of domestic violence,[192]

twelve_month_protective_order.pdf?sfvrsn=2 (last visited Jan. 12, 2023).

[186] Ridge, *supra* note 160.

[187] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502(c), 132 Stat. 4490, 4987 (2018).

[188] Pallotta, *supra* note 157 (citing Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4490, 4982 (2018)).

[189] *See* 18 U.S.C. § 2261.

[190] *See id.*

[191] U.S. Const. art. I, § 8, cl. 3.

[192] *See* Wisch, *supra* note 125.

adding a few words to an existing federal statute is more resourceful, far-reaching, and quicker than lobbying for state legislation in every state without pertinent laws.

ii. Explanation of Solution

First, the federal criminal code's definition of interstate stalking as codified in 18 U.S.C. § 2261A, contains PAWS Act amendment language.[193] The statute, as amended, reads as follows:

> Whoever—
> (1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—
> (A) places that person in reasonable fear of the death of, or serious bodily injury to—
> (i) that person;
> (ii) an immediate family member (as defined in section 115) of that person;
> (iii) a spouse or intimate partner of that person; or
> (iv) *the pet, service animal, emotional support animal, or horse of that person*; or…
> (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—
> (A) places that person in reasonable fear of the death of or serious bodily injury to a person, *a pet, a service animal, an emotional support animal, or a horse* described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or

[193] 18 U.S.C. § 2261A.

> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) or section 2261B, as the case may be.[194]

Next, the similar federal statute on interstate domestic violence that is to be amended is codified as follows:

> (A) Offenses—
>
> (i) Travel or conduct of offender—
>
> A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).
>
> (ii) Causing travel of victim—
>
> A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).[195]

Using the foregoing language of the PAWS Act as a model,[196] the following language is proposed to be added to 18 U.S.C. § 2261, the federal statute for the crime of interstate domestic violence: "or a pet, a service animal, an emotional support animal, or a horse of that person." This specific language mirrors exactly what was put in the PAWS Act.[197]

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

[195] 18 U.S.C. § 2261(a).

[196] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

[197] Agriculture Improvement Act § 12502.

Thus, the proposed federal domestic violence statute, as amended, would read:

> (A) Offenses—
>
> (i) Travel or conduct of offender—
> A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, *or a pet, a service animal, an emotional support animal, or a horse of that person,* and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).
>
> (ii) Causing travel of victim—
> A person who causes a spouse, intimate partner, or dating partner, *or a pet, a service animal, an emotional support animal, or a horse of that person* to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, *or a pet, a service animal, an emotional support animal, or a horse of that person,* shall be punished as provided in subsection (b).[198]

This language specifically accounts for various categories of companion animals, ranging from pets to service animals.[199] Identifying cruelty to these animals by name in the statute recognizes that harm to them is a method of harassment or intimidation to their caretakers, and this alteration ensures that these pets and companion animals are not simply designated as personal property in these instances, as they historically have been.[200]

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[198] 18 U.S.C. § 2261(a).

[199] Agriculture Improvement Act § 12502.

[200] *See* Francione, *supra* note 41.

The penalty for interstate domestic violence is as follows:

(B) Penalties—

A person who violates this section or section 2261A shall be fined under this title, imprisoned—

(i) for life or any term of years, if death of the victim results;

(ii) for not more than 20 years if permanent disfigurement or life-threatening bodily injury to the victim results;

(iii) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(iv) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(v) for not more than 5 years, in any other case, or both fined and imprisoned.

(vi) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.[201]

Notably, the proposal does not include changes to the penalty for the offense because the focus of the amendment is on the addition of pets to the existing statute and not on the severity of the penalty.

iii. Challenges to Solution

The major challenge that laws recognizing animal cruelty as domestic violence face is the argument that cruelty to animals is a separate crime from domestic violence because animals are not considered human victims,[202] and thus, of course, could not be a category of romantic partner as most domestic violence statutes generally require of the victim.[203] Even 18 U.S.C. 2261 requires that the main victim of

[201] 18 U.S.C. 2261(b).

[202] *See* State v. Abdi-Issa, 504 P.3d 223, 227-28 (Wash. 2022).

[203] *See Selected State Statutes*, WomensLaw.org, https://www.womenslaw.

interstate domestic violence be "a spouse, intimate partner, or dating partner."[204] Further, Colorado, for example, treats a crime between a couple in an "intimate relationship" as a sentence enhancement, not a separate crime.[205]

Other challenges generally faced by federal legislation include the lengthy duration of time it can take to pass the law and, specifically, the low chance of its survival in committee.[206] Ninety percent of bills die in committee.[207] Analyzing the path that the similar PAWS Act legislation took through Congress by peering into its legislative history presumably gives strong insight into what the proposed amendment would have to overcome.[208] For example, the PAWS Act was referred to the Committee on the Judiciary and the Committee on Agriculture by the House of Representatives[209] then further referred to the Subcommittees on Crime, Terrorism, Homeland Security, and Investigations as well as Livestock and Foreign Agriculture, respectively.[210] Because the interstate domestic violence statute also deals with crime and livestock, i.e. pets,[211] it is arguably certain that these subcommittees would take on the proposed amendment if the bill is introduced into the House of Representatives. In the Senate, an identical bill was referred to the Committee on Senate Agriculture, Nutrition, and Forestry.[212]

iv. Overcoming Challenges to Solution

The criminal statutory elements of animal cruelty are not the same as those for domestic violence because they are inherently separate crimes;[213] moreover, the main argument in favor of legally recognizing the 'link' between animal cruelty and domestic violence is just that– recognizing the interrelatedness of the crimes.[214] These legislative bodies

org/laws/statutes (last visited Jan. 14, 2023).

[204] 18 U.S.C. 2261(a).

[205] Colo. Rev. Stat. 18-6-800.3(1) (2017).

[206] *See* U.S. Capitol Visitor Ctr., Essay: Committees, https://www.visitthecapitol.gov/sites/default/files/documents/resources-and-activities/CVC_HS_ActivitySheets_Committees.pdf (last visited Jan. 14, 2023).

[207] *What Are Committees?*, Civics 101: A Podcast (2022), https://www.civics101podcast.org/civics-101-episodes/committees?rq=committees.

[208] H.R. 909, 115th Cong. (2017).

[209] *Id.*

[210] H.R. 909, 115th Cong. (as referred to H.R. Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations 2017); H.R. 909, 115th Cong. (as referred to H.R. Subcomm. on Livestock & Foreign Agric. (2017).

[211] H.R. 909, 115th Cong. (2017).

[212] S. 322, 115th Cong. (2017).

[213] *See, e.g.*, Mich. Comp. Laws § 750.50 (2020); *see also* Mich. Comp. Laws § 750.81 (2016).

[214] *See supra* Part I.

are not combining the crimes of animal cruelty and domestic violence in their criminal codes, but, rather, acknowledging that animal cruelty is often used as a tool for abusers to utilize against their victims.[215] The argument is not that they are the same crime, but that the crime of animal cruelty is used as a method of abuse, which must be legally addressed to better protect victims.[216]

Using the specific phrasing of "or a pet, a service animal, an emotional support animal, or a horse of that person"[217] from the PAWS Act in the proposal was chosen because the PAWS Act was supported[218] and passed using that same language. The PAWS Act was passed using identical language for the similar purpose of combating domestic violence and stalking offenders on a federal level to offer victims better resources and legal recourse.[219] Implementing an amendment using language that was consistent with the language already approved and passed in 18 U.S.C. § 2261A for stalking, a similar criminal realm as domestic violence, arguably lowers the risk of the proposed legislation being stuck in the Senate or House longer than necessary because Congress was already comfortable with the phraseology.[220]

v. Implementation of Solution

Again, giving a nod to the similarities between the PAWS Act legislation and the proposed amendment, looking at the history and supporters of the PAWS Act provides insight into the best practice for implementation of the proposal. Sponsoring the passage of the bill, the PAWS Act Coalition, consisting of non- and for-profit organizations, included Nestle Purina PetCare, Bayer Corporation, Human Animal Bond Research Institute (HABRI), Noah's Animal House, Pet Partners, and Urban Resource Institute.[221] Looking at statements from a major lobbyist of the PAWS Act, the executive director of HABRI indicated that adding the language of the PAWS Act to the Agriculture Improvement Act of 2018 was one of the main reasons for its success as the PAWS Act was first introduced as a stand-alone bill: "[w]hen you can get your legislation attached to a moving vehicle like that, [it really

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[215] Upadhya, *supra* note 45, at 1175.

[216] *Id.*

[217] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

[218] Patricia Wuest, *The Pet and Women Safety (PAWS) Act Is Signed Into Law*, Today's Veterinary Nurse (Jan. 4, 2019), https://todaysveterinarynurse.com/news/the-pet-and-women-safety-paws-act-is-signed-into-law/.

[219] Agriculture Improvement Act, Pub. L. No. 115-334, § 12502, 132 Stat. 4982 (2018).

[220] 18 U.S.C. § 2261A.

[221] Wuest, *supra* note 218.

helps] to get it over the [goal] line."[222] The director further explained that the Senate Committee on Agriculture was reauthorizing the Agriculture Improvement Act, as it does every five years, around the same time that the PAWS Act legislation was referred, and crediting that "domestic violence is a bipartisan issue,"[223] the bill's sponsors pushed for it to be included in the farm bill.[224] Thus, a major goal for the implementation of the proposal would be to include the short amendment in a larger piece of legislation to lessen its chance of dying in committee.

Conclusion

The proposed amendment to 18 U.S.C. § 2261 that would explicitly include companion animals and pets in the interstate domestic violence statute of the federal criminal code closes a unique gap in federal domestic violence and animal cruelty law that state legislation cannot address. Even though this gap cannot be met through state laws, states that continue to include companion animals and pets in protection orders, lobby for legislation to account for animal abuse as a method of domestic violence, and advocate for more shelters that allow pets and victims to stay together are various ways to further support domestic violence victims through the law. By federally criminalizing interstate animal cruelty as domestic violence, Congress will continue to legally acknowledge that animal cruelty is often used by abusers in interpersonal violence situations to further harm victims on a national level. The passage of this amendment will foster better resources for victims and their pets, as well as create more awareness of abuse tactics, effects, and insight into what victims need to escape such situations. By explicitly allowing animal cruelty to be charged or designated as domestic violence in federal law, an amendment such as this would further help protect and provide recourse for pets, like Mona, and survivors like her owner, Julie, in the future.

[222] Tony McReynolds, *The Pet and Women Safety (PAWS) Act to Become Law This Week*, Am. Animal Hosp. Ass'n (Dec. 17, 2018), https://www.aaha.org/publications/newstat/articles/2018-12/the-pet-and-women-safety-paws-act-to-become-law-this-week/.

[223] *Id.*

[224] *Id.*

Locking Horns: State Agency Regulation of Deer Farms in the "Amish Belt" in the Face of Chronic Wasting Disease

Griffin Cole*

Introduction

Across the United States, roughly thirty percent of the estimated 10,000 whitetail deer farms operating for the purpose of breeding for game preserves and selling deer byproducts are owned by the Amish community.[1] Given the disproportionate representation of Amish business owners within cervid farming, Amish deer farmers in midwestern states with high Amish populations relative to the rest of the country have fallen victim to massive outbreaks of chronic wasting disease (CWD) amongst their herds in the past decade.[2] Cervids refers to the class of animals that includes deer, elk, and moose.[3] The state agencies that attempt to investigate or regulate CWD outbreaks on Amish cervid farms are sometimes met by hostile and uncooperative

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[1] Adam Davidson, *Money, Power, and Deer Urine*, New Yorker (Sept. 18, 2017), https://www.newyorker.com/magazine/2017/09/25/money-power-and-deer-urine#:~:text=There%20are%20roughly%20ten%20thousand,premier%20producers%20of%20deer%20urine.

[2] *See, e.g.*, D'Arcy Egan, *Holmes County Deer Hunting Preserve Ordered to Euthanize Herd of 300 Trophy Bucks, Does*, Cleveland.com, https://www.cleveland.com/outdoors/2014/12/holmes_county_deer_hunting_pre.html (Dec. 5, 2014, 10:53 PM); *Discovery of Lancaster County Deer with Chronic Wasting Disease Leads to Quarantine Zone Expansion*, LancasterOnline (Apr. 11, 2022), https://lancasteronline.com/news/local/discovery-of-lancaster-county-deer-with-chronic-wasting-disease-leads-to-quarantine-zone-expansion/article_32342538-b9da-11ec-8443-1f9bff9f899c.html.

[3] *Cervid Diseases and Resources*, The Ctr. for Food Sec. & Pub. Health, https://www.cfsph.iastate.edu/species/cervids/#:~:text=The%20term%20cervid%20is%20used,axis%2C%20sika%2C%20among%20others (last visited Mar. 19, 2023).

behavior.[4] To ensure effective regulation of cervid farms in the context of the spread of CWD, state agencies within the "Amish Belt" need to formulate policy that addresses the problems posed by cervid farms being operated by communities that wish to remain separated from the rest of society.

The first part of this commentary will provide background information on CWD as well as identify and examine prominent instances of state agencies battling with owners of deer farms over CWD outbreaks. The second part of this commentary will provide factual background on Amish communities, examine previous conflicts between Amish followers and the public, and observe the connection between captive cervid farming and Amish adherents. The third part of this commentary will provide examples and examine recent CWD outbreaks within areas known for having a large Amish population. Finally, the fourth part of this commentary will examine the current approaches employed to regulate captive cervid farms as well as proposed solutions. The commentary concludes with a recommendation for state governments within the "Amish Belt" to statutorily enact legislation that strictly grants the state wildlife agency sole authority to regulate captive cervid farms while working in conjunction with supplementary federal programs.

a. Chronic Wasting Disease and Captive Cervid Farms

Chronic Wasting Disease (CWD) is a prion disease that causes neurological decay in deer, elk, reindeer, and moose.[5] CWD spreads from direct animal-to-animal contact as well as indirect contact with the disease-causing agent in the environment.[6] Because of the proximity of deer and other cervids commonly bred and held at captive cervid farms, these farms enhance opportunities for transmission of CWD.[7] Additionally, there is a risk of the disease spreading between wild deer herds roaming in the surrounding area and captive cervids through contact at the fence line as well as accidental or intentional ingress and egress of cervids from the facility.[8] However, transmission is a two-way

[4] *See, e.g.*, *Preserve Owner Uncooperative, Deer Escape as CWD Concerns Intensify*, Deer & Deer Hunting (Dec. 11, 2014), https://www.deeranddeerhunting.com/content/articles/deer-news/preserve-owner-uncooperative-deer-escape-as-cwd-concerns-intensify.

[5] *Chronic Wasting Disease*, CDC, https://www.cdc.gov/prions/cwd/index.html (last visited Oct. 30, 2022).

[6] *Id.*

[7] *See CWD Overview*, Chronic Wasting Disease All., https://cwd-info.org/cwd-overview/ (last visited Dec. 23, 2023).

