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

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

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

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

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

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

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Animal law has traditionally focused on the legal status of animals as either property, persons, or something in between. Recent scholarship seems to open a new avenue that allows us to ask if shifting our focus to animals' activities can inaugurate more just human-animal relations. Ecosystem services ("ES") proponents posit that animals' services are largely ignored by humans, and that their worth should be calculated by cost-benefit analyses of the benefits animals provide humans. Animal labor ("AL") proponents provoke with the claim that animals have been working for humans for centuries without wages and benefit of core labor protections that human workers enjoy and suggest we should extend labor rights to animals. These concepts, seemingly similar, diverge in important respects and lead us down different paths. This article explores the breadth, demands, and consequences of the ES and AL approaches, identifying the advantages and disadvantages of each. It evaluates their ability to (i) make animals and their services visible and recognizable, (ii) establish new and effective forms of protection for them, (iii) address and resolve conflicts of interests with humans, and (iv) operate independently of economic parameters. This comparative analysis shows why AL must be preferred over ES, and how combinations of AL and ES can contribute to the slow but gradual rapprochement of animal law and environmental law.

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ANIMAL LABOR, ECOSYSTEM SERVICES

CHARLOTTE E. BLATTNER*

I. AT CROSSROADS

Scholars in anthropology,¹ law,² ethics,³ politics,⁴ and labor studies⁵ are increasingly arguing that we should consider animals not as recipients of our charity, but as workers in their own right, as a matter of justice. Be it dogs working in the military, service animals operating in education, animals assisting in therapy, or animals in the wild ensuring the functioning of ecosystems, these animals contribute to our ecological and economic well-being on a daily basis. Hence, they deserve rights to recognition and membership. As Jason Hribal writes:

Since the 17th century, a great many animals have been put to work, they have produced large monetary profits, and they have received little to no compensation or

* Charlotte Blattner is a senior researcher and lecturer at the Institute for Public Law, University of Bern, Switzerland. From 2018-2020, Blattner was a Visiting Researcher at Harvard Law School's Animal Law & Policy Program, funded by the Swiss National Science Foundation, to explore critical intersections of animal and environmental law. From 2017-2018, she completed the Postdoctoral Fellowship for Animal Studies at the Department of Philosophy at Queen's University, focusing on issues of animal labor. She earned her PhD in Law from the University of Basel, Switzerland, as part of the doctoral program Law and Animals: Ethics at Crossroads, and was a Visiting International Scholar at the Center for Animal Law Studies at Lewis & Clark Law School in 2016. She is the author of *Protecting Animals Within and Across Borders* (2019) and *Animal Labour: A New Frontier of Interspecies Justice?* (2020, coedited with Will Kymlicka and Kendra Coulter), both published by Oxford University Press.

The author would like to thank the participants in the MANCEPT workshop "Just Animals? The Future of the Political Turn in Animal Ethics," held at the University of Manchester in September 2019 for critically engaging with the topic and sharing their thoughts and ideas. Special thanks go to Prof. Jonathan Lovvorn for his continued interest in the topic and his feedback on an early draft of this paper. I would also like to extend my gratitude to Dr. Kali Tal for her excellent edits, and to the entire editorial team at MSU JANRL for their outstanding work on this article.

¹ JOCELYNE PORCHER, *THE ETHICS OF ANIMAL LABOR* (2017).

² *See* 24.1 ANIMAL L. (2018).

³ Alasdair Cochrane, *Labour Rights for Animals, in* THE POLITICAL TURN IN ANIMAL ETHICS 15, 15 (Robert Garner & Siobhan O'Sullivan eds., 2016).

⁴ CHARLOTTE E. BLATTNER, KENDRA COULTER & WILL KYMLICKA, *ANIMAL LABOUR: A NEW FRONTIER OF INTERSPECIES JUSTICE?* (2020).

⁵ KENDRA COULTER, *ANIMALS, WORK, AND THE PROMISE OF INTERSPECIES SOLIDARITY* (2016).

recognition for their efforts. The farms, factories, roads, forests, and mines have been their sites of production. Here, they have manufactured hair, milk, flesh, and power for the farm, factory, and mine owners. And here, they are unwaged.⁶

For people who specialize in environmental law, ecology, environmental economy, and related disciplines, animal labor is not news. Animal labor takes place within ecosystems, which provide a wide array of services valued and used by humans so-called ecosystem services (“ES”). These services include sequestering carbon, purifying water, regulating the climate, providing fisheries, and pollinating agricultural crop production.⁷ Animals provide these services when they migrate, provide trophic interactions within ecosystems, when they move pollen and seeds, decompose, produce manure, help maintain soil health, scavenge, or ensure genetic diversity in ecosystem functioning.⁸ The animals that provide these services include microorganisms, ants, beetles, butterflies, salmon, bats, songbirds, swans, wildebeest, deer, cows, coyotes, wolves, and many more.⁹ ES are “the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life.”¹⁰ This is not the same as ecosystem goods, denoting tangible, material products derived from ecosystem processes.¹¹