[8] *B&C Position Statement – Chronic Wasting Disease*, Boone & Crockett Club, https://www.boone-crockett.org/bc-position-statement-chronic-wasting-disease (Aug. 30, 2022).

street, as nearby wild cervids that are CWD-positive are also capable of transmitting the disease to nearby captive herds.[9] While scientific analysis so far has revealed that humans are unlikely to be susceptible to CWD, public health officials recommend testing animals from affected areas before harvesting and not consuming animals that test positive for CWD.[10] There are concerns that CWD could affect cervid populations and overall herd health, which arguably hurts hunting and other efforts that fund conservation by state agencies.[11]

i. Prion Diseases

CWD is a type of transmissible spongiform encephalopathy (TSE) that is similar but different from other TSEs that affect domestic animals like scrapie of sheep and goats, and bovine spongiform encephalopathy (BSE), which is commonly known as "Mad Cow Disease."[12] All TSEs are fatal with no available treatments or vaccines.[13] The disease-causing agent of this family of diseases is known as a prion.[14] Prions are proteins that are commonly found in the cells of nearly all living organisms including humans.[15] The abnormal prions that cause CWD and other prion diseases are misfolded and induce normal prions to misfold as well, resulting in brain damage and eventual death.[16] While CWD, scrapie, and BSE affect wildlife and livestock, there are prion diseases that infect humans,[17] which creates a concern that CWD could be transmitted to humans as well.

Specifically, Creutzfeldt-Jakob disease (CJD) is a sporadic human TSE that occurs in approximately one in one million people.[18]

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[9] *Id.*

[10] *Chronic Wasting Disease (CWD) – Prevention*, CDC, https://www.cdc.gov/prions/cwd/prevention.html (Oct. 18, 2021).

[11] *See*, *e.g.*, Andrew Moore, *The Role of Hunting in Wildlife Conservation Explained*, N.C. State: Coll. Nat. Res. (Feb. 4, 2021), https://cnr.ncsu.edu/news/2021/02/hunting-wildlife-conservation-explained/.

[12] Alicia Otero et al., *Chronic Wasting Disease: A Cervid Prion Infection Looming to Spillover*, 52 Veterinary Rsch. 1, 3 (Sept. 6, 2021), https://veterinaryresearch.biomedcentral.com/articles/10.1186/s13567-021-00986-y.

[13] *See id.* at 1.

[14] *See id.*

[15] *See id.*

[16] *CWD: The Basics*, Chronic Wasting Disease All., https://cwd-info.org/cwd-the-basics/ (last visited Mar. 19, 2023).

[17] *See generally* Muhammad Imran & Sabiq Mahmood, *An Overview of Human Prion Diseases*, 8 Virology J. 1 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3296552/.

[18] *Creutzfeldt-Jakob Disease*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/creutzfeldt-jakob-disease/symptoms-causes/syc-20371226 (Jan. 28, 2023).

The clinical signs and symptoms of CJD include memory loss, insomnia, lack of coordination, and trouble speaking.[19] Like all prion diseases, CJD eventually results in death.[20] In the 1990s, several people in the United Kingdom fell sick with a variant of CJD after consuming products from cattle with Mad Cow Disease.[21] It is associations like this that fuel concerns that CWD could possibly be transmissible to humans.

ii. Overview of Chronic Wasting Disease and Its Transmission

Cases of CWD were first observed in North America as early as 1967 when cervid researchers started noticing significant weight loss and behavioral changes in their mule deer research herd.[22] However, researchers did not formally identify CWD as a TSE until 1978.[23] Since the 1970s, CWD has been identified in cervid populations across Canada and the United States, affecting five provinces and thirty-one states.[24] CWD also has been found in wild cervids in Finland, Norway, and Sweden as well as in captive cervids in South Korea.[25]

One of the especially pernicious problems of CWD is prolonged incubation prior to development of clinical signs.[26] The average incubation period for CWD is typically between eighteen and twenty-four months.[27] Thus, when early clinical signs like slight changes in behavior and weight loss manifest, it can be hard to determine whether regular, more seasonal changes are to blame, rather than CWD.[28] However, the most dangerous element of CWD is its invariably fatal outcome once contracted, with no effective treatment, cure, or vaccine.[29] CWD can first appear with clinical signs such as subtle weight loss and behavioral changes, but, as the disease progresses, the neurological deterioration

[19] *See id.*

[20] *Id.*

[21] *Id.*

[22] *Timeline*, Chronic Wasting Disease All., https://cwd-info.org/timeline/ (last visited Mar. 19, 2023).

[23] *Id.*

[24] *CWD: The Basics*, *supra* note 16.

[25] Christopher J. Silva, *Chronic Wasting Disease (CWD) in Cervids and the Consequences of a Mutable Protein Conformation*, 7 ACS Omega 12474, 12480-1 (Apr. 4, 2022), https://www.researchgate.net/publication/359726363_Chronic_Wasting_Disease_CWD_in_Cervids_and_the_Consequences_of_a_Mutable_Protein_Conformation.

[26] *See CWD Overview*, *supra* note 7.

[27] Kip Adams, *The Most Common Questions about CWD in Deer, and NDA's Answers*, Nat'l Deer Assoc. (Aug. 10, 2022), https://deerassociation.com/the-most-common-questions-about-cwd-in-deer-and-ndas-answers/.

[28] *See What are the Visual Signs of Chronic Wasting Disease?*, U.S. Geological Surv., https://www.usgs.gov/faqs/what-are-visual-signs-chronic-wasting-disease (last visited Dec. 24, 2023).

[29] *Id.*

in the brain leads to extreme weight loss, excessive salivation, lack of coordination, and drooping of the ears.[30] Finally, CWD transmission can occur through direct contact between animals as well as contact with the disease-causing agent within the environment.[31] Indirect transmission through contact with prions in the environment is made possible by the ability of prions to remain infectious for years after being shed in feces, saliva, and urine from an infected animal or via decomposition of deceased cervids.[32]

Encouragingly, there is no scientific evidence that CWD can transmit to humans through the ingestion of meat harvested from a cervid infected with CWD.[33] The only prion disease that appears to be able to be transmitted from animal to human is Mad Cow Disease.[34] However, researchers have found that CWD is able to be transmitted to some nonhuman primates.[35] Because of the unknown potential for sickness, the CDC strongly urges hunters and those consuming cervids to test animals from an area known to have CWD cases and to avoid exposure and consumption of CWD positive animals or tissues.[36]

iii. State Agency Attempts to Conquer the Spread of CWD on Captive Cervid Farms

Because of the long incubation periods and long-term resistance of prions to environmental exposure, captive cervid farms are prime pools of transmission for the disease.[37] Specifically, the close contact of animals within the captive cervid farms, as well as the importation of cervids from other regions to these farms, increases the chances for transmission of CWD.[38] Furthermore, because of the long incubation period, it is possible for the deer on cervid farms to be infected without observing any abnormalities for a long period of time.[39] To date, there is no validated live animal test for CWD; only results from animals tested after death are regarded as official.[40] The emergence of captive cervid

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[30] Otero et al., *supra* note 12, at 3.

[31] *See id.*

[32] *See id.*

[33] *See CWD: The Basics*, *supra* note 16.

[34] *See, e.g.*, *Creutzfeldt-Jakob Disease*, *supra* note 18.

[35] *CWD: The Basics*, *supra* note 16.

[36] *CWD – Prevention*, *supra* note 10.

[37] *See Captive Cervid Breeding*, The Wildlife Soc'y (May 2014), https://wildlife.org/wp-content/uploads/2014/05/captive-cervid-breeding.pdf.

[38] *See id.*

[39] *See CWD: The Basics*, *supra* note 16.

[40] Dan Gunderson, *State Agencies Not Sold on New Chronic Wasting Disease Test Option*, MPR News (Mar. 16, 2023, 4:00 AM), https://www.mprnews.org/story/2023/03/16/state-agencies-not-sold-on-new-chronic-wasting-disease-test-option.

farms alongside the emergence and spread of CWD causes natural resource managers and policymakers to call for substantial regulation, if not an all-out ban, on captive cervid farms.[41] Owners and operators of these farms assert that their facilities are overregulated and that there is no evidence to suggest that CWD outbreaks in wild populations can be linked to their operations.[42]

State agencies in numerous states have had to take action to depopulate cervids on infected farms in order to stop the transmission of CWD to the wild populations or other captive herds (via shipment) and the contamination of the environment.[43] In some of these scenarios, the captive cervid farmers are resistant to the state agency's attempts to enforce compliance on the facility.[44] One such instance is currently in progress on a captive deer farm located in Texas.[45] A captive cervid farm in East Texas was the subject of a Texas Parks and Wildlife Department (TPWD) mandate for the culling of its captive herd.[46]

Around 500 of the farm's deer were set to be killed by the state; however, the owner of the farm, Robert Williams, challenged the state agency by filing two temporary restraining orders in Texas courts that stayed the cull and initiated a lawsuit against the state.[47] Mr. Williams insists that his deer are healthy and that the state agencies are overreacting to CWD outbreaks.[48] In total, approximately 2,600 deer have been culled by the TPWD since 2015.[49] Williams has even managed to keep the state from carrying out its depopulation for almost two years as another temporary injunction hearing was held in the case in August of 2023.[50] This hearing resulted in the Kaufman County, Texas judge

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[41] *E.g.*, Joe Friedrichs, *Cook County Becomes First in the State to Ban Deer and Elk Farms*, WTIP (May 5, 2023), https://wtip.org/cook-county-becomes-first-in-the-state-to-ban-deer-and-elk-farms/; Laura Brown, *Deer Farm Moratorium Draws Suit*, Minn. Law. (Jan. 8, 2024), https://minnlawyer.com/2024/01/08/deer-farm-moratorium-draws-suit/.

[42] *See, e.g.*, Brown, *supra* note 41.

[43] *E.g.*, *Experts Say a Deer at a Wisconsin Shooting Preserve is Infected with Chronic Wasting Disease*, CBS News (Sept. 3, 2023, 1:04 PM), https://www.cbsnews.com/minnesota/news/experts-say-a-deer-at-a-wisconsin-shooting-preserve-is-infected-with-chronic-wasting-disease/; Matt Williams, *East Texas Breeder, TPWD Clash over the Fate of 500 White-Tailed Deer*, Dall. Morning News (Apr. 23, 2022, 11:22 PM), https://www.dallasnews.com/sports/other-sports/2022/04/23/breeder-fights-to-save-500-deer-herd/.

[44] Williams, *supra* note 43.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Emily Brindley, *A Texas Rancher Is Fighting the State to Save His Deer Herd. He Just Won a Small Victory.*, Fort Worth Star-Telegram, https://www.star-telegram.com/news/state/texas/article278707714.html (Aug. 29, 2023, 6:16 PM).

ruling that the state cannot cull Williams's deer until a full trial can be held determining whether Williams's ownership rights are such that he can permanently cease any state action to attempt to cull the deer.[51] This trial is set to happen in the early part of 2024; meanwhile, the number of deer infected with CWD on Williams's farm increased from 124 to 125 during the span of the two-day hearing in August of 2023.[52]

This is not the first battle over CWD on captive cervid farms that has occurred in Texas. In fact, a landmark ruling for the public trust doctrine and conservation management emerged from a case concerning another deer farm in Texas.[53] In *Bailey v. Smith*, Texas deer breeders sued the TPWD to stop the agency from mandating the testing of deer on captive cervid farms for CWD.[54] The breeders argued that the regulations could not be enforced because the deer are the private property of the owners.[55] However, the State of Texas argued that all the wildlife within the State of Texas is to be managed by the TPWD as trustee for the public's benefit.[56] This argument is aligned with the public trust doctrine, which is the foundation for conservation law in the United States.[57] Ultimately, the Court of Appeals sided with the State of Texas and held that the State of Texas owns and has the power to manage all wildlife within the state.[58] While this seems to be a small victory for conservation enthusiasts, one can easily see how the proponents of the cervid breeding industry view this as a hit to their personal property rights.

Beyond the specific outbreaks observed and identified by state wildlife agencies, there are other risks of transmitting CWD outside of the transportation or escape of deer from captive cervid farms, such as the sale of urine.[59] The sale of deer urine spray is a profitable endeavor for some captive cervid farmers.[60] Unfortunately, the sale of deer urine could be potentially dangerous because research has shown that CWD prions may be shed in urine and the infectivity of prions can persist for prolonged periods.[61]

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[51] *Id.*
[52] *Id.*
[53] *See generally,* Bailey v. Smith, 581 S.W.3d 374 (Tex. App. 2019).
[54] *Id.* at 382.
[55] *Id.*
[56] *Id.* at 390.
[57] *Id.*
[58] *Id.*
[59] *E.g.*, Davidson, *supra* note 1.
[60] *Id.*
[61] *See* Otero et al., *supra* note 12.

b. The Amish Community and Its Connection to Captive Cervid Farming

Amish adherents make up less than 0.5 percent of the United States population.[62] Yet, just within the captive cervid farming industry, approximately thirty percent of the deer farms in the United States are estimated to be owned by Amish followers.[63] As a religious minority that has received governmental immunity from following certain policies, there is an argument that this group's general disregard for regulation could lead to increased infection of CWD among deer herds in Ohio, Pennsylvania, Indiana, Wisconsin, Minnesota, and Michigan. Along with establishing which states are most affected by the prospect of CWD outbreaks on Amish-owned captive cervid farms, this section will examine the tenuous relationship between government entities and Amish communities.

i. Background of Amish America

There are approximately 400,000 Amish adherents spread across the United States.[64] According to a population study, the states that contain approximately sixty percent of Amish adherents are Indiana, Ohio, and Pennsylvania.[65] While there are pockets of Amish settlements that exist across the United States, the Midwest, specifically the "Great Lake" states, tend to have the highest population density of Amish adherents.[66] For instance, the largest Amish settlements exist in Lancaster County, Pennsylvania; Holmes County, Ohio; and Elkhart/Lagrange Counties, Indiana.[67] Because of the large concentration of Amish adherents in the "Great Lake" states, the term "Amish Belt" will be used in this comment to study the effects of Amish-owned captive cervid farms in the states of Pennsylvania, Ohio, Indiana, Minnesota, Michigan, and Wisconsin.

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[62] *See Amish Population Profile, 2022*, Young Ctr. for Anabaptist & Pietist Stud.: Amish Stud., https://groups.etown.edu/amishstudies/statistics/amish-population-profile-2022/ (last visited Nov. 27, 2022).

[63] Davidson, *supra* note 1.

[64] *Amish Population Profile, 2022*, *supra* note 62.

[65] *Id.*

[66] *See Statewide Amish Travel Study*, Ohio Dept. Transp. (Mar. 2020), https://www.transportation.ohio.gov/wps/wcm/connect/gov/b3b86275-f673-4a2b-b4ae-69a58f82c194/AmishPopulationTrends.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_K9I401S01H7F40QBNJU3SO1F56-b3b86275-f673-4a2b-b4ae-69a58f82c194-nAkqhqh.

[67] *See Twelve Largest Settlements, 2022*, Young Ctr. for Anabaptist & Pietist Stud.: Amish Stud., https://groups.etown.edu/amishstudies/twelve-largest-settlements-2022/ (last visited Nov. 27, 2022).

The basis for the Amish communities' way of life is their faith.[68] Amish people adhere to a strict version of Christianity.[69] Amish beliefs force them to separate themselves from general society, which is viewed as proud and disobedient to God's word.[70] Amish followers are brought up to believe that they are in the world, but must not be part of it.[71] This means that Amish followers are supposed to steer away from conformity with broader society.[72] Their religious and customary beliefs have led to a development of rules called *ordnung*.[73] The rules contained within the *ordnung* are established by Amish congregations across the country.[74] While some of the rules have direct contextual support from the Bible, other rules are developed based on extensions of other rulings, or preserving their traditional, non-conforming way of life.[75] Some of these rules include the traditional norms that the public thinks of when discussing the Amish: no electricity, horse-drawn farm machinery, no automobiles, and no telephones.[76] However, there are also rules that govern associations between Amish people and the outside world. For instance, Amish adherents must not have conjugal or business ties with outsiders.[77] Amish followers are also not permitted to serve in roles as public officials or caretakers to "worldly" society.[78] The Amish believe that strife and violence have no purpose in their traditional way of life that disfavors being worldly; instead they favor being traditional and doing things *das alt Gebrauch*, the old way.[79] The overriding importance of rejecting modern society and being separated from it is a tenet of the Amish way of life.

Because of the traditional way of life preferred by Amish community members, Amish communities can sometimes come into conflict with broader society on a variety of issues including insurance coverage, treatment of animals, and education.[80] Not only does the public sometimes come into conflict with Amish followers, but state and federal governments have had to resolve conflicts that stem from the desire of Amish communities to remain separated and nonconforming to the modern world.[81]

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[68] *See* John A. Hostetler, *The Amish and the Law: A Religious Minority and Its Legal Encounters*, 41 Wash. & Lee L. Rev. 33, 34 (1984).

[69] *Id.*

[70] *Id.* at 35.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

[81] *See id.*

ii. Tenuous Relationship Between Government Entities and Amish Communities

Unfortunately, partially driven by stereotypes, Amish adherents are often depicted as being hostile to modern ways and broadly held societal norms. While this narrative can sometimes be discussed in a less-than-couth fashion, there have been serious controversies and legal battles between Amish communities and the government.

Particularly, the Amish community can use a religious exemption to prohibit their children from mandatorily attending a public or private high school.[82] The United States Supreme Court case of *Wisconsin v. Yoder* granted the Amish community an exemption from following a Wisconsin state law that made schooling after eighth grade mandatory.[83] According to the Amish plaintiffs who brought the case, the Wisconsin state law, which essentially required all children to attend public high school or participate in an equivalent private education, was contrary to their way of life as the Amish believed that attending high school could risk the influence of "worldly" society on their children.[84] The Amish parents used this religious argument to justify not sending their children to high school, and, ultimately, the Supreme Court prioritized the Free Exercise Clause of the First Amendment by holding that Wisconsin's state interest in an educated populace is subordinated to this clause.[85] The Court reasoned that the vocational style training the children learned working as farmers or craftsmen, in essence, acted as education in some capacity, and felt that the mandate to attend a private or public high school infringed on bringing up their children in the Amish faith.[86] This decision struck down enforcement of the Wisconsin compulsory high school attendance law and allowed Amish parents to keep their children from attending school past the eighth grade.[87]

Some legal scholars disagree with the holding of this opinion and believe that the *Yoder* decision should be overturned.[88] One such argument for this is that the Court could have upheld the Wisconsin state law and enforced it by simply illustrating that most Amish followers already send their children to Amish private schools for their elementary education.[89] Nothing in the state statute would have stopped Amish parents from sending their children to an Amish school for several more

[82] *Id.* at 213.

[83] Gage Raley, Note, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 Va. L. Rev. 681 (May 2011).

[84] *Id.* at 687.

[85] *See id.*

[86] *Id.* at 685.

[87] *Id.* at 681-82.

[88] *Id.*

[89] *Id.* at 687-88.

years after the eighth grade.[90] In fact, while most Amish parents are against the idea of sending their children to college because the "worldly" atmosphere could corrupt their traditional views, some Amish parents have begun to develop homeschool curricula.[91] Also, Amish publishers create textbooks that would allow for the homeschooled or private school education of Amish children, without the worry of perverse or "worldly" influences affecting their education.[92]

Closer to the topic at hand, Amish farmers have also tried to challenge the enforcement of agricultural regulations against them. In 2008, several Amish farmers in Michigan brought a suit against the U.S. Department of Agriculture (USDA) to stop enforcement of the National Animal Identification System.[93] Ran by the USDA, this was established to aid in the identification and tracking of livestock to help prevent and trace the spread of diseases that affect cattle.[94] However, the Amish farmers challenged the enforcement of this program in Michigan by filing a lawsuit in the D.C. District Court, alleging the program forced them to violate their deeply held religious beliefs.[95] More specifically, the Radio Frequency Identification (RFID) tag portion of the program violated their religious beliefs as it resembled the "mark of the beast" referred to in the book of Revelations.[96] However, the judge of the federal district court ultimately dismissed the case on the grounds that the case should have been brought under Michigan law as only Michigan law made the federal program mandatory within its borders.[97]

There are examples of Amish noncompliance with societal norms and governmental policies concerning animal welfare and conservation management. Specifically, Amish dog breeders have been identified in exposés concerning the cruelty of puppy mills.[98] Amish breeders are said to see dogs as livestock, and do not observe the niceties that modern society has cast upon its canine friends.[99] In fact, Lancaster

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[90] *Id.*

[91] *Id.*

[92] *Id.* at 688-89.

[93] David Kravets, *Farmers See 'Mark of the Beast' in RFID Livestock Tags*, Wired (Sept. 9, 2008, 4:43 PM), https://www.wired.com/2008/09/farmers-decryin/.

[94] Tom Leonard, *Amish Sue US Government for 'Mark of the Beast' on Livestock*, Telegraph (Nov. 17, 2008, 5:12 PM), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/3473461/Amish-sue-US-government-for-mark-of-the-Beast-on-livestock.html/amp/.

[95] Kravets, *supra* note 93.

[96] *Id.*

[97] *See* Bill Ray, *Amish Farmers Lose Court Battle Against RFID*, Register (July 31, 2009, 3:14 PM), https://www.theregister.com/2009/07/31/rfid_cows/.

[98] *E.g.*, Sharyn Alfonsi & Ted Gerstein, *Puppies "Viewed as Livestock" in Amish Community, Says Rescue Advocate*, ABC News (Mar. 27, 2009, 9:21 AM), https://abcnews.go.com/Business/story?id=7187712&page=1.

[99] *Id.*

County, known for having the largest Amish settlement in the country, is sometimes referred to as the puppy mill capital of the world.[100] There are Amish puppy mills where thousands of dogs are stacked in crates, almost like chickens on industrial poultry farms, and are not given access to the outside or solid floors.[101] There have even been reports that dogs who are rescued from these facilities tend to have trouble walking due to years of being confined to tight quarters.[102] Additionally, there have been reports that Amish breeders often engage in cruel practices to "de-bark" dogs through the hammering of sharp metal instruments down a dog's throat to cause permanent damage to the dog's vocal cords.[103]

iii. The Amish's Relationship with Captive Cervid Farming

The prominent representation of Amish farmers within captive cervid farming begs the question of what aspects of captive cervid farming make it an attractive business venture for Amish followers. One advantage of captive cervid farming for Amish farmers is the small acreage required.[104] Captive cervids, like deer and elk, require less acreage and resources for sustenance than traditional farm animals.[105] Specifically, deer mature quicker and breed longer than traditional livestock.[106] Captive deer also cause less damage to pasture lands and consume less food than traditional livestock.[107] Because of the ability to use small plots and less resources to breed and sustain deer, cervid farms require less hands-on work to maintain the herds.

While deer farming is ideal for Amish adherents because of its relative ease of resources and effort compared to traditional animal husbandry, the draw to deer hunting can also be attributed to its profitable nature. Outside of stocking high-fence game preserves, captive cervid farms can also be used to harvest venison, sell deer urine, and use antlers for a variety of purposes.[108] Furthermore, venison has recently trended as a healthy alternative to beef because of its lean quality.[109] Some consumers see venison as a more ethical alternative to

[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] Kristen Schmitt, *Deer Farming: The Next Adventure in Agriculture*, Mod. Farmer (Feb. 19, 2014), https://modernfarmer.com/2014/02/deer-farming-next-adventure-agriculture/#:~:text=Raising%20a%20herd%20of%20deer,to%2020%20years%20in%20captivity.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Davidson, *supra* note 1.
[109] Schmitt, *supra* note 104.

consuming factory farmed meat from the grocery store.[110] The potential profit available in captive cervid farming makes it a growing industry in the Amish community and general population.[111]

Among the states with high Amish populations, Pennsylvania, Ohio, Minnesota, and Wisconsin are recognized as states that each have over 500 captive cervid farms located within their boundaries.[112] What is more impressive is the sheer presence and prominence of Amish farmers within this industry.[113]

One Amish farmer, Abe Miller, is identified as the pioneer of captive cervid farming in the United States.[114] Mr. Miller of Baltic, Ohio (which is partially located in Holmes County) started his deer farm in 1974.[115] He is identified as launching the industry when he first purchased two deer, one doe, and one buck from a man in Pennsylvania who owned the deer through an agreement with the state government.[116] Miller paid seventy-five dollars per deer and transported the deer back to his farm in eastern Ohio.[117] Miller noticed that his friends and family took a liking to his new hobby and began to purchase deer themselves.[118] At first, Miller and his fellow deer owners just owned the animals as pets.[119] However, after a couple of years, Miller had a fawn born named Patrick that began to show signs of having a nontypical rack as he developed.[120] The demand for bucks with nontypical racks is high among sportsmen because of its rarity.[121] Furthermore, sportsmen in Texas, as well as other parts of the United States where white-tailed deer are naturally smaller in size, have a high demand for Midwestern deer.[122] So, in 1987, Miller sold Patrick to a Texas deer farm for $7,500.[123] After this sale, the captive cervid farming industry took off as other farmers saw the profit in the practice.[124] Miller kept some of the fawns of Patrick and continued to rake in top-dollar for the fawns with prestigious genetics.[125]

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[110] *Id.*

[111] *See, e.g.*, Ryan Sabalow, *A Troubling Industry is Born*, Indianapolis Star, https://www.indystar.com/story/news/investigations/2014/03/27/buck-fever-chapter-one/6865283/ (Apr. 10, 2014, 6:05 PM).

[112] *Captive Cervid Breeding*, *supra* note 37, at 1.

[113] *See* Sabalow, *supra* note 111.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

Currently, the deer farming industry is one of the fastest-growing industries in agriculture.[126] There are even conferences held across the country for cervid farmers to mingle and browse vendor stands offering technology or products that could supplement their practices.[127] While there are plenty of non-Amish people at these conferences, the Amish followers stand out, with many men in flat-brimmed hats, their wives in bonnets and long dresses, browsing at the vendors and engaging in meetings with other industry personnel.[128] The industry has evolved over time and now resembles the market for racing horses in some respects, as captive cervid farmers now utilize genetics testing that certifies the genetics of a given deer and traces its lineage.[129] The emphasis on genetics has now caused cervid farmers to engage in the practice of extracting semen for artificial insemination from trophy bucks using a device that sends a current through the animal's body, which causes the buck to involuntarily ejaculate into a funnel set up by the farmer.[130] While semen from a prize deer can go for top-dollar on the market, the pioneer deer farmer, Miller, has noted his discomfort with the technology and practices used to achieve this objective.[131] Eventually, Miller ceased cervid farming and sold off his remaining herd because of cumbersome state agency regulation and testing to prevent the spread of disease amongst captive deer, rather than his distaste for the adoption of new technology.[132]

c. Chronic Wasting Disease on Amish-Owned Captive Cervid Farms

Along with the potential for issues involving massive outbreaks of CWD on Amish captive cervid farms, there have been prominent outbreaks in recent years at captive cervid farms owned by Amish adherents. This section will examine the effects of these outbreaks as well as the response by state fish and wildlife agencies to manage these outbreaks.

In December of 2014, whitetail deer held at a captive cervid farm near Millersburg, Ohio tested positive for CWD.[133] Notably, this farm is in Holmes County, which is known for its high Amish population relative

[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Egan, *supra* note 2.

to the general population.[134] Before culling any deer, the Ohio Department of Natural Resources (DNR) ordered the quarantine of the farm, meaning the farm was under strict orders to cease the transportation of deer outside the facility.[135] Unfortunately, the farmer deliberately disobeyed the orders of the state wildlife agency and transported some deer within his herd to a nearby farm, causing the DNR's decision to depopulate the rest of the farmer's captive herd.[136] The Holmes County farm also had some alleged escaped deer from the facility and charges of keeping inaccurate records.[137] Ultimately, the DNR culled his remaining herd.[138]

Similarly, in Lancaster County, which is home to the largest Amish settlement in the country, farms have had problems with CWD in 2018 and early 2022.[139] Both outbreaks resulted in the Pennsylvania Game Commission creating a quarantine zone around the county with testing checkpoints for sportsmen and cervid farmers.[140] While this practice ensures that harvested deer are not contaminated with CWD, it is problematic because it is a responsive strategy rather than a preemptive one.

d. State Agency Alternatives to Manage Captive Cervid Farms and CWD

Depending on the state, there are different ways to manage captive cervid farms and the CWD outbreaks that can potentially occur. This section of the article will investigate the current policies kept in place in the narrowly defined "Amish Belt" as well as the rest of the United States. Furthermore, this section will look at proposed solutions from legal scholars, interest groups, and public officials. The conclusion is that a moratorium on cervid farming should be implemented by states within the "Amish Belt" until a tighter regulation scheme can be formulated by these states in conjunction with federal programs that address CWD transmission.

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[134] *See Amish Population Profile, 2022*, *supra* note 62.

[135] *Id.*

[136] *Preserve Owner Uncooperative, Deer Escape as CWD Concerns Intensify*, *supra* note 4.

[137] *Id.*

[138] *Id.*

[139] *Discovery of Lancaster County Deer with Chronic Wasting Disease Leads to Quarantine Zone Expansion*, *supra* note 2.

[140] *Id.*

i. Current Approach to Management of Deer Farms by State Agencies in the "Amish Belt"

The States of Ohio, Pennsylvania, Indiana, Michigan, Minnesota, and Wisconsin use various mechanisms to manage captive cervid farms and the outbreak of CWD. Most of the states within the "Amish Belt" rely on some form of concurrent authority between the state departments of natural resources and agriculture.[141] The only state that solely invests the authority to regulate captive cervid farms to its department of agriculture is Pennsylvania.[142] Even though most of the states rely on concurrent authority, all of the states within the "Amish Belt" classify captive cervids as livestock in some fashion.[143] This concurrent form of authority can be beneficial as it allows for information sharing and increased oversight over captive cervid farms. However, given the differing goals of the agencies, conflicts can arise regarding their priorities in enforcement and regulation.

1. Analysis of the Hybrid Approach

The use of a hybrid approach is common across the Midwest given the popularity of farming as an industry in these states. The hybrid approach is taken when a state government gives the state departments of agriculture and natural resources concurrent authority over regulating captive cervid farms. Sometimes, this concurrent authority can look like the state departments of agriculture and natural resources having overlapping authority. In other circumstances, the state agencies overseeing agriculture and natural resources will have supplemental duties that fit into their respective focuses. Furthermore, the profitability for farmers and owners of rural land makes these states ideal for captive cervid farming. Depending on the state, the amount of concurrent authority exercised by the agencies varies.

In Ohio, the state's Department of Natural Resources requires those interested in captive cervid farming to fill out an application and obtain a license to own captive cervids.[144] The Ohio Department of Agriculture also requires that cervid farmers complete their own

[141] *See generally*, *Chronic Wasting Disease and Cervidae Regulations in North America*, Mich. Dept. of Nat. Res. 1 (Oct. 2018), https://gfp.sd.gov/userdocs/docs/CWDRegstableState-Province_Fall18.pdf.

[142] *Id.* at 7.

[143] Josh Honeycutt, *Captive Cervids Aren't Treated Equally Nationwide*, Realtree (Sept. 19, 2018), https://www.realtree.com/brow-tines-and-backstrap/captive-deer-and-elk-classifications-by-state.