The ES perspective emerged from the discipline of ecology, and describes in economic terms the benefits humans obtain from ecosystems; benefits we do not pay for and often fail to consider in our decision-making.¹² Though the ES concept and its terminology are relatively new,

⁶ Jason Hribal, “*Animals Are Part of the Working Class:*” *A Challenge to Labor History*, 44 (4) *LABOR HISTORY* 435, 436 (2003).

⁷ Barton H. Thompson Jr., *Ecosystem Services & Natural Capital: Reconceiving Environmental Management*, 17 *N.Y.U. ENVTL. L.J.* 460, 460 (2008).

⁸ Sandra Quijas & Patricia Balvanera, *Biodiversity and Ecosystem Services*, in *ENCYCLOPEDIA OF BIODIVERSITY* 341, 343 (Simon A. Levin ed., 2d ed. 2013).

⁹ E.A. McKenney, K. Koelle, R.R. Dunn & A.D. Yoder, *The Ecosystem Services of Animal Microbiomes*, 27(8) *MOLECULAR ECOLOGY* 2164 (2018); Valier E. Peters et al., *Ants and Plants as Indicators of Biodiversity, Ecosystem Services, and Conservation Value in Constructed Grasslands*, 25(8) *BIODIVERSITY AND CONSERVATION* 1481 (2016); S. Bauer & B.J. Hoye, *Migratory Animals Couple Biodiversity and Ecosystem Functioning Worldwide*, 54, 57 (6179) *SCIENCE* 344 (2014).

¹⁰ Gretchen C. Daily, *Introduction: What Are Ecosystem Services?* *NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 1, 3 (Gretchen C. Daily ed., 1997).

¹¹ Thomas C. Brown, John C. Bergstrom & John B. Loomis, *Defining, Valuing, and Providing Ecosystem Goods and Services*, 47 *NAT. RES. J.* 329, 331 (2007).

¹² Nicolás Kosoy & Esteve Corbera, *Payments for Ecosystem Services as Commodity Fetishism*, 69 *ECOLOGICAL ECONOMICS* 1228, 1228 (2010).

ES was quickly adopted by public policy and private sectors.¹³ So is the call for recognizing animals as service providers or workers really so new? What difference does it make if we qualify animals as ecosystem service providers instead of laborers? This article explores the breadth, demands, and consequences of the ES approach and the animal labor (“AL”) approach on the lives of animals. It identifies the advantages and disadvantages of each approach and asks if and how either can (i) make animals and their services visible and recognizable, (ii) provide protections for them, (iii) cope with the conflicting interests of humans in using animals, and finally, (iv) consider ES and AL’s dependence on or independence from economic parameters. Scoping the ES and AL approaches helps distinguish desirable from undesirable policy proposals, which is necessary as new legal developments in either direction are underway. Comparing the two approaches and determining whether or, potentially, how to combine them can also move us closer to illuminating a new path to the gradual rapprochement of animal law and environmental law.¹⁴

II. ECOSYSTEM SERVICES

Our contemporary concerns for ES originated with Plato and can be traced through time to George Perkins Marsh and, more recently, Aldo Leopold.¹⁵ Leopold, who was deeply committed to protecting ecosystems, wrote in *A Sand County Almanac*:

I now suspect that just as a deer herd lives in mortal fear of its wolves, so does a mountain live in mortal fear of its deer [...]. So also with the cows. The cowman who cleans his range of wolves does not realize he is taking over the

¹³ Erik Gómez-Baggethun, Rudolf de Groot, Pedro L. Lomas & Carlos Montes, *The History of Ecosystem Services and Practice: From Early Notions to Markets and Payment Schemes*, 69 *ECOLOGICAL ECONOMICS* 1209, 1209 (2010).

¹⁴ See, e.g., WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? (Randall S. Abate ed., Environmental Law Institute 2015); PETER L. FITZGERALD, INTERNATIONAL ISSUES IN ANIMAL LAW: THE IMPACT OF INTERNATIONAL AND ENVIRONMENTAL AND ECONOMIC LAW UPON ANIMAL INTERESTS AND ADVOCACY (Carolina Academic Press 2012); Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29: 1 *GEO. ENVTL. L. REV.* 1 (2016); Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part II: Near-Term Climate Mitigation in a Post-Regulatory Era*, 30: 2 *GEO. ENVTL. L. REV.* 203 (2018).