[144] *Chronic Wasting Disease and Cervidae Regulations in North America*, *supra* note 141, at 6.

application to obtain a license to hold cervids as livestock and sets standards regarding the materials permitted to be used to build high fences for captive cervid farms.[145] When it comes to CWD outbreaks on captive cervid farms, both departments can exercise their authority to investigate or take actions.[146] In Michigan, state formulation for concurrent authority is slightly different with more clearly defined roles for the agencies.[147] The Michigan Department of Natural Resources is tasked with the licensing and registration of cervid farms as well as the inspection of these facilities.[148] On the other hand, the Michigan Department of Agriculture is responsible for operating the disease surveillance programs and conducting testing on captive cervids.[149]

While the hybrid approach may be beneficial in its ability to ensure that policymakers acquainted with wildlife and agricultural policy have a seat at the table, many people oppose the approach in favor of an alternative that wholly vests power in either the state agency responsible for regulating wildlife or the agency responsible for regulating agriculture. The trend of placing more power within a state's department of agriculture stems from successful lobbying by farmers to reap the benefits of less regulation surrounding captive cervid farming.[150] The underlying notion is that the state department of agriculture is less concerned with CWD and the general issues surrounding wildlife than state departments regulating wildlife.[151] However, proponents of the hybrid approach declare that involvement by a state's department of agriculture can spell positive benefits for the state.[152] Because state departments of agriculture are responsible for the inspection of meat products, the department of agriculture can provide a useful service in the regulation of venison harvested from captive cervids to ensure human health and safety.[153] Additionally, the state department of natural resources can use their institutional knowledge to handle the health concerns of the deer using a hybrid approach.[154]

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[145] *Id.*

[146] *See generally*, *Chronic Wasting Disease and Cervidae Regulations in North America*, *supra* note 141.

[147] *Id.* at 4.

[148] *Id.*

[149] *Id.*

[150] Kip Adams et. al, *Whitetail Report 2018*, Nat'l Deer Ass'n 1, 26 (2018), https://deerassociation.com/wp-content/uploads/2018/02/Whitetail_Report_2018.pdf.

[151] Miles Figg, *Are Wild Deer Wild?: The Legal Status and Regulation of White-Tailed Deer*, 23 J. Env't & Sustainability L. 35, 71-72 (2016).

[152] *See* Jordan R. McMinn, Note, *Seriously Doe: Why a Hybrid Approach to Regulating Deer Farms is Right for West Virginia*, 123 W. Va. L. Rev. 707, 719 (2020).

[153] *Id.*

[154] *Id.*

ii. Public Trust Doctrine and State Wildlife Agency Authority as a Solution

Outside of the hybrid approach, there are other approaches to captive cervid farm regulatory authority across the United States. Some states, like Texas, have completely left the authority to regulate captive cervid farms within the purview of the state's department of natural resources.[155] The underlying theoretical framework, as mentioned earlier, is the public trust doctrine. The public trust doctrine is the basis for conservation and wildlife law in the United States. The case of *Martin v. Waddell* was the first to formally recognize the public trust doctrine as the basis for management of wildlife in the United States.[156] The Supreme Court held that navigable and tide waters are the property of the public and, as such, should be managed by the state government for the benefit of the public.[157] Eventually, the decision in *Greer v. Connecticut* expanded the public trust doctrine to wildlife by holding that states manage the wildlife within their borders for the benefit of the public.[158]

The public trust doctrine is a principle of the North American Model of Wildlife Management.[159] The North American Model of Wildlife Management is the framework for much of conservation policy in the United States.[160] The idea behind the model was to provide for the scientific management of wildlife to ensure conservation of game species for generations to come.[161] The model was largely adopted in the United States and Canada in response to the problems posed by market hunting and the Industrial Revolution.[162] Proponents of the North American Model allege that captive cervid farming violates the principles of the model because it ignores the public trust doctrine and scientific management principles.[163] These same proponents, in turn, completely oppose the transfer of authority from state wildlife agencies to agricultural agencies.[164] The transfer of control undermines the public

[155] *See* Bailey v. Smith, 581 S.W.3d 374, 382 (Tex. Ct. App. 2019).

[156] Brigit Rollins, *The Public Domain: Basics of the Public Trust Doctrine*, Nat'l Agric. L. Ctr. (Apr. 6, 2023), https://nationalaglawcenter.org/the-public-domain-basics-of-the-public-trust-doctrine/.

[157] *Id.*

[158] *Id.*

[159] *See* Shane Mahoney, *The North American Model of Wildlife Conservation*, Prop. & Env. Rsch. Ctr. (June 19, 2019), https://www.perc.org/2019/06/19/the-north-american-model-of-wildlife-conservation/.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Captive Cervid Breeding*, *supra* note 37.

[164] *Id.*

trust doctrine and blurs the lines between livestock and wildlife, which can lead to undermining the entire North American Model.[165] That is why prominent conservation interest groups, like The Wildlife Society, explicitly support the sole delegation of rule-making authority and enforcement concerning captive cervid farms to state wildlife agencies rather than state agricultural agencies.[166] State wildlife agencies are better equipped to handle issues concerning the spread of diseases, like CWD, from captive to wild cervids, or vice versa.

iii. Opposition of Application of the Public Trust Doctrine to Captive Cervids

While many conservationists and sportsmen advocate for the sole ownership and management of wildlife by the state as trustee, farmers and proponents of the cervid farming industry advocate for strengthening the private property rights of cervid farmers. In states where the public trust doctrine is applied to captive cervids, there is a growing concern that the status of deer and other cervids as public property could weaken property rights for farmers and curb economic growth.[167] Specifically, if cervids are recognized solely as public property, then property owners are technically not able to be compensated for potential government culling of herds.[168] While state eradication of captive herds with animals infected with CWD may be necessary, the farmer may bear millions of dollars in losses without a guarantee of compensation.[169] The risk associated with investing in captive cervid farming increases when captive cervids are identified as public property to be managed by the state.

iv. Beyond State Agency Management: Proposal for National Management of Captive Cervid Farms

While states have been inconsistent on the management of captive cervid farms, especially in relation to CWD management policy, national management of CWD on captive cervid farms has been proposed by policymakers and scholars.[170] The argument for the authority of the federal government in regulating CWD would stem from the

[165] *Id.*

[166] *Id.*

[167] J.D. Kirby, *Private Property Rights in Captive Breeder Deer: How Wild Are They?*, 53 Tex. Tech. L. Rev. 345, 374 (2021).

[168] *Id.* at 375.

[169] *Id.*

[170] Ronald W. Opsahl, Comment, *Chronic Wasting Disease of Deer and Elk: A Call for National Management*, 33 Env't L. Rev. 1059, 1087-88 (2003).

Animal Health Protection Act (AHPA).[171] The Act gives the Secretary of Agriculture the power to promulgate rules restricting or prohibiting the interstate transportation of livestock as necessary to stop the spread of any disease or pest of livestock.[172] Because prions are classified as a "pest" under the AHPA and captive cervids are "farm-raised animals," there is a compelling argument that the transportation of captive deer and elk could be regulated under the Act.[173] Under these circumstances, the Secretary of Agriculture could establish a comprehensive program to monitor CWD and regulate the transportation of captive cervids.[174] For instance, the Secretary of Agriculture could implement a permitting process for the transportation of captive cervids between the states as well as temporarily banning transportation of captive cervids.[175] The regulatory scheme could even include testing requirements for farms looking to transport cervids into or out of the state to ensure the CWD is not present in their herds.[176]

Although federal management may seem like a way to counteract the establishment of laws that loosen the regulation of cervid farms, federal management may infringe on the traditional role of the states to be the primary conservation policymakers and enforcers. State agencies are much closer to the problems associated with its wildlife and are better situated to make and enforce policy concerning captive cervid farms and CWD. Moreover, the priorities of executive agencies morph between administrations, which may lead to inconsistent enforcement.

v. Supplemental Federal Regulation to Support Stopping the Spread of CWD

Currently, there is active and pending federal legislation meant to supplement the efforts of state, tribal, and local government entities to curb the transmission of CWD. One program that already exists to combat CWD is the Herd Certification Program ("HCP"). Creation of the HCP began in December 2003 with a proposed rule that was never officially put into effect until an amended version was implemented by the Animal and Plant Health Inspection Service ("APHIS"), under the Department of Agriculture, in 2012.[177] Specifically, The HCP encourages

[171] *Id.*

[172] *Id.* at 1088.

[173] *Id.*

[174] *See id.*

[175] *Id.*

[176] *Id.*

[177] *See generally* Chronic Wasting Disease Herd Certification program and Interstate Movement of Captive Deer and Elk, 68 Fed. Reg. 74513 (Dec. 24, 2003); *USDA Establishes a Herd Certification Program for Chronic Wasting Disease in the United States*, Chronic Wasting Disease All. (June 8, 2012), https://cwd-info.org/

APHIS to enter into cooperative agreements with state, tribal, and local government entities to regulate the interstate transportation and commerce of captive cervids.[178]

The HCP is a voluntary program that states can opt in to, which provides guidance and approval to participating state and tribal governments that create HCP programs to comply with the requirements published by APHIS.[179] While the HCP is voluntary for states to opt in to, any captive cervid farmer that intends to transport interstate must conform to the requirements of the federal HCP.[180] The long-term goals of HCP are to increase market confidence within the captive cervid farming industry, reduce the risk of transmission from and environmental contamination by CWD, and protect healthy, wild, and captive cervids.[181] As of 2017, twenty-eight states adopted HCP programs that comply with the requirements set forth by APHIS.[182]

Among the requirements created by APHIS, HCP certification for captive herds hinges on complying with testing, fencing, and inventory management requirements.[183] One of the more prominent regulations is that federally-approved state HCP programs must ensure that participating farms test any cervid over 12 months of age that dies from CWD.[184] Approved HCP programs endow enrolled farms with a specific CWD-risk status.[185] Participating farms are granted more preferential status with each year that passes without CWD infections amongst their herds.[186] Once a participating facility reaches five years without evidence of CWD, the captive cervid farm can be certified as "low risk" for transmitting CWD and interstate shipment from the herd is allowed.[187] However, this does not mean that the animals in facilities certified as "low risk" do not have CWD. For example, between January 2017 and May 2019, thirty-five cervid farms had CWD cases, and fourteen of these farms were certified as "low risk" under the guidelines of the HCP.[188]

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usda-establishes-a-herd-certification-program-for-chronic-wasting-disease-in-the-united-states/.

[178] *Cervids: CWD Voluntary Herd Certification Program*, Animal & Plant Health Inspection Serv., https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/cervid/cervids-cwd/cervids-voluntary-hcp (Sept. 14, 2023).

[179] *Id.*

[180] *See id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] James M. Kincheloe, et al., *Chronic Wasting Disease Transmission Risk Assessment for Farmed Cervids in Minnesota and Wisconsin*, 13 Viruses 1, 2 (Aug. 11, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8402894/.

While the HCP may sound close to the national management approach advocated for in the previous section, the difference is that the HCP is completely voluntary for states to join.[189] There is nothing within the APHIS rule establishing that opt-in states must compel captive cervid operations to enter into and comply with the APHIS-approved state HCPs, unless they ship animals interstate.[190] Because of the voluntary nature of the HCP for farms that do not transport cervid between states, the obvious drawbacks of the program is its lack of mandate and its lenient standards for participating farms to be classified "low risk" by the agency.[191]

Along with voluntary programs to decrease CWD transmission between captive cervids, there has been recently passed legislation that would support state funding for efforts to combat CWD.[192] The Chronic Wasting Disease Research and Management Act (CWDRA) was first introduced into the House of Representatives in early 2021 and passed over to the Senate in December of 2021.[193] The bill became law at the end of 2022 as part of the Omnibus Budget Bill.[194] The CWDRA increases funding to support state agencies' efforts to research CWD more thoroughly and engage in more effective management practices to curb the spread of CWD.[195] As of 2021, the average amount spent by states on researching and addressing CWD is over $700,000 annually, but actual amounts are highly variable.[196] For instance, Minnesota and Michigan each spent around $1,300,000 in 2021 to address CWD, while nearby Indiana spent just over $130,000 for the same purpose.[197] The federal government spends around $10 million annually in addressing CWD.[198] While some of this money is spent on partnerships between state and tribal agencies to address the transmission of CWD, a portion

[189] *See id.*

[190] *See* Responsibilities of States and Enrolled Herd Owners, 9 C.F.R. § 55.23 (2012).

[191] *See CWD Overview*, *supra* note 7.

[192] *E.g.*, Kristyn Brady, *Congress Passes Important Chronic Wasting Disease Legislation*, Theodore Roosevelt Conservation P'ship (Dec. 23, 2022), https://www.trcp.org/2022/12/23/house-senate-send-important-chronic-wasting-disease-legislation-presidents-desk/.

[193] *See* National Deer Association, *National Deer Association Celebrates CWD Research and Management Act Final Passage*, Outdoor Wire (Jan. 6, 2023), https://www.theoutdoorwire.com/releases/9c6a78e1-4c22-486d-9a6c-ced8c264c256.

[194] *Id.*

[195] Brady, *supra* note 192.

[196] *Id.*

[197] Noelle E. Thompson & J. Russ Mason, *The Cost of Combatting Chronic Wasting Disease*, Ass'n Fish & Wildlife Agencies (2022), https://www.fishwildlife.org/application/files/6416/6879/5372/Thompson_Mason-CWD_Costs-V2-Clean-29Aug22.pdf.

[198] Brady, *supra* note 192.

of these federal funds go toward indemnifying captive cervid owners who have their herds depopulated because of CWD-positive cases.[199] This Act will funnel money to state and tribal government entities, which will allow the policymakers closest to the issue to increase the magnitude of their efforts to combat CWD while enshrining it as a federal priority.[200] Traditional adherents to the North American Model of Wildlife Conservation and the public trust doctrine may be leery about this initiative being housed underneath the Department of Agriculture. However, this avenue seems to be the most appropriate, as the management of CWD can be invoked through the federal Animal Health Protection Act.[201]

The Chronic Wasting Disease Research and Management Act of 2022 (CWDRMA) is broken down into two segments: one segment that focuses on research and another that focuses on disease management and surveillance programs.[202] In total, the Act authorizes $70 million per fiscal year until the end of 2028.[203] Half of the money will be dispersed to state, tribal, and other public interest entities engaging in research to curb the transmission of CWD.[204] The other half will go toward helping increase funding for state and tribal agency/department programs that address the spread of CWD.[205] Additionally, the CWDRMA calls on the Secretary of the Department of Agriculture to conduct a review under the current department-managed HCP.[206] There has been pushback on the effectiveness of HCP because it allows captive cervids to be designated as "low risk" for CWD transmission.[207] Some conservationists and hunters think this program does not do enough to address the impact that captive cervid farms have on the spread of CWD, so conservation and special interest groups consider it a marginal victory that the language of the CWDRMA addresses the need to self-evaluate the HCP.[208]

In some ways, the newly-passed CWDRMA balances the heavy-handed approach of authorizing extensive management of CWD and captive cervid farms at the national level as well as the sovereignty of

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[199] *See* Chronic Wasting Disease Indemnification Program, 9 C.F.R. § 55.2 (2016).

[200] *See* Brady, *supra* note 192.

[201] *Id.*

[202] *See generally* Chronic Wasting Disease Research and Management Act, S. 4111, 117th Cong. (2022).

[203] *CWD Research and Management Act Approved by Congress*, Outdoor News (Dec. 24, 2022), https://www.outdoornews.com/2022/12/24/cwd-research-and-management-act-approved-by-congress/ .

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *See* Brady, *supra* note 192.

state and tribal agencies to make decisions concerning the spread and management of CWD. The CWDRMA also acts as a stronger aid to support state and tribal government efforts to combat CWD in captive and wild cervid populations than the HCP as it specifically calls on APHIS to re-evaluate the final rule establishing the HCP. However, because the Department of Agriculture would oversee re-evaluating its own program,[209] any attempt for reform of the HCP might prove to be fruitless. Furthermore, given that the average amount spent by state agencies is under $1 million annually,[210] the increase in funding will provide much needed financial support for a cause that may be difficult to rally support for within the smaller budgets housed by state and tribal governments. In other words, the Act supports the expertise of state and tribal agencies in spearheading the fight to stop transmission of CWD in cervid populations while enshrining CWD research and management as a national issue. Supplemental federal funding legislation is an ideal supplementary solution to provide support to state agencies while allowing them to retain their decision-making power.

vi. Ban on Cervid Farming—The Best Approach?

Although some conservationists and environmental scholars simply advocate for the resurrection or adherence to the public trust doctrine as a solution to managing cervid farms, there is a solution that goes further: a statutory ban on captive cervid farming by state governments. The solution may be disfavored by those stakeholders of the captive cervid farming industry, but some interest groups feel that this course of action is necessary to curb the transmission of CWD and keep infection rates low.[211] In 2021, conservation interest groups in Minnesota formed a coalition to lobby for a ban on the practice of captive cervid farming.[212] The group advocated for the Minnesota Legislature to buy out the deer farming industry, implement a moratorium on the further establishment of captive cervid farms, ban the transport of live cervids into the state, and ban the movement or transportation of the bodily fluids of cervids.[213]

[209] *See* Chronic Wasting Disease Research and Management Act, S. 4111, 117th Cong. (2022).

[210] *See* Brady, *supra* note 192.

[211] *See, e.g.*, Paul A. Smith, *Coalition Seeks to End Deer Farming in Minnesota*, Milwaukee J. Sentinel (Oct. 2, 2021, 4:48 PM), https://www.jsonline.com/story/sports/outdoors/2021/10/02/deer-farmers-would-bought-out-goal-protect-wild-deer-cwd/5946882001/.

[212] *Id.*

[213] *Id.*

Smaller localities have even taken to enacting ordinances to prohibit the establishment or expansion of deer farms.[214] In September 2022, the board of commissioners of St. Louis County, Minnesota passed an ordinance that banned the establishment or expansion of captive cervid farms within the county.[215] The feasibility of doing a large-scale ban prevents problems, namely pushback from the captive cervid farming industry and the cost of justly compensating these farmers. Furthermore, in the case of Amish cervid farmers, a state ban could be met with massive non-compliance, especially given their desire to be separated from the rest of society.[216]

Conclusion

To effectively manage the outbreak of CWD amongst deer herds in the "Amish Belt," the regulation of captive cervid farms needs to be part of the policy formulation. The long incubation period of CWD and its ability to go undetected make it easy for CWD to spread between captive and wild cervids, and the transportation of unknowingly infected captive cervids to other farms can spread CWD to previously unaffected regions.[217] While the knee-jerk reaction would be to ban the practice of captive cervid farming,[218] the prohibition of captive cervid farming would be unfeasible and have detrimental economic effects to established captive cervid farmers.

However, the privatization of captive cervids and classifying them as "livestock" has its own detriments. Governing captive cervids as "livestock" transfers power away from state wildlife agencies, who have institutional knowledge and resources to better address problems facing cervids, whether captive or wild. Federal legislation that supports state agency efforts to research CWD more thoroughly and develop more effective management solutions is a supplemental solution that should be embraced.[219] Federal funding legislation that supplements state agency efforts to curb the transmission of CWD allows for states to increase the magnitude of their work combating CWD while maintaining

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[214] John Meyers, *St. Louis County Makes Deer Farm Ban Permanent*, Duluth News Trib. (Sept. 27, 2022, 4:10 PM), https://www.duluthnewstribune.com/sports/northland-outdoors/st-louis-county-makes-deer-farm-ban-permanent.

[215] *Id.*

[216] *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Hostetler, *supra* note 68, at 35.

[217] *See Captive Cervid Breeding*, *supra* note 37.

[218] *E.g.*, Smith, *supra* note 211.

[219] *E.g.*, Chronic Wasting Disease Research and Management Act, S. 4111, 117th Cong. (2022); *Cervids: CWD Voluntary Herd Certification Program*, *supra* note 178.

its policymaking sovereignty. However, given that CWD is still found even on HCP certified low risk farms,[220] these federal programs could benefit from an independent audit or evaluation by organizations with technical expertise on CWD and scientific management principles. In conjunction with federal legislation supplementing state funding for CWD management and research, the ideal solution would be for state legislatures within "Amish Belt" state governments to statutorily enact language upholding the public trust doctrine and granting sole authority to state wildlife agencies to manage captive cervid farms.

[220] *E.g.*, Kincheloe, *supra* note 188, at 2.

The Olympic Games: An Environmental Calamity

Allyson Hammond*

Introduction

Every four years since 1896, over 400 countries around the world become unified for one purpose: The Olympic Games.[1] Fans across continents gather around their televisions to cheer for their country as they watch the athletes that represent them compete in over 400 different sporting events.[2] The Olympics is broadcasted live, and those watching at home often feel as though they are there in real-time, seeing everything there is to see.[3] However, there are many things left unseen, like the devastating impact that hosting the Olympic Games has on its surrounding environment.[4] These environmental consequences stem from "building new stadiums, hotels, parking lots, and other infrastructure[,] to handling the sanitation from all those toilets."[5] Today, because of the construction of Olympic infrastructure, the environment is subject to irreparable global harm; this is because neither the International Olympic Committee (IOC)—the body responsible for overseeing the Game—nor the Olympic Charter imposes specific environmental standards on host cities. This Note argues that the Olympic Charter must adopt specific environmental standards that each host city is required to adhere to; without these standards, motivations for economic benefit are

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[1] *Olympic Games*, Olympics, https://olympics.com/en/olympic-games (last visited Nov. 13, 2022) (explaining what the Olympic Games are).

[2] *Id.* (describing the number of sporting events that take place during the Olympic Games).

[3] *What is the IOC's policy on broadcasting the Olympic Games?*, Int'l Olympic Comm., https://olympics.com/ioc/faq/olympic-marketing/what-is-the-ioc-s-policy-on-broadcasting-the-olympic-games (last visited Nov. 13, 2022) (discussing the Olympic Games' broadcast policy as it relates to recording and screening the Games).

[4] Marc Zemel, *How Powerful is the IOC? – Let's Talk About the Environment*, 1 Chi.-Kent J. Env. & Energy L., 173, 176 (2011) ("The Olympic Games remain an unsustainable goliath.").

[5] *Id.*

placed above concern for environmental sustainability, and irreversible environmental degradation is the result.

The Olympic Charter is the document that governs the Olympic Games.[6] Unfortunately, the Olympic Charter does not impose any type of specific environmental standards that host cities must comply with—instead, it vaguely mentions the environment in one sentence.[7] Without specific environmental standards from the IOC, host cities degrade the environment without consequences.[8] The Olympic Charter must enact specific environmental standards to provide greater protection of the environment during the Olympic Games.[9] Moreover, the IOC is composed of wealthy individuals notorious for participating in corrupt practices, such as buying and selling votes when making host city determinations.[10] No oversight of the IOC exists—rather, the public is expected to put their full faith and trust into a body that operates with virtually no transparency and that puts economic gain over environmental sustainability.[11]

Prior to the 1992 Olympic Games held in Albertville, France, the IOC had never formally recognized the need for environmental sustainability.[12] In 1994, following the environmental disaster that was the Albertville Games, the IOC finally recognized the environment as a third pillar of Olympism.[13] After the adoption of the third pillar, the Olympic Games should have become more environmentally conscious, but research suggests that the sustainability of the Games has declined over time.[14]

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[6] *See The Olympic Charter*, Paris 2024, https://www.paris2024.org/en/the-olympic-charter/#:~:text=The%20Olympic%20Charter%20is%20the,Federations%20and%20National%20Olympic%20Committees (last visited Nov. 13, 2022).

[7] *Id.*

[8] *See generally* Gina S. Warren, *Big Sports Have Big Environmental and Social Consequences*, 85 Mo. L. Rev. 495, 502-03 (2020).

[9] *Id.*

[10] *Structure of the Olympic Movement*, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Games-Salt-Lake-City-2002-Winter-Olympic-Games/Fundamentals-and-Ceremonies/Fundamentals-and-Ceremonies-3-4-Salt-Lake-City-2002.pdf (last visited Mar. 19, 2023).

[11] Sarah DeWeerdt, *In the sustainability race, the Olympic Games are lagging behind*, Anthropocene (Apr. 20, 2021), https://www.anthropocenemagazine.org/2021/04/in-the-sustainability-race-the-olympic-games-are-lagging-behind/.

[12] Hart Cantelon & Michael Letters, *The Making of the IOC Environmental Policy as the Third Dimension of the Olympic Movement*, 35(3) Int'l Review for the Socio. of Sport 294, 300 (2000).

[13] Caitlin Pentifallo & Rob VanWynsberghe, Blame it on Rio: Isomorphism, Environmental Protection and Sustainability in the Olympic Movement, 4 Int'l J. of Sport Pol'y and Pol. 427, 431 (2012).

[14] Cantelon & Letters, *supra* note 12, at 301.

Preparation to host the Olympic Games involves vast amounts of construction; host cities must build temporary Olympic cities that can accommodate millions of people.[15] The construction of these cities wipes out ecosystems and the flora and fauna that exist within them.[16] Before a city can be deemed a host city, it must go through two different phases, wherein it proves to the IOC that it is "green" enough to be a host.[17] However, cities frequently exaggerate their true level of sustainability, and because it is a self-reporting process, no independent verification of cities' reports are made.[18] This type of self-reporting bias cannot exist if the goal of the Olympic Games is to become environmentally sustainable.

As of now, the process entails the host city and the IOC entering into a contract governing how the Games are to be managed.[19] Nevertheless, no enforceable standards exist when it comes to the environment; if, though, the IOC amended the contract to include "best management practices," as they relate to environmental sustainability, the IOC would be granted more authority and oversight over the Games.[20] The IOC could impose environmental standards on host cities in two different ways: Through the contract theory or treaty law theory.[21] The contract theory includes express, strict environmental standards that host cities must adhere to.[22] The treaty law theory states that because the Olympic Charter has been recognized in court as an international agreement, countries' participation in the Games means they assent to the Olympic Charter and its' requirements.[23] It therefore follows that if strict environmental standards were to then be written into the Olympic Charter, countries would therefore have to abide by them, or be in violation of international law.[24] To reach true environmental sustainability, the Games could be held on a much smaller scale, or

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[15] *See* Müller et al., *An evaluation of the sustainability of the Olympic Games*, 4 Nature Sustainability 340, 341-42 (2021).

[16] *See generally* Charles Vercillo, *Rio's 2016 Olympic Golf Course: City's Last Remaining Ecosystems Left "in the Rough*," 47 U. Miami Inter-Am. L. Rev. 221, 225 (2016).

[17] Alexandra L. Sobol, *No Medals for Sochi: Why the Environment Earned Last Place at the 2014 Winter Olympic Games, and How Host Cities Can Score a Green Medal in the Future*, 26 Vill. Envtl L. J. 169, 171 (2015).

[18] Arnout Geeraert & Ryan Gauthier, *Out-of-control Olympics: why the IOC is unable to ensure an environmentally sustainable Olympic Games,* 20 J. of Env. Pol'y & Planning 16 (2018).

[19] Ian Guthoff, *Creating a More Sustainable Olympic Games,* 44 Syracuse J. Int'l & Com. 357, 363 (2017).

[20] *Id.* at 394.

[21] *See* Zemel, *supra* note 4.

[22] *Id.*

[23] *Id.*

[24] *Id.*

the Games could rotate among several Olympic Games-designated cities; this would result in less construction and less environmental degradation.[25] Lastly, if the IOC were to be replaced with an independent body to undertake environmental audits on potential host cities, it would strengthen the likelihood that host cities are honest about the state of their city's environment when going through the process of applying to be a host city.[26]

a. The Olympic Charter

The Olympic Games are governed by the Olympic Charter, which "contains the rules adopted by the [International Olympic Committee] and establishes relationships with International Federations and National Olympic Committees."[27] The International Olympic Committee (IOC) is the ultimate overseer of the Olympic Games.[28] One of its many duties is to make amendments to the Olympic Charter.[29] The Olympic Charter defines the rights and obligations of the IOC, the International Federations (IF) and the National Olympic Committees (NOC), as well as the Organizing Committees for the Olympic Games (OCOG).[30] All of the constituents just named—the IF, NOC, and OCOG—must comply with the Olympic Charter in order to participate in the Olympic Games.[31] The IOC is the "supreme authority" of the Olympic Games and is therefore responsible for ensuring that the Olympic Games are promoting "environmental well-being" in alignment with the organization's goals.[32]

The Olympic Charter is 106 pages long and only makes mention of the environment in one single line when it references the role the International Olympic Committee plays: "[T]o encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly."[33] In 1999, the International Olympic Committee adopted

[25] *See* DeWeerdt, *supra* note 11.

[26] Geeraert & Gauthier, *supra* note 18, at 27.

[27] *The Olympic Charter*, Paris 2024, https://www.paris2024.org/en/the-olympic-charter/#:~:text=The%20Olympic%20Charter%20is%20the,Federations%20and%20National%20Olympic%20Committees (last visited Nov. 13, 2022).

[28] Eli Wolff, *What's the IOC – and Why Doesn't It Do More About Human Rights Issues Related to the Olympics?*, Univ. of Conn. (Feb. 24, 2022), https://education.uconn.edu/2022/02/24/whats-the-ioc-and-why-doesnt-it-do-more-about-human-rights-issues-related-to-the-olympics/#.

[29] *Id.*

[30] Zemel, *supra* note 4, at 180.

[31] *Id.*

[32] *Id.*

[33] Wolff, *supra* note 28.

Agenda 21.[34] Agenda 21 "seeks to encourage nations participating in the Olympic Games to participate in sustainable practices."[35] This followed the United Nations Conference on Environment and Development (UNCED) in 1992 in Rio de Janeiro, where the UN adopted its own Agenda 21.[36] The Olympic Movement's Agenda 21 was, ironically, published with the support of Shell Oil.[37] The overseer of the implementation of Agenda 21 is the Sustainability and Legacy Commission (SLC).[38] The SLC is the body responsible for advising the IOC on sustainability and legacy matters to aid it in making "informed, balanced decisions that maximi[z]e positive impacts, minimi[z]e negative impacts and foster positive change and legacies in the social, economic, and environmental spheres."[39] However, despite the IOC's adoption of Agenda 21, it has failed to impose specific binding requirements or regulations to achieve its objectives; rather, the IOC President merely "invited" the Olympic Movement to comply with the Agenda 21 recommendations to the best of their abilities..[40] Further, while Agenda 21 is a plan of action, it isby its terms, only "'soft law' that is not legally binding."[41]

Moreover, within the Manual for Candidate Cities who wish to host future Olympic Games, there exists Theme 4.[42] Theme 4 indicates that the IOC will consider the environmental impact of hosting the games in a specific location, yet it fails to quantify the amount of weight environmental impact actually holds in making host city determinations.[43] Of course, however, environmental impact is just one consideration the IOC makes when it chooses a host city, and environmental impact can easily be outweighed by other, more attractive, factors.[44] For example, the IOC rejected Tokyo's bid to host the 2016 Olympic Games, despite the fact that its plan was widely seen as the most environmentally ambitious design of the year.[45]

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[34] Guthoff, *supra* note 19.