¹⁵ Plato acknowledged that deforestation erodes soil and dries up springs. Marsh pointed out changes in soil fertility, arguing that natural resources are limited. Harold A. Mooney & Paul R. Ehrlich, *Ecosystem Services: A Fragmentary History*, in *NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 11, 11-12 (Gretchen C. Daily ed., 1997).

wolf's job of trimming the herd to fit the range. He has not learned to think like a mountain. Hence we have dust bowls, and rivers washing the future into the sea.¹⁶

Driven by Leopold's idea that humans directly benefit from nature and that nature's capacity to support these benefits is limited, the first proposals for ES emerged from an effort to draw attention to the critical role of services generated by ecosystems, a dynamic complex of plant, animal, and microorganism communities interacting with the nonliving environment as a functional unit.¹⁷ The first report describing the functioning of ES appeared in 1970 the *Study of Critical Environmental Services*¹⁸ triggered ecological research on the roles and delivery of ES.

ES slowly worked its way into the policy arena, first through the Ecosystems Approach, then the Global Biodiversity Assessment.¹⁹ By 2000, ES was expanded and popularized under the tenets of the United Nations ("UN") in their *Millennium Ecosystem Assessment* ("MA"), brought to life by then-Secretary-General Kofi Annan.²⁰ In 2012, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services was formed under the auspices of four UN entities: the UN Environment Programme; the UN Educational, Scientific, and Cultural Organization; the UN Food and Agriculture Organization; and

¹⁶ ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (Oxford University Press 1949).

¹⁷ The term 'ecosystem services' was first coined by Paul Ehrlich & Anne Ehrlich in *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* (1981). See, for a historical account of ES, Marion Potschin, Roy Haines-Young, Robert Fish & R. Kerry Turner, *Ecosystem Services in the Twenty-First Century*, in *ROUTLEDGE HANDBOOK OF ECOSYSTEM SERVICES 1-11* (Marion Potschin, Roy Haines-Young, Robert Fish & R. Kerry Turner eds., 2016). See, for the MA's definition of ecosystems, *MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: MULTISCALE ASSESSMENTS IV: FINDINGS OF THE SUB-GLOBAL ASSESSMENTS WORKING GROUP* (2005) [hereinafter *MILLENNIUM ECOSYSTEM ASSESSMENT (2005b)*].

¹⁸ *REPORT OF THE STUDY OF CRITICAL ENVIRONMENTAL PROBLEMS (SCEP), MAN'S IMPACT ON THE GLOBAL ENVIRONMENT* (1970). The study focused on the following services: pest control, insect pollination, fisheries, climate regulation, soil retention, flood control, soil formation, cycling of matter, and composition of the atmosphere. *Id.* at 122-125.

¹⁹ UNEP-CBD, *The Ecosystem Approach: Description, Principles and Guidelines*, Decisions adopted by the CoP to the CBD at its fifth meeting, Nairobi, May 15-26, 2000 (UNEP/CBD/COP/5/23, Decision V/6); V.H. HEYWOOD & R.T. WATSON, *GLOBAL BIODIVERSITY ASSESSMENT* (1995).

²⁰ The MA has published multiple reports since its inception in 2000. The goal of the program is to "provide a state-of-the-art scientific appraisal of the condition and trends in the world's ecosystems and the services they provide (such as clean water, food, forest products, flood control, and natural resources) and the options to restore, conserve or enhance the sustainable use of ecosystems." *Overview of the Millennium Ecosystem Assessment*, Millennium Ecosystem Assessment (2005), <https://www.millenniumassessment.org/en/About.html#1> (last visited Jun. 4, 2020).

the UN Development Programme. The platform is intended to provide policymakers with objective, scientific assessments of the planet's biodiversity and ecosystems, the benefits they provide to humans, and the tools and methods for protecting and sustainably using these "vital natural assets."²¹ These efforts at the global level also emerged at the level of domestic policy. For example, in the United States, Congress emphasized the importance of ES provided by forests in the Multiple-Use Sustained-Yield Act of 1960,²² and provided by wetlands in the Clean Water Act of 1972.²³ Today, the Environmental Protection Agency claims to be actively working to integrate ES into its decision-making and conducting extensive research on the subject.²⁴

ES are an integral research area of ecology, economics, and management policy, which explains its various and sometimes contradictory goals, including:

- communicating societal dependence on ecological support systems;²⁵
- increasing public interest in biodiversity conservation;²⁶
- demonstrating, as a pedagogic tool, the effect of biodiversity loss on ecosystem functions;²⁷
- appreciating ecosystems as valuable capital assets;²⁸
- making explicit the costs and benefits of alternative actions to humans;²⁹
- increasing methods to estimate the economic value of ES;³⁰

²¹ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *About*, IPBES Science and Policy for People and Nature, <https://www.ipbes.net/about> (last visited Jun. 4, 2020).

²² Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 et seq. (1960).

²³ Clean Water Act, 33 U.S.C. § 1344(c) (1948).

²⁴ U.S. Environmental Protection Agency, *Research*, <http://www.epa.gov/ord/htm/multiyearplans.htm> (last visited Jun. 4, 2020); L. Cox, A. Almeter & K. Saterson, *US Federal Agency Research on Ecosystem Services*, https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NHEERL&dirEntryId=240825 (last visited Jun. 4, 2020).

²⁵ Gretchen C. Daily et al., *Ecosystem Services in Decision-making: Time to Deliver*, 21 THE ECOLOGICAL SOCIETY OF AMERICA (2008).

²⁶ Paul R. Ehrlich & Gretchen C. Daily, *Population Extinction and Saving Biodiversity*, 22 BIODIVERSITY 64, 64, 66 (1993).

²⁷ Gómez-Baggethun et al., *supra* note 13, at 1213.

²⁸ See Harold A. Mooney & Paul R. Ehrlich, *Ecosystem Services: A Fragmentary History*, in NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 11, 11-22 (Gretchen C. Daily ed., 1997).

²⁹ See NAT'L RESEARCH COUNCIL, VALUING ECOSYSTEM SERVICES: TOWARD BETTER ENVIRONMENTAL DECISION-MAKING (2005).

³⁰ See Robert Costanza, Ralph d'Arge, Rudolf de Groot, Stephen Farber, Monica Grasso, Bruce Hannon, Karin Limburg, Shahid Naeem, Robert V. O'Neill,

- responding to the fear of the negative short-term and long-term consequences of human activities on ecological systems upon which the human species depends.³¹

The UN, in its MA approach to ES, shows that ES is responding to and integrating the demands of various international conventions: the Convention on Biological Diversity,³² the UN Convention to Combat Desertification,³³ the Ramsar Convention on Wetlands,³⁴ and the Convention on Migratory Species.³⁵ Despite Leopold and other environmentalists' early efforts to make visible and protect ES regardless of whether they directly benefit humans, today's popular opinion and policy adoption of ES focus on the "benefits people obtain from ecosystems,"³⁶ including provisioning food, fresh water, fuelwood, fiber, as well as nonmaterial benefits, such as spiritual, recreational, and educational services. Under the ES approach, various entities qualify as service providers: mountains, stones, water, air, beetles, zebras, humans, and many more. This study focuses on animals as a sub-category of service providers in the ES framework, and thus, on services provided by animals, defining ES as *benefits people obtain from animals*.

Jose Paruelo, Robert G. Raskin, Paul Sutton & Marjan van den Belt, *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253, 253-59 (1997).

³¹ PAUL EHRLICH & ANNE EHRLICH, POPULATION, RESOURCES, ENVIRONMENT: ISSUES IN HUMAN ECOLOGY 157 (Donald Kennedy & Roderic B. Park eds., 1st ed. 1970).

³² See generally United Nations Convention on Biological Diversity, May 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993) [hereinafter CBD].

³³ See generally United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996) [hereinafter UNCCD].

³⁴ See generally UNESCO Convention on Wetlands of International Importance especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245 (entered into force Jan. 7, 1977).

³⁵ See generally United Nations Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 (entered into force Nov. 1, 1983) [hereinafter CMS]; MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at vii.

³⁶ MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: A FRAMEWORK FOR ASSESSMENT 53 (2005) [hereinafter MILLENNIUM ECOSYSTEM ASSESSMENT (2005a)]. See also, *id.* at 27 (for a description of these services). Cf. Rudolf de Groot, et. al., *Integrating the Ecological and Economic Dimensions in Biodiversity and Ecosystem Service Valuation*, in THE ECONOMICS OF ECOSYSTEMS AND BIODIVERSITY: ECOLOGICAL AND ECONOMIC FOUNDATIONS 9, 19 (Pushpam Kumar ed., 2010) (for an alternative definition of ES as "direct and indirect contributions of ecosystems to human well-being.").

a. *Making Visible and Recognizing Animals and Their Services*

MA, the most authoritative and widely used ES approach to date, distinguishes between four types of services: provisioning services, regulating services, cultural services, and supporting services.³⁷ Provisioning services are products obtained from ecosystems, or animals, for the purposes of the present inquiry.³⁸ These are perhaps the best-known provisioning services, directly benefitting humans:

- Food and fiber: food products derived from animals, such as silk, wool, meat, and milk;
- Fuel: dung and other materials from animals that serve as energy sources;
- Genetic resources: genes and genetic information used for animal breeding and biotechnology;
- Biochemicals, natural medicines, and pharmaceuticals: medicines, biocides, and food additives derived from animals;
- Ornamental resources: animal products, such as skins or shells, used as ornaments;
- Fresh water: the service animals provide toward producing fresh water.³⁹
- Regulating services are the second category of services and denote benefits obtained from regulating ecosystem processes, including:
- Air quality maintenance: animals' contribution to the production and extraction of chemicals from the atmosphere to ensure and improve air quality;
- Climate regulation: sequestration or emission of greenhouse gases by animals;⁴⁰
- Water purification and waste treatment: animals' contribution to filtering out and decomposing organic wastes;

³⁷ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 56.

³⁸ *Id.* at 56-57.

³⁹ *Id.* at 56-57.

⁴⁰ For example, in 2017, a report by the Society for Conservation Biology showed that “whale feces, rich in iron, nitrogen and other nutrients, trigger phytoplankton blooms that increase the productivity of the entire marine food web and sequester thousands of tons of carbon from the atmosphere annually.” (Animal Welfare Institute, New Report Highlights Valuable Ecological Services Provided by Whales, Dec. 19, 2017, *available at* <https://awionline.org/press-releases/new-report-highlights-valuable-ecological-services-provided-whales> (last visited Jun. 4, 2020). *See Role of Cetaceans in Ecosystem Functioning: Defining Marine Conservation Policies in the 21st Century*, SOCIETY FOR CONSERVATION BIOLOGY (2017) (Providing full report).

- Regulation of human diseases: animals' contribution to the abundance and reduction of human pathogens, e.g., mosquitoes;
- Biological control: the contribution animals make to pests and diseases, including domesticated animals;
- Pollination: the contribution animals make by spreading and disseminating seeds and pollen.⁴¹

Many more services can be viewed as regulatory. Predators help maintain the “ecological balance” in a certain system, and wild animals help maintain forest health.⁴² When elephants work in the forests of India, they modify the physical structure of the vegetation as they feed, mobilize large amounts of nutrients with their excrement, provide food and create habitats for many vertebrates and invertebrates, and disperse the seeds of the plants they consume. Elephants that maintain forests and regenerate them are best viewed as “mégajardiniers” or megagardeners.⁴³

The third category, cultural services, consists of nonmaterial benefits humans obtain from ecosystems through spiritual enrichment, cognitive development, reflection, recreation, and aesthetic experiences. These encompass:

- Cultural diversity: animals' contribution to making human cultures more diverse;
- Spiritual and religious values: religious and spiritual values attached to animals;
- Knowledge systems: the influence of animals on traditional and formal knowledge systems;
- Educational values: the formal and informal contributions of animals to education, including instructing humans who seek to emulate their ways of living and being;
- Inspiration: animals inspiring art, folklore, national symbols, architecture, and advertising;

⁴¹ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 57-58.

⁴² Shinji Sugiura, Ryusei Tanaka, Hisatomo Taki & Natsumi Kanzaki, *Differential Responses of Scavenging Arthropods and Vertebrates to Forest Loss Maintain Ecosystem Function in a Heterogenous Landscape*, 159 *BIOLOGICAL CONSERVATION* 206 (2013); William J. Ripple, James A. Estes, Robert L. Beschta, Christopher C. Wilmers, Euan G. Ritchie, Mark Hebblewhite, Joel Berger, Bodil Elmhagen, Mike Letnic, Michael P. Nelson, Oswald J. Schmitz, Douglas W. Smith, Ariad D. Wallach & Aaron J. Wirsing, *Status and Ecological Effects of the World's Largest Carnivores*, 343(6167) *SCIENCE* 1241484 (2014). *See also*, Robert B. Wielgus & Kaylie A. Peebles, *Effects of Wolf Mortality on Livestock*, 9(12) *PLoS ONE* 1932 (2014) on how predator control and sport hunting used to reduce predator populations and livestock depredations are counterproductive both for depredated livestock and wolves.

⁴³ Nicolas Lainé, *Travail interspèces et conservation: Le cas des éléphants d'Asie*, 54(1) *ÉCOLOGIE & POLITIQUE* 45, 61 (2017).