[35] *Id.*

[36] Sobol, *supra* note 17.

[37] Int'l Olympic Comm., Sport and Env't Comm'n, *Olympic Movement's Agenda 21,* https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Olympism-in-Action/Environment/Olympic-Movement-s-Agenda-21.pdf (last visited Mar. 30, 2024).

[38] *Id.*

[39] *Mission, Sustainability and Legacy Commission,* Int'l Olympic Comm., https://olympics.com/ioc/sustainability-and-legacy-commission#:~:text=The%20IOC%20Sustainability%20and%20Legacy,and%20legacies%20in%20the%20social%2C (last visited Aug. 16, 2023).

[40] Zemel, *supra* note 4, at 182.

[41] *Id.*

[42] Zemel, *supra* note 4, at 185.

[43] *Id.*

[44] *Id.* at 194-95.

[45] *Id.*

Today, the Olympic Charter does not impose any environmental standard or regulation that cities must meet before they can be approved to be a host city for the Olympic Games.[46] As a result of the lack of environmental standards within the Olympic Charter, each city given the opportunity to host the Games subjects itself to environmental degradation risks due to the construction of Olympic stadiums and temporary infrastructure.[47] These stadiums are likely to be abandoned subsequent to the Olympic Games, such as the stadium constructed in South Korea for the 2018 Winter Olympics.[48] The leader of Sydney, Australia's bid to host the Olympic Games, Robert McGeoch, stated that "[s]elective compliance [for environmental standards] tends to produce only the most superficial responses to environmental responsibilities… [t]he fact that organizations are able to adopt only some measures might demonstrate the inadequacy of a discretionary approach to [environmental] compliance."[49] However, so long as there is an absence of binding environmental standards, compliance with any environmental commitment or goal remains optional; further, compliance with these standards relies on the host city to hold itself accountable, as opposed to an independent body.[50] Additionally, "[t]he problem with the host city contract is not so much that the [host city's] mandate is discretion-based, but that it is vague."[51] The host city contract does not actually define clear environmental standard goals, but instead, only requires the host city to embrace sustainable development while promoting the protection of the environment—requirements that are quite subjective.[52]

i. The International Olympic Committee

The IOC is composed of an Executive Board consisting of the President, four Vice-Presidents, and ten other members elected by secret ballot, cast by the Session for a four-year term.[53] The Session is the general meeting of all the members of the IOC.[54] A member of the IOC may serve up to two terms, but no more.[55] In total, the number of

[46] *Id.* at 217.

[47] Warren, *supra* note 8.

[48] *Id.*

[49] Zemel, *supra* note 4, at 188.

[50] *Id.*

[51] Geeraert & Gauthier, *supra* note 18.

[52] *Id.*

[53] *IOC Executive Board*, Int'l Olympic Comm., https://olympics.com/ioc/executive-board#:~:text=The%20Executive%20Board%2C%20founded%20in,for%20a%20four%2Dyear%20term (last visited Nov. 13, 2022).

[54] *IOC Sessions*, Int'l Olympic Comm., https://olympics.com/ioc/session#:~:text=The%20Session%20is%20the%20general,one%2Dthird%20of%20the%20Members (last visited Nov. 13, 2022).

[55] *Id.*

IOC members may not exceed 115 people.[56] The IOC's members have been historically composed of wealthy businessmen, individuals coming from powerful political families, and past Olympic athletes.[57] How would people that come from these types of backgrounds and that are largely accustomed to "lavish gifts, corporate largesse, bribery, and extortion as a means of facilitating transactions," care about how the staging of the Olympic Games impacts the surrounding environment? [58] If its members are used to this kind of power and wealth, whether in a business or political sense, economic benefit likely trumps concern for environmental sustainability.[59] Els van Breda Vriesman, a former IOC member, stated that "when it came to voting, some members didn't see the environment as important, 'despite the fact that the IOC is so committed to the environment.'"[60]

1. Lack of Accountability Within the International Olympic Committee

The members of the IOC have included "princes from reigning royal families," a head of state, academics, sports leaders, and athletes.[61] This becomes an even greater issue in the context of implementation of rules within the IOC itself because the IOC is responsible for holding its own members accountable and ensuring that correct procedures and policies are being followed.[62] Critics of this self-policing system have pointed out that the powerful members of the IOC are unlikely to police its members and subsidiaries for behavior that it would very likely find acceptable.[63] Who is holding IOC members accountable if the IOC itself is failing to do so? There is currently no accountability or transparency within the IOC beyond its insular method of self-policing.[64] As critics have said— "the IOC could change itself and the way it operates to be more accountable and transparent to its global constituents."[65]

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[56] *The Olympic Charter*, Paris 2024, https://www.paris2024.org/en/the-olympic-charter/#:~:text=The%20Olympic%20Charter%20is%20the,Federations%20and%20National%20Olympic%20Committees (last visited Nov. 13, 2022).

[57] *Structure of the Olympic Movement*, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Games-Salt-Lake-City-2002-Winter-Olympic-Games/Fundamentals-and-Ceremonies/Fundamentals-and-Ceremonies-3-4-Salt-Lake-City-2002.pdf (last visited Mar. 19, 2023).

[58] Angela Gamalski, *An Olympic Joke: Sanctioning the Olympic Movement*, 27 Mich. St. Int'l L. Rev. 305, 326 (2019).

[59] *Id.*

[60] Kharunya Paramaguru, *The Not So Sustainable Sochi Winter Olympics*, Time (Jan. 30, 2014), https://time.com/2828/sochi-winter-olympics-environmental-damage/.

[61] *Structure of the Olympic Movement*, *supra* note 10.

[62] Gamalski, *supra* note 58.

[63] *Id.*

[64] *Id.*

[65] *Id.*

2. Corruption Within the International Olympic Committee

With the IOC largely being made up of individuals accustomed to money and power comes the chance that these members are engaging in corrupt behavior.[66] In 1998, Marc Hodler, a respected IOC member from Switzerland, shed light on the fact that vote "buying" and "selling," a process that involves cities bidding to host the games, were practices regularly taking place within the IOC.[67] Even further, rumors circulated alleging that multiple members of the IOC had, in exchange for votes, received "lavish gifts and favors."[68] This is problematic for a myriad of reasons, but cities that are doing everything they can for an opportunity to host the games, including bribing members of the IOC, are likely to be doing so for the economic benefit that often comes from hosting the Olympic Games.[69] When economic benefit is the focal point of a city's purpose for hosting the Games, pressure on city officials increases, which often encourages these officials to sidestep or ignore existing procedural rules for urban development and restructuring.[70] Thus, environmental impact of construction of Olympic infrastructure is given less concern than economic incentive, and this environmental negligence is compounded by the IOC's participation in buying and selling votes.[71] Furthermore, these allegations completely contradict Theme 4.[72] The IOC cannot genuinely consider the environmental impact of granting a city the option to host the Olympic Games if its foremost concern is deriving an economic benefit from its decision.[73] When short-term economic gain is placed at the forefront of the decision to host the Olympics, cities ignore the long-term consequences—irreversible degradation to the environment, such as what happened in the Albertville Olympic Games in 1992.[74]

b. History of Sustainability and the Games

Environmental responsibility is often sacrificed for the economic gain and international prestige that accompanies hosting the

[66] *Id.*; Mason et al., *An Agency Theory Perspective on Corruption in Sport: The Case of the International Olympic Committee*, 20 J. of Sport Mgmt. 52, 53 (2006) (discussing allegations of corruption within the IOC).

[67] Mason, *supra* note 66.

[68] *Id.*

[69] *Id.* at 56 (highlighting that hosting the Olympics is often a lucrative venture for cities).

[70] Zemel, *supra* note 4, at 506-07.

[71] Mason, *supra* note 66.

[72] Zemel, *supra* note 4; Mason, *supra* note 66.

[73] Zemel, *supra* note 4; Mason, *supra* note 66.

[74] Pentifallo & VanWynsberghe, *supra* note 13, at 430.

Olympic Games.[75] Prior to the 1992 Olympic Games held in Albertville, France, the IOC had no environmental policy, nor did it articulate any environmental guidelines for bidding or hosting sites.[76] "It was not until Albertville's environmental blunder…that the IOC began to formally institutionalize the role of sustainability and environmental protection."[77] Thus, it was only in 1994 that the IOC recognized the environment as a third pillar of Olympism, along with sport and culture.[78]

The most sustainable Winter Olympics took place in Salt Lake City, Utah, in 2002, and in Albertville, France, in 1992.[79] These Games are also the most sustainable Olympic Games on record to date.[80] The Salt Lake City Games had a score of 71 and the Albertville Games had a score of 69.[81] The most sustainable Summer Olympics were the Barcelona, Spain, Games in 1992; these Games had a score of 56.[82] The fact that earlier Games scored higher in ecological sustainability than the later Games reveals that sustainability within the Olympic Games is declining over time, despite the IOC touting the contrary.[83]

Although Albertville is named as one of the most sustainable Olympic Games in history, at the time of the Games, Albertville received disapproval due to the environmental degradation and the irreparable harm the Games had on the natural environment.[84] The fact that the Albertville Games are ranked as one of the most sustainable Olympic Games in history is mainly because it had only a moderate number of visitors and personnel, and few new venues were built.[85] Preparation for the Albertville Games included the explosion of entire sides of mountains and the destruction of large swaths of trees.[86] The Games' bobsled course was built in an avalanche zone and was cooled with 45 tons of ammonia, a chemical that can be damaging to biodiversity.[87] Some argue

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[75] Sobol, *supra* note 17, at 179-80.

[76] Cantelon & Letters, *supra* note 12.

[77] Pentifallo & VanWynsberghe, *supra* note 13, at 431.

[78] Sobol, *supra* note 17 (describing adopting the environment as a pillar of Olympism).

[79] Martin Müller et al., *An Evaluation of the Sustainability of the Olympic Games*, Nature Sustainability (Apr. 19, 2021), https://www.nature.com/articles/s41893-021-00696-5#:~:text=The%20most%20sustainable%20Olympics%2C%20all,score%20(M%20%3D%2056).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Pentifallo & VanWynsberghe, *supra* note 13, at 430.

[85] John Karamichas, *Tokyo 2020: How did the latest Olympics rank against others for sustainability?*, The Conversation (Aug. 11, 2021), https://theconversation.com/tokyo-2020-how-did-the-latest-olympics-rank-against-others-for-sustainability.

[86] Zemel, *supra* note 4, at 186.

[87] *Id.*; *see Impact of ammonia emissions from agriculture on biodiversity*, RAND,

that if the IOC would have implemented a carefully considered policy for environmental protection, much of the excessive damage could have been avoided in Albertville. However, the IOC did not adopt any type of environmental standard until after the Albertville Games, and even with these "standards," environmental sustainability within the Games has continued to decline.[88] The Games' environmental damage gained attention from international media and the public, but despite global awareness of the environmental harm that took place in Albertville, the IOC refused to ever publicly admit that its Olympics had severely and permanently affected the environment.[89]

Although the IOC added the environment as a pillar of Olympism in 1994 following Albertville, the Games continue to harm the environment.[90] In 2008, notwithstanding its status as one of the world's largest polluters, China was deemed "green" enough to host the Olympic Games and was awarded the opportunity to be the host.[91] Before China was selected to be the host city, IOC officials indicated that they expected both air and water quality in Beijing to fall within World Health Organization Standards.[92] However, in the summer of 2008, a professor from China contended that compliance with those standards "appears rather doubtful at this point."[93] Although the IOC had relayed expectations to the public and to Beijing, there was no follow-through, as Beijing was not subject to any formal consequences from the IOC.[94] Likewise, Beijing was not particularly sustainable in its construction of Olympic venues.[95] In Beijing, of the 37 total Olympic venues utilized for the Games, less than half used structures that were already in existence prior to the Games and nine of the structures were temporary and "disposable."[96] The 2010 Winter Olympic Games were held in Vancouver and Whistler and environmentalists claim that 100,000 trees, including four acres of old growth, were razed for the temporary "Celebration Plaza."[97] In 2018, the Winter Olympics were held in South Korea, wherein a new stadium was constructed for the

https://www.rand.org/randeurope/research/projects/impact-of-ammonia-emissions-on-biodiversity.html (last visited Nov. 20, 2022).

[88] Cantelon & Letters, *supra* note 12, at 301.

[89] *Id.*

[90] Sobol, *supra* note 17, at 172 (describing adopting the environment as a pillar of Olympism).

[91] *See* Zemel, *supra* note 4, at 193.

[92] *Id.* at 184.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 193.

[96] *Id.*

[97] *Id.* at 176.

Games, which cost $110,000,000 and held 35,000 people.[98] This stadium was demolished shortly following the conclusion of the Games.[99] "No matter how 'green' a developer makes a building, if it is only used for two weeks and then demolished, it is the antithesis of sustainable.[100]

In 2020, the Summer Olympics were held in Tokyo, Japan.[101] Prior to the Tokyo Olympic Games, there existed 65,000 square feet of open-air gardens in the heart of the city.[102] However, these gardens were sacrificed for the construction of an Olympic Aquatic Center.[103] The city of Tokyo therefore sacrificed a total of nine football fields worth of green space for the construction of one single building.[104] This was not the only way in which the environment was sacrificed for construction of Olympic infrastructure for the Tokyo Games; just for the construction of the plywood used as the form wood for the concrete casting of the Stadium alone, Japan used timber from rainforests home to threatened orangutans, which evoked a response from US-Based Rainforest Action Network along with 40 other non-governmental organizations ("NGOs").[105]

The 1998 Winter Olympics in Nagano, Japan marked the first Games at which the IOC had a clearly articulated environmental protection policy; however, the most sustainable Olympic Games to date were held prior to this in the Summer of 1992 and in the Winter of 2002.[106] Between 1992 and 1994, the IOC went from having no environmental policy in place to integrating environmentalism into its philosophy of Olympism; however, this has unfortunately proven to be an insufficient means of achieving sustainable environmental practices.[107] In a study conducted that compared 16 different Summer and Winter Olympic Games since 1992, researchers compared three dimensions of sustainability: How many new venues were built for the games as part of the ecological dimension of sustainability; how many people were displaced from their homes and neighborhoods due to Olympics-related

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[98] Warren, *supra* note 8, at 502-03.

[99] *Id.*

[100] *See generally* Zemel, *supra* note 4, at 193.

[101] Garrett Sullivan, *Everything That Glitters Is Not Gold: The Argument for a Permanent Olympic City*, Univ. of Notre Dame Coll. of Arts and Letters, https://freshwriting.nd.edu/essays/everything-that-glitters-is-not-gold-the-argument-for-a-permanent-olympic-city/ (last visited Mar. 23, 2024).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] David Thorpe, *Olympic Games are Getting Less, Not More, Sustainable*, The Fifth State (Apr. 21, 2021), https://thefifthestate.com.au/innovation/building-construction/olympic-games-are-getting-less-not-more-sustainable/.

[106] Cantelon & Letters, *supra* note 12; *Id.*; DeWeerdt, *supra* note 11.

[107] Cantelon & Letters, *supra* note 12, at 295.

construction as part of the social dimension; and cost overruns as part of the economic dimension.[108] The study scored each indicator on a scale of 0 (the least sustainable) to 100 (the most sustainable).[109] The average ecological sustainability score was 44, which would be considered a failing grade, if such a grading scale were to be used.[110] These results, researchers argue, signal that the Olympics have the potential to be much more sustainable than they currently are.[111]

The 1992 Summer Olympics held in Barcelona, one of the most sustainable Olympic Games to date, were influenced in large part by the Earth Summit in Rio and European social democracy, and were a large reason as to why the city of Barcelona, in preparation for the Games, was developed sustainably.[112] A social democracy is a system "in which extensive state regulation, with limited state ownership, has been employed by democratically elected governments in the belief that it produces a fair distribution of income without impairing economic growth."[113] The 1992 Barcelona Games proved that environmental protection can be perfectly integrated within the organization of large sporting events.[114] The Barcelona City Council planned to implement environmental regenerations along the metropolitan area in Barcelona the same year that the Games were to take place.[115] The City Council's strategy was based on three milestones: The shoreline renewal, reduction of atmospheric pollution, and the promotion of green areas.[116]

When preparing for the 2002 Winter Olympics in Salt Lake City, Salt Lake City's Olympic Committee (SLOC) worked closely with its Environmental Advisory Committee to ensure all twelve of the environmental goals found in its Candidature File were met.[117] Although Salt Lake City is seen as one of the most sustainable Games to date, it faulted on many issues in relation to the environment.[118] For one, the SLOC used land for the Men's and Women's Alpine Skiing events that was previously undeveloped and protected.[119] The government "traded"

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[108] *Id.*

[109] DeWeerdt, *supra* note 11.

[110] *Id.*

[111] *Id.*

[112] *Environmental Legacy*, Barcelona Olímpica, https://www.barcelonaolimpica.net/en/legate/legado-economico-2-2-2/ (last visited Nov. 18, 2022).

[113] *Social Democracy,* Merriam-Webster, https://www.merriam-webster.com/dictionary/social%20democracy (last visited Jan. 12, 2023).

[114] *Environmental Legacy*, *supra* note 112.

[115] *Id.*

[116] *Id.*

[117] Sobol, *supra* note 17 (discussing Salt Lake City's commitment to environmentalism).

[118] *Id.*

[119] *Id.* at 179.

over 1,300 acres of previously designated National Forest land to the private Snowbasin Resort, disregarding conservation groups that argued that the land traded was more ecologically valuable than the land obtained.[120] In order to facilitate this, not only did Congress temporarily suspend the Endangered Species Act, which previously protected this land from development, but it did so while exempting its decision from public review.[121]

The least sustainable Games, the study concluded, were the 2014 Winter Olympics held in Sochi and the 2016 Summer Olympics held in Rio de Janeiro.[122] The Sochi Games had an ecological score of 24 and the Rio de Janeiro Games scored at 29.[123] These are vastly lower ecological scores than the most sustainable Games in history, which leads to the conclusion that there is a lack of oversight, consistency, and regulation when it comes to the Olympic Games and its continued non-relationship with environmental sustainability.[124] Bolstering that inference is the fact that the largest gap between the most sustainable Games and the least sustainable Games is 24 years.[125] Furthermore, the 2010 Winter Games held in Vancouver, Canada, were the first Games proclaimed by the Olympics to be "sustainable," although Vancouver's sustainability score fell at a low 53 points.[126] Ironically, the Games prior to Vancouver 2010 were more sustainable from Vancouver onward.[127]

When Russia first placed its bid to host the 2014 Winter Olympics, it initially told IOC members it would be staging a "zero waste" Games that followed green building standards.[128] It touted a green Games and claimed that sustainability would be one of its main focal points and that it was going to deliver the games "in harmony with nature."[129] However, the results of the Sochi Olympics were extremely damaging to the surrounding environment and the flora and fauna that exist within it.[130] Suren Gazaryan, a zoologist and member of the environmental campaign group Environmental Watch of the North Caucasus (EWNC), documented multiple atrocities accompanying the preparation for the Sochi Olympics that directly contradicted Russia's claim for a green games.[131] Working with the EWNC, Gazaryan documented evidence

[120] *Id.*
[121] *Id.* at 180.
[122] DeWeerdt, *supra* note 11.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Paramaguru, *supra* note 60.
[129] *Id.*
[130] *Id.*
[131] *Id.*

of illegal waste dumping and infrastructure construction that blocked the migration routes of animals such as the brown bear.[132] Further, the EWNC found that crushed-stone quarries had been mined in off-limit areas of Sochi National Park and that new threats of landslides, erosion, and avalanches had been created.[133] Additionally, mudslides had appeared on the slopes of mountain ridge Aibga as a result of the continuous deforestation and construction the land was subject to, including the placement of ski trails and chair lifts.[134] Although the IOC claims it emphasizes the importance of environmental sustainability when it comes to building Olympic infrastructure, "[t]he IOC [was] notably absent from the discussion around Sochi's environmental degradation."[135]

During the 2016 Summer Olympics in Barcelona, golf was reintroduced as an official event.[136] To accommodate this reintroduction, the city of Rio de Janeiro built an Olympic golf course and it did so on land adjoining the Marapendi lagoon, which is land that is "historically known to be ecologically valuable and environmentally protected."[137] Not only is the Marapendi lagoon environmentally protected, but it is also situated in the Atlantic Forest biome and contains the highest biodiversity index of any other biome on the planet.[138] Furthermore, "sixty percent of Brazil's endangered species call the [Atlantic Forest biome] home, some of which inhabit the vicinity of the Olympic golf course."[139] To be successful in its construction of the golf course, the city of Rio passed a law known as Complementary 125—this effectively stripped the Marapendi lagoon of its environmental protection, allowing construction to take place on the land.[140] This is additional evidence that host cities of the Olympic Games sidestep procedural processes in order to expedite construction of Olympic infrastructure.[141] The Olympic golf course in Rio was built over the course of a three-year period and construction resulted in suppression and fragmentation of native vegetation; furthermore, local biodiversity was reduced, which resulted in the loss of habitat and native species of flora and fauna, some of them already being endangered prior to this intrusion.[142] One of the

[132] *Id.*

[133] Sobol, *supra* note 17, at 189 (explaining the result of construction in Sochi National Park).

[134] *Id.*

[135] *Id.* at 191.

[136] Vercillo, *supra* note 16.

[137] *Id.* at 226.

[138] *Id.* at 231.

[139] *Id.* at 232.

[140] *Id.*

[141] Zemel, *supra* note 4, at 507.

[142] Emmett Knowlton, *Here is what the Abandoned Venues of the Rio*

local species subject to danger or vulnerability from the construction and upkeep of the Olympic golf course is the reptilian species known as the caiman.[143] Following the construction of the golf course's ponds, some caiman migrated into them and are now at risk for exposure to chemicals and fertilizers that are used in the general upkeep and maintenance of golf courses.[144] Additionally, the Olympic golf course is covered with a non-native grass that requires the use of nitrogen fertilizer, a chemical extremely damaging to wildlife located both on and near the golf course.[145] Consequently, the local flora and fauna that inhabit the land's natural habitat, which was sand, now face decreased chances of survival.[146] To offset the environmental impact of the Games in Rio de Janeiro, the city promised that it would plant 24,000,000 seedlings.[147] However, no seedlings have been planted, nor has any type of plan been implemented to ensure that the seedlings get planted.[148] Rather, the seedlings sit in planting pots under a sheer black canopy on a farm 100 kilometers from Rio de Janeiro.[149] Likewise, the 12,000 trees that were planted in Rio's Olympic Park are dying from a lack of irrigation and maintenance.[150] Katia Rubio, a professor and longtime Olympic analyst, stated "[the unfulfilled promise] was a big boost that ultimately led to nothing."[151] The construction of Olympic infrastructure for the 2016 Barcelona Games directly harmed local ecosystems when officials circumvented existing protocols and placed socioeconomic benefits before concern for the environment, despite protests from various environmental activists and the state prosecutors of the Public Ministry of Rio.[152]

Olympics Look Like Just 6 months After the Games, Insider (Feb. 13, 2017), https://www.businessinsider.com/rio-olympic-venues-are-abandoned-just-6-months-after-games-2017-2; Carolina Torres, *New Rio Olympic golf course harmed environment, says critics*, Mongabay (May 31, 2016), https://news.mongabay.com/2016/05/new-rio-olympic-golf-course-harmed-environment-say-critics/#:~:text=According%20to%20GAEMA%20and%20the,fauna%20and%20flora%2C%20including%20endangered.

[143] Vercillo, *supra* note 16.

[144] *Id.* at 238.

[145] *Id.* at 238-39.

[146] *Id.* at 239.

[147] Wayne Drehs & Mariana Lajolo, *After the Flame*, ESPN (Aug. 10, 2017), http://www.espn.com/espn/feature/story/_/id/20292414/the-reality-post-olympic-rio.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Torres, *supra* note 142.

c. Preparing for the Olympic Games and the Consequences of Hosting Them

Though ideas of ecological sustainable development are found within the *Environmental Guidelines* for the Olympic Games, the Games, as currently planned, are inherently unsustainable.[153] For many cities that are afforded the opportunity to host the Olympic Games, extensive construction of new sports venues is part of the process.[154] This is harmful to the local ecosystem, as "[t]he process of building an Olympic City can be detrimental to the surrounding environment and community."[155] Cities afforded the opportunity to host the Games must build sports stadiums and facilities within a short timeline and every deadline must be met.[156] Host cities face both external and internal pressures during preparation for the Games and must act quickly to satisfy their obligations, consequently "work[ing] around procedural processes."[157] This negligent oversight often results in ecological damage caused by careless construction, toxic waste disposal, and unsustainable building practices; this is exactly what happened during the 2014 Winter Olympics in Sochi, Russia, and the 2016 Summer Olympics held in Rio de Janeiro, Brazil.[158] Ecological issues arise from preparing for both the Winter and Summer Olympic Games; for example, artificial snow used for the Winter Olympics destroys native vegetation and increases the likelihood of landslides and soil erosion.[159]

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[153] Farideh Baroghi, Paulo J. G. Ribiero & Fernando Fonseca, *Towards a Holistic Framework for the Olympic-Led Sustainable Urban Planning Process,* 16(3) Sustainability 1, 5 (Jan. 23, 2024).

[154] Müller et al., *supra* note 15 (discussing that construction of new venues is a regular occurrence).

[155] Cara Pesciotta, *The Defeat of Olympians: How Olympic Venues Impact Surrounding Environments*, Nu Sci Magazine (Apr. 18, 2020), https://nuscimagazine.com/the-defeat-of-olympians-how-olympic-venues-impact-surrounding-environments-5c976e575f75/.

[156] *Using Cityworks to Prepare for Events: Olympics Edition*, Cityworks, https://www.cityworks.com/blog/using-cityworks-to-prepare-for-events-olympics-edition/ (last visited July 22, 2021); Jeff Wallenfeldt, *7 Ways Hosting the Olympics Impacts a City*, Britannica, https://www.britannica.com/list/7-ways-hosting-the-olympics-impacts-a-city (last visited Nov. 17, 2022).

[157] Zemel, *supra* note 4, at 507.

[158] Nathanael Chang, *The Olympics Are Hard on the Environment. Will the 2022 Beijing Games Continue the Trend?*, Council on Foreign Relations (Dec. 14, 2021), https://www.cfr.org/in-brief/olympics-are-hard-environment-will-2022-beijing-games-continue-trend.

[159] *Id.*

i. Host City Determinations

There are two phases that govern the process of choosing a host city for the Games.[160] The first is the applicant cities phase, which requires all interested cities to fill out a questionnaire which contains an "environmental conditions and impact" section.[161] In this section, cities are required to detail their current environmental conditions, the impact that hosting the Games would possibly have on the local environment, information regarding any ongoing environmental projects, and the results of any studies that have been conducted regarding potential venues and their environmental impact on the region.[162] Host city candidates must provide the IOC with details regarding the environment of their region: topography of the city, any protected or vulnerable regions, possible natural hazards, and information describing the city's natural resource management system.[163] The ensuing phase is the candidate cities phase, wherein each selected city must submit a "Candidature File" to the IOC, detailing the city's plan for hosting the Games.[164] Within a Candidature File, each city has to complete a roughly 200-question survey on eighteen different subjects; the topics of the questions range from security to environmental protection.[165] Unfortunately, however, "the answers to the questionnaires…are not verified, and are simply rote answers to meet the minimum expectations of the bid."[166] Similarly, "the questionnaires have a perverse effect: they incentivize potential [host cities] to downplay potential negative externalities on the environment, and exaggerate positive impacts in order to secure the right to host the Games."[167] Likewise, because the IOC fails to actually verify the information put forth by potential host cities in the questionnaires, the probable risk of providing false/exaggerated information is low.[168] On the other hand, "the cost for candidates of not providing false/exaggerated information may be high, namely losing the bid [to host the Games]."[169] This process leads to "contagion," which occurs when hosts exaggerate their own bids to host the Games and in consequence put pressure on their competitors to also exaggerate their answers in order to compete with them, and this quickly turns into a detrimental game of follow-the-leader.[170]

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160 Sobol, *supra* note 17 (explaining the process of selecting a host city).

161 Zemel, *supra* note 4, at 193.

162 *Id.*

163 Sobol, *supra* note 17 (explaining the process of selecting a host city).

164 *Id.*

165 *Id.*

166 Geeraert & Gauthier, *supra* note 18.

167 *Id.* at 23.

168 *Id.*

169 *Id.*

170 *Id.* (describing the concept of "contagion").

d. Put Environmental Concerns Before Economic Ones: How to Fix the Olympic Games

Cities are incentivized to bid to host the Games by the economic benefit that is often enjoyed through hosting.[171] When the IOC began to consider the environmental impact when deciding who would host the Games, it incentivized cities to prove to the IOC that they are "green" enough to make the cut.[172] This resulted in many cities greenwashing themselves in order to grab the attention of the IOC.[173] Greenwashing is known as

> [t]he process of conveying a false impression or misleading information about how a [city is] environmentally sound. Greenwashing in this context means an unsubstantiated claim to deceive [the IOC] into believing a [city's practices]…have a greater positive impact on the environmental impact than what is true.[174]

Cities greenwashing themselves in order to grab attention from the IOC has been observable since the 2000 Summer Olympic Games held in Sydney, Australia.[175] One of the ways the IOC chose to incorporate "sustainability" into the Games was by imposing the requirement that host cities must show they are carbon neutral before they can be named as an official host city. [176] However, it does not mean much to know that the host city is offsetting the *extra* carbon the Games are emitting. Instead, the world should be working towards a total reduction of carbon usage and reliance on fossil fuels, rather than merely offsetting the carbon that would not have even been there absent the Games.[177] To show its carbon neutrality, China planted trees in and around Beijing in preparation for the 2022 Winter Olympic Games.[178] Additionally, to construct the National Alpine Ski Center required for these Games, the city cut down nearly 20,000 trees that were originally in the former central piece of the

[171] Mason, *supra* note 66, at 56.

[172] Zemel, *supra* note 4, at 176-77.

[173] *Id.*

[174] Will Kenton, *What is Greenwashing? How it Works, Examples, and Statistics*, Investopedia (Oct. 17, 2022), https://www.investopedia.com/terms/g/greenwashing.asp

[175] Zemel, *supra* note 4, at 176-77.

[176] Warren, *supra* note 8, at 500.

[177] *Id.*

[178] Jacyln Diaz, *Beijing Olympic organizers are touting a green Games. The reality is much different*, NPR (Feb. 19, 2022, 7:00 AM), https://www.npr.org/2022/02/19/1081657319/winter-olympics-environmental-impact.