- Aesthetic values: the aesthetic value humans derive from animals;
- Social relations: the beneficial or sustaining effects of animals on social relations;⁴⁴
- Cultural heritage values: the value societies derive from culturally significant animals or species;
- Recreation and ecotourism: animals increasing the attractiveness of resorts and tourism.⁴⁵

Finally, supporting services denote the processes by which ecosystems support the production of the first three categories of ES. Supporting services are distinct from provisioning, regulating, and cultural services because they affect change indirectly, often over a long period of time (e.g., soil formation, nutrient cycling, and provisioning of habitat).⁴⁶

People may usually overlook the fact that animals provide services because their focus is on end goods (e.g., genes, pharmaceuticals, meat, honey, entertainment) and not the services that give rise to them.⁴⁷ The ES approach promises to reveal those services, change people's perceptions, and fill knowledge gaps by rendering visible the work-lives of animals and the human benefits animals produce. An ES perspective may prompt us to study the daily plight of animals and recognize their subjectivities, revealing the tremendous work they invest in their communities and surroundings. For example, a specialized committee commissioned by the U.S. National Research Council took an ES approach to its 2013 report on the effects of the Deepwater Horizon oil spill in the Gulf of Mexico. In one of its case studies, it focused on bottlenose dolphins harmed by the oil spill in the Gulf, arguing that the dolphins provide valuable cultural services (as subjects for observational studies from the beach or small watercraft), spiritual services (the role dolphins play in Native American culture and American culture), recreational services (like ecotourism), and supporting and regulating services (bottlenose dolphins are apex predators in the food web of the Gulf).⁴⁸ The committee

⁴⁴ Scholars usually point to fishing societies as an example. Those differ significantly in their social relations from nomadic herding or agricultural societies: Parthena Charzinikolaou, Davide Viaggi & Meri Raggi, *Review of Multicriteria Methodologies and Tools for the Evaluation of the Provision of Ecosystem Services*, MULTICRITERIA ANALYSIS IN AGRICULTURE: CURRENT TRENDS AND RECENT APPLICATIONS 43, 49 (Julio Berbel, Thomas Bournaris, Basil Manos, Nikolaos Matsatsinis & Davide Viaggi eds., 2018).

⁴⁵ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 58-59.

⁴⁶ *Id.* at 59-60.

⁴⁷ J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, *THE LAW AND POLICY OF ECOSYSTEM SERVICES* 27 (2007).

⁴⁸ Committee on the Effects of the Deepwater Horizon Mississippi Canyon-252 Oil Spill on Ecosystem Services in the Gulf of Mexico, *An Ecosystem Services Approach to Assessing the Impacts of the Deepwater Horizon Oil Spill in the*

then examined the effects of the oil spill on dolphin communities and losses incurred by humans due to the lack of those animal-provided services.⁴⁹ Using the ES approach, the committee made visible to policy makers the services dolphins performed and the wealth of benefits the animals offered humans. In turn, this spurred policy makers to secure better protections for dolphins.

Since ES is relatively new, there are good reasons to believe that many other services provided by animals still remain hidden. For example, ES recognizes the direct actions of animals in regulating and provisioning services, but fails to see that those are only possible due to the manifold relations of care and nurturing maintained by other animals in the background. ES leaves under-valued subsistence work of wild animals, like locating shelter and protection; building homes; cleaning themselves and their young; locating water; finding, transporting, and processing food; avoiding predators; and many more.⁵⁰ The ES approach may ignore these indirect services because they are too far removed from the human benefits they provide. In other words, the chain of causality may be too long. But, an expanded ES approach could foreground less visible forms of provisioning and regulating services, and thereby, deliver a more complete account for animal work. In this sense, Kendra Coulter, drawing on insights from feminist political economy, argues that subsistence and care work of wild animals, like raising their young, must be recognized as work, namely as eco-social reproduction.⁵¹ ES, if expanded, could break the political logjam around animals by powerfully explaining why protecting animals must be an integral part of global policy objectives.

b. Establishing Protections for Animals

Even when animals' work is recognized as a valuable service, it is not clear how animals fare under the ES approach. To evaluate its benefits, we must know if ES results in protections for animals and how these compare to the *status quo*. The broad, non-legalistic definition of protections is mainly focused on whether animals are better off under ES than they would be without. At root, following the ES approach necessarily means triggering a process that places value on services.

Gulf of Mexico 134-137 (2013) <https://www.nap.edu/catalog/18387/an-ecosystem-services-approach-to-assessing-the-impacts-of-the-deepwater-horizon-oil-spill-in-the-gulf-of-mexico> (last visited Jun. 4, 2020).

⁴⁹ *Id.* at 139.

⁵⁰ Kendra Coulter, *Beyond Human to Humane: A Multispecies Analysis of Care Work, Its Repression, and Its Potential*, 10(2) STUDIES IN SOCIAL JUSTICE 199 (2016).

⁵¹ Kendra Coulter, *How the Hard Work of Wild Animals Benefits Us, Too*, THE CONVERSATION, May 3, 2018 (hereinafter *Hard Work of Wild Animals*).

Costanza et al. caused a major shift in public consciousness in 1997 when they, for the first time, estimated the annual value of global ecological benefits at 33 trillion USD, twice the gross global product at the time.⁵² Almost 20 years later, the same authors were able to show, using new assessment tools, that the aggregate global ES was worth closer to 125-145 trillion USD a year.⁵³ The process by which a price is put on ES follows rigorous economic calculations. Under the Ecosystem Services Partnership, experts from across the world established “estimates of monetary values of ecosystem services” to develop a database on monetary values of ES that contains over 1350 data-points from over 300 case studies.⁵⁴ By using terminology like “services,” “capital,” or “products,” ES emphasizes the close connection between animals and economic prosperity, and challenges economists to develop new models and techniques to accurately quantify and project the social value of animals’ services.⁵⁵ As Costanza et al.’s work shows, ascribing value to services that were thus far unrecognized usually prompts decision-makers to properly quantify the value of these services and their replacement, putting a higher price on services than they did before.

In an ES approach, it is made startlingly evident that bees, for example, work to produce benefits. Though most humans associate bees with honey, they are far more than honey producers. Bees pollinate trees and plants from which fruits, nuts, and vegetables grow. Their pollinating service is crucial to the functioning of ecological processes and survival of other species that depend on the fruits of pollinated plants, including humans.⁵⁶ Honey bees, bumblebees, solitary bees, and carpenter bees make it possible for many others to access crop plants like potatoes, cashews, strawberries, beets, mustard, broccoli, cauliflower, cabbage, jack beans, peppers, coffee, watermelon, coconut, apple, avocado, mango, tomato, cowpea, grapes, cranberries, etc.⁵⁷ In fact, 75% of all

⁵² Costanza et al., *supra* note 30, at 253.

⁵³ Robert Costanza, Rudolf de Groot, Paul Sutton, Sander van der Ploeg, Sharolyn J. Anderson, Ida Kubiszewski, Stephen Farber & R. Kerry Turner, *Changes in the Global Value of Ecosystem Services*, 26 GLOBAL ENVIRONMENTAL CHANGE 152 (2014) (hereinafter *Changes in the Global Value of ES*).

⁵⁴ Ecosystem Services Valuation Database, ECOSYSTEM SERVS. P’SHP, <https://www.es-partnership.org/services/data-knowledge-sharing/ecosystem-service-valuation-database/> (last visited Jun. 4, 2020); *see also*, Rudolf de Groot et al., *Global Estimates of the Value of Ecosystems and their Services in Monetary Units*, 1 ECOSYSTEM SERVICES 50 (2012).

⁵⁵ Thompson, Jr., *supra* note 7, at 467.

⁵⁶ Paul Rodgers, *Einstein and The Bees. Should You Worry?*, FORBES, (Sept. 9, 2014, 3:46 PM), <https://www.forbes.com/sites/paulrodgers/2014/09/09/einstein-and-the-bees-should-you-worry/#53a195618157>.

⁵⁷ I. Bartomeus, S.G. Potts, I. Steffan-Dewenter, B.E. Vaissière, M. Woyciechowski, K.M. Krewenka, T. Tscheulin, S.P.M. Roberts, H. Szentgyorgyi, C. Westphal & R. Bommarco, *Contribution of Insect Pollinators to Crop Yield and*

crop plant species require pollination by animals of some sort, be it bees, flies, butterflies, birds, or bats; one-third of this work is done by honeybees.⁵⁸ Some human communities have learned what it means to do without the services of bees. Because local bees are extinct, Chinese apple farmers must hand-pollinate their trees, which results in lower pollination success and a concentration of high-end food products.⁵⁹ Pollination services by bees are now estimated at 14.6 billion USD in the U.S. alone.⁶⁰ In 2011, the UN declared the decline of honeybees a global phenomenon and underscored our dependence on bees: “Bees underline the reality that we are more, not less, dependent on nature’s services in a world of close to seven billion people.”⁶¹

What if we could extend this logic to all animals whose work for humans is currently unnoticed and unremunerated? This could be a game-changer since almost no services provided by animals are paid for. At the heart of ES is the notion that setting a price on animal services is the best way to protect or save them.⁶² ES follows mainstream economic rationality, constituting positive externalities that provide as-yet-unpaid benefits.⁶³ If we know what animals bring to the table, we can better estimate cost-benefit ratios and incorporate them into the decision-

Quality Varies with Agricultural Intensification, 2(328) PEER J. 1 (2014), <https://peerj.com/articles/328.pdf>.