Songshan National Park in Yanqing.[179] The city made plans to transport and "replant" them in Beijing; while conservation experts claim that 90% of the trees survived the transport, environmental experts warn that replanting the trees could seriously harm the environment that they are replanted in.[180] Terry Townshend, an adviser to the Paulson Institute's conservation work, argues that animal habitats could also suffer as a direct result of replanting non-native trees or single species.[181] Two animal species in particular could suffer serious harm if tree replanting is not planned and executed responsibly: the leopard cat and the great bustard bird.[182] The great bustard bird is a heavy, slow, bird and requires a large runway for landing and taking off.[183] If the bird's sought-after open areas are planted with trees, it will be forced to find another place to land.[184] These animals are unique to the Beijing area and are at serious risk of losing their habitat if the trees are replanted in an haphazard way.[185] Beijing's desire to host the Olympics, paired with its unsustainable construction practices, could lead to the loss of this species.[186]

i. Things Need to Change

Currently, the system in place for the management of the Olympic Games is governed by a contract between the host city and the IOC.[187] However, there is a "lack of clear and enforceable provisions on the maintenance of the Games," which often leads to host cities abandoning the environmental promises and sustainable practices that were originally made in their bid.[188] If the contract between the host city and the IOC were to be amended to include best management practices (BMPs) when it comes to environmental sustainability, the IOC would have greater authority and oversight of the Olympic Games.[189] BMPs are devices ordinarily "used within the realm of natural resource and environmental policy to ensure implementation of mitigation measures."[190] Within the dominion of the Olympic Games, the BMPs employed should include things like the construction of Olympic venues, quantifiable environmental standards, and the like.[191]

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179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*
187 Guthoff, *supra* note 19, at 393.
188 *Id.*
189 *Id.* at 394.
190 *Id.*
191 *Id.*

If the IOC elects to address the environmental issues that escort the Olympic Games, "it should first and foremost involve qualified and independent third parties in its [host selection process] and provide a clear mandate in the [host city contract]."[192] When a host city has conflicting interests with the IOC, an action called "shirking" takes place.[193] Shirking is the idea that, when conflicting interests are present, "the [host city] will seek to [maximize] the attainment of its own interests and exploit information asymmetries so as to pursue its own interests at the expense of the principal."[194] Even if a host city does have a genuine interest in protecting the environment before, during, and after the Games, the host city will almost always place greater importance on avoiding the financial and reputational costs associated with failing to complete Olympic infrastructure in time.[195]

ii. Sources of Authority for Imposing Environmental Standards

1. Contract Theory

"The most straightforward way for the IOC to bind host cities to specific environmental standards is through a written contract that indicates exactly what those standards are."[196] Once the IOC announces the city that won the bid to host the Olympic Games, the newly named host city and the NOC sign the host city contract.[197] It is through this contract that the host city may be bound by environmental requirements of hosting the Games.[198] This may be criticized by some, but, "[w]here some may reject the concept of binding international sports law and incorporating jurisdiction over environmental standards for the Olympics, multi-lateral agreements vest complete power in the IOC for every Olympics, and contracts can easily include binding environmental provisions for host cities."[199] There are two ways this may be achieved: "through specific environmental language in the contract, or through an agreement that the IOC will determine the specific standards at a later date."[200] This is the simplest way the IOC could bind the host city to follow specific environmental standards because "the IOC could easily include certain environmental standards into the language of the host

[192] Geeraert & Gauthier, *supra* note 18, at 27.
[193] *Id.* at 18.
[194] *Id.*
[195] *Id.* at 19.
[196] Zemel, *supra* note 4, at 195.
[197] *Id.* at 198.
[198] *Id.*
[199] *Id.* at 178.
[200] *Id.* at 198.

city contract itself, and if the host city agrees to be bound…they become binding as a matter of contract law."[201] This option may be attractive to the IOC both because of its straightforwardness and due to the fact that the IOC could predetermine the remedy if the host city were to breach the contract; these remedies could include monetary damages, payable to the IOC.[202] If the IOC opted to not expressly put the standards and damages into the contract, but rather, chose to determine the standards and remedies at a later date, it could do so in two ways.[203] First, "[t]he contract could explicitly state that the parties agree that the host city will be bound by the environmental requirements set by the IOC at a later date."[204] The second path could be implicit: "such agreement could be implied through repeated language within the contract that recognizes the IOC as the supreme authority over the Olympics and the NOC's subordinate status, as indicated by the Olympic Charter."[205] If the IOC preferred neither the first nor the second option, the last method may involve "a persistent rejection of the NOC's plan for the Games until it satisfies the IOC's vision for environmentally responsible Games."[206]

2. Treaty Law Theory

In *Martin v. International Olympic Committee*, the Ninth Circuit Court of Appeals recognized the Olympic Charter as an international agreement, which reinforced the IOC's power.[207] The 1969 Vienna Convention on the Law of Treaties governs international treaty law, and recognizes "the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations."[208] The 1986 Vienna Convention, though not yet in force, may be useful as persuasive authority:

> The 1986 Convention defines "treaty" to include 'international agreement[s] governed by international law and concluded in written form: (1) between one or more States and one or more international organizations; or (ii) between international organizations' and does so 'noting that international organizations possess the

[201] *Id.*
[202] *Id.* at 199-200.
[203] *See generally Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Martin v. International Olympic Committee*, 740 F.2d 670, 677 (9th Cir. 1984).
[208] Zemel, *supra* note 4, at 202.

> capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfillment of their purposes.[209]

The 1986 Convention further states that "consent to be bound by a treaty can include approval by accession."[210] Thus, the parties' decision to enter a contract, like each host city agreeing to adhere to the Olympic Charter during the Olympic Games, may be enough to bind the host city to environmental standards, determined by the "wide latitude [of] the language of the agreement."[211] Although most NOCs agreed to the Olympic Charter before the IOC adopted the 1996 sustainability amendment, NOCs continue, with each Olympic Games, to reaffirm their commitment to the charter merely by their participation in the games.[212] This is because a prerequisite to being a member of the Olympic Movement and being able to participate in the Olympic Games is the acceptance of the Olympic Charter and the power of the IOC.[213] Thus, if the IOC requires each host city to adhere to specific environmental standards, their non-compliance would be a violation of the international agreement binding them to these requirements: the Olympic Charter.[214]

iii. Improving the Sustainability of the Olympic Games

The current approach adopted by the IOC to improve environmental sustainability within the Olympic Games is not enough: "[w]ithout specific environmental standards for the Games, the IOC continues to underachieve in its quest to protect the environment from Olympic burden."[215]

1. Make the Olympic Games Smaller

Each time the Olympic Games come around, they attract millions of people from across the globe, from athletes and trainers to spectators and media workers.[216] For example, the 2000 Sydney Games attracted 6.7 million; the 2004 Athens Games attracted 3.6 million; the 2008 Beijing Games attracted 6.5 million; the 2012 London Games attracted

[209] *Id.* at 203.
[210] *Id.* at 204.
[211] *Id.*
[212] *Id.* at 205-06.
[213] *Id.* at 206.
[214] *Id.* at 201-02.
[215] *Id.* at 176-77.
[216] Felix Richter, *The Olympics Attract Millions of Spectators*, Statista (Mar. 5, 2020), https://www.statista.com/chart/21046/number-of-tickets-sold-for-summer-olympic-games/.

8.2 million, and the 2016 Rio de Janeiro Games attracted 6.2 million.[217] If the Games were held on a much smaller scale, it would lead to fewer visitors (that could potentially be replaced with "immersive digital content"), and less new infrastructure would need to be constructed.[218] This would mean the Games would leave a much smaller ecological footprint.[219]

2. Rotate the Location of the Games

Currently, the Olympic Games are held in cities determined by the IOC.[220] If, rather than the IOC choosing a different host city for each Games, the Games "were rotated between a small group of cities[,] this would also reduce the need for new construction."[221] This idea was recently considered by the IOC, at least for the Winter Games, who stated "it will seriously consider a rotation of hosts as it examines the impact of climate change on winter sports."[222] Moreover, "one proposal to ensure climate reliability would require host cities to have an average temperature at or below zero over a 10-year period."[223] At this meeting, the IOC also discussed the possibility of a double award for the 2030 and 2034 Games in order to "create stability for winter sports and the Olympic Winter Games."[224]

3. Create an Independent Body to Monitor Sustainability Standards

Presently, the IOC oversees evaluating whether host cities meet the required level of environmental sustainability, which often leads to self-reporting bias, as exemplified in the IOC's evaluation of the Sochi Olympics.[225] However, if an independent body were created to undertake environmental audits, it would result in the strengthening of the "goals of

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[217] *Id.*

[218] DeWeerdt, *supra* note 11.

[219] *Id.*

[220] Sobol, *supra* note 17, at 171-75 (explaining the process of selecting a host city).

[221] DeWeerdt, *supra* note 11.

[222] Kendall Baker, *IOC weighs rotating host cities for Winter Olympics*, Axios (Dec. 8, 2022), https://www.axios.com/2022/12/08/ioc-rotating-winter-olympics-hosts.

[223] *Id.*

[224] *Future Host Commission studying landscape of winter sport with the Olympic Winter Games 2030 and beyond*, Int'l Olympic Comm. (Dec. 6, 2022), https://olympics.com/ioc/news/future-host-commission-studying-landscape-of-winter-sport-with-a-view-to-the-olympic-winter-games-2030-and-beyond.

[225] Zemel, *supra* note 4, at 185.

creating a sustainable environmental legacy for the Olympic Games."[226] Moreover, "the IOC may want to require independent verification of the information and pledges made in the bids by an independent and qualified third-party."[227] The third-party could include universities and NGOs, intermingling both local and international experts.[228]

The IOC presently utilizes three types of monitoring mechanisms to alert it to shirking.[229] These include reporting requirements, "police patrol" monitoring, and "fire-alarm" monitoring.[230] The first of the three, reporting requirements, is found within the host city contract, known as OGI reports.[231] OGI reports "are a series of four reports, examining the impact of the Olympic Games over a 12-year period before, during, and after the games."[232] The host city is required to publicly report on progress in relation to its sustainability strategy using "at least two pre-Games reports, and one post-Games report."[233] However, this self-reporting mechanism incentivizes host cities to make reports that reflect favorably upon themselves.[234] The second, "police patrol" monitoring, entails "continuous and detailed vigilance of the [host city] through the Coordination Commission," which is the "IOC's primary monitoring system."[235] The Coordination Commission is responsible for monitoring the progress of host cities in preparing for the Games.[236] The "police patrol" monitoring could be much more effective if it was increased; however, "this is very costly."[237] The third monitoring mechanism the IOC may rely on is "fire-alarm" monitoring.[238] This type of monitoring system includes third-party actors, such as the media, to alert the IOC to host city transgressions.[239] In summation, "a clear mandate in combination with rigorous (third-party) monitoring will only correct shirking if the costs of shirking are large enough to offset the potential benefit that the host city would gain from engaging in it."[240]

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[226] *Id.*
[227] Geeraert & Gauthier, *supra* note 18, at 23.
[228] *Id.*
[229] *Id.* at 25.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*

i. Ending Self-Reporting Bias

An Olympic Games Impact Study is required before the host city and the IOC enter into a contract.[241] The host city is responsible for developing this Impact Study.[242] The Impact Study creates an incentive for the host city to misreport or inaccurately measure findings so that it is more attractive to the IOC; this is known as self-reporting bias.[243] Self-reporting bias could be eradicated through the implementation of an independent audit structure to oversee and review the Olympic Games' impacts on the surrounding environment.[244] To improve its reputation and legitimacy within the environmental realm, the IOC could contract with existing environmental agencies that already conduct independent assessments of the Olympic Games, such as the World Wildlife Fund.[245]

Though concern for environmental effects is not one of the IOC's top priorities, there still exists symbolic commitments to environmentalism within the Olympic movement.[246] "[T]he IOC prefers that the Olympic Games do not cause significant environmental harm and that Games [organizers] live up to proposed environmental objectives."[247] The IOC's commitments to environmental responsibility "play a part, however minor, in deflecting criticism away from the Olympic movement itself – an overall goal of which is to retain its dominant place in world sport, without which it would be nothing."[248] Furthermore, "the IOC seeks to avoid negative publicity related to the Olympic Games, as this may lead to high reputational costs, possibly leading to a reduction in cities bidding to host Games in the future, or for a reduction in sponsors and media willing to pay."[249] Thus, there exists an incentive within the Olympic movement to make commitments to environmental sustainability, and through this fact, both freely organized groups and activist groups may push forward the "green agenda."[250]

The "green agenda," is often advocated for by people's movements, whether those movements are freely organized or led by activist groups, rather than the IOC.[251] Instead, the IOC's role in respect

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[241] Guthoff, *supra* note 19, at 392.

[242] *Id.*

[243] *Id.* at 394-95.

[244] *Id.* at 395.

[245] *Id.*

[246] Kate Kearins & Kathryn Pavlovich, *The Role of Stakeholders in Sydney's Green Games*, 9 Axios Corp. Soc. Responsib. Environ. Mgmt. 157, 160 (2002).

[247] Geeraert & Gauthier, *supra* note 18, at 19.

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.* at 158.

of "greening" the Olympics is "a more symbolic one."[252] Environmental lobbying and watchdog groups were implemented for the 2000 Sydney Olympic Games in order to "green" the Games.[253] During those Games, "[e]nvironmental groups both assisted in defining the agenda and… reserved the right to evaluate and publicly critique performance."[254] While the Sydney Olympic Games were not perfect, they demonstrated the importance of involving stakeholders who will advocate on behalf of the environment when it becomes necessary to.[255] To "green" the Sydney Games, "various other mechanisms to facilitate the greening of the Sydney 2000 Olympics were set up, including planning and monitoring frameworks and management systems."[256] It is plausible that a system similar to the one implemented for the 2000 Sydney Games could be utilized to oversee different host cities environmental impact reports, which currently, only requires the host city to self-report, leading to bias.[257]

[252] Kearins, *supra* note 246, at 160.
[253] *Id.* at 165-66.
[254] *Id.* at 157.
[255] *Id.* at 168.
[256] *Id.* at 162.
[257] Guthoff, *supra* note 19, at 392-93.

Conclusion

The Olympic Games currently serve as a model of national pride, community, and global unification; to that list we must add environmental sustainability and awareness. The Olympic Movement can effectuate international change when it comes to how countries prioritize environmental protection. The IOC must impose specific environmental standards within the Olympic Charter; this way, when countries participate in the Games, they are assenting to these standards and cannot violate them without violating international law. The flora and fauna of each host city deserve protection, not maltreatment. The Olympic Games' commitment to sustainability is declining over time, despite its statements saying otherwise. We cannot continue to harm the environment in the manner that it was harmed in Rio, Albertville, Sochi, Vancouver, and so many more. The IOC has a global responsibility to ensure that the environment is protected where the Games are taking place; this may be achieved through contract law and/or treaty law. Shifting the Olympic Games to a smaller scale would be beneficial as well, as fewer spectators mean less construction of Olympic infrastructure. Rotating the location of the Games between a small group of cities is another pathway worth analyzing; keeping the Games between a few different cities would virtually erase the need for construction of Olympic infrastructure and would thus minimize the environmental harm that accompanies it. Moreover, creating an independent body to monitor sustainability standards during each Games would put an end to the self-reporting bias that currently exists. Presently, cities may exaggerate their level of environmental sustainability without repercussion due to the lack of independent verification. Hosting the Olympic Games is a well-sought-after privilege that will not diminish with the adoption of strict environmental standards—because of this, the Olympic Movement can completely transform how the environment is treated on a global scale.