⁵⁸ Gary P. Nabhan & Stephen L. Buchmann, *Services Provided by Pollinators*, in *NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 133, 136, 138 (Gretchen C. Daily ed., 1997); Dave Goulson, *Decline of Bees Forces China’s Apple Farmers to Pollinate by Hand*, CHINA DIALOGUE, (Oct. 2, 2012), <https://www.chinadialogue.net/article/show/single/en/5193-Decline-of-bees-forces-China-s-apple-farmers-to-pollinate-by-hand>; KLAUS TÖPFER, JAMES D. WOLFENSOHN & JONATHAN LASH, *WORLD RESOURCES 2000–2001: PEOPLE AND ECOSYSTEMS: THE FRAYING WEB OF LIFE* 13 (2000) (Indeed, 90% of all flowering plants would not exist without animals transporting pollen from one plant to another).

⁵⁹ Goulson, *supra* note 58.

⁶⁰ *Id.*

⁶¹ Michael McCarthy, *Decline of Honey Bees Now a Global Phenomenon*, *Says UN*, THE INDEPENDENT, (Mar. 10, 2011, 1:00 AM), <https://www.independent.co.uk/environment/nature/decline-of-honey-bees-now-a-global-phenomenon-says-united-nations-2237541.html>; see Stéphane Kluser et al., *UNEP Emerging Issues: Global Honey Bee Colony Disorder and Other Threats to Insect Pollinators*, UNEP EMERGING ISSUES 1 (2010).

⁶² Brown et al., *supra* note 11, at 376 (arguing “[t]he indirect effects on human well-being are more likely to be quantified using production function or replacement cost methods. An important economic issue that these methods can help with is the quantification of the costs of loss or degradation of ecosystem goods and services, as foreknowledge of these costs may show that ecosystem protection is the more efficient social choice.”)

⁶³ Gómez-Baggethun et al., *supra* note 13, at 1212, arguing that “non marketed ecosystem services are viewed as positive externalities that, if valued in monetary terms, can be more explicitly incorporated in economic decision-making.”

making process.⁶⁴ This strategy may help convince skeptics who may choose to protect animals not because it is the morally right thing to do but because it makes economic sense.⁶⁵ The ES approach could also remedy the free rider problem that plagues management of ES, i.e., overuse without concern for negative effects created for others.⁶⁶ By quantifying the value of ES and tracing its beneficiaries, we can control its distribution and effectively allocate rights and duties associated with ES. Given the requisite regulatory environment, ES valuation can nudge decision-makers to more highly esteem, and hence protect, the animals that provide these services. The main effect of ensuring that animal services are paid for is that their services become more expensive, resulting in a net decrease of services used and presumably in animals being less exploited over time. The more scarce an animal service becomes, the more the value of the service will increase and the more likely it is that exploitation will decrease.

The initial rationale of ES was mainly pedagogic, as a means to demonstrate the irreplaceable value of environmental processes, and to remind decision-makers and the broader public of the price of continuous consumption of nature, which causes a drain on natural resources.⁶⁷ As more economists grew interested in ES, however, it developed into a platform where stakeholders could buy and sell services, like carbon offsets.⁶⁸ The dominant logic of ES became, “we could save the world and turn a profit at the same time.”⁶⁹ A favored mechanism by which ES is operationalized is *Markets for ES* (MES),⁷⁰ which creates markets for trade in ES, or *Payment for ES* (PES).⁷¹ This denotes a beneficiary or user’s (private or public) direct or indirect voluntary payment to the provider of a service.⁷² Examples of PES include “Nestlé (formerly

⁶⁴ Brown et al., *supra* note 11, at 351.

⁶⁵ Thompson, Jr., *supra* note 7, at 468.

⁶⁶ RUHL ET AL., *supra* note 47, at 74.

⁶⁷ Gómez-Baggethun et al., *supra* note 13, at 1213.

⁶⁸ See e.g., Michael Van Patten & Arron Martin, *The Role of Electronic Marketplaces in Scaling Environmental Markets*, in PROACTIVE STRATEGIES FOR PROTECTING SPECIES: PRE-LISTING CONSERVATION AND THE ENDANGERED SPECIES ACT 141, 143 (C. Josh Donlan ed., 2015).

⁶⁹ Richard Conniff, *What’s Wrong with Putting a Price on Nature?*, THE GUARDIAN (Oct. 18, 2012, 11:44AM), <https://www.theguardian.com/environment/2012/oct/18/what-wrong-price-on-nature>.

⁷⁰ Ricardo Bayon, *Making Environmental Markets Work: Lessons from Early Experience with Sulfur, Carbon, Wetlands, and other Related Markets* (2004). https://vtechworks.lib.vt.edu/bitstream/handle/10919/66848/2358_Bayon2004_make_enviro_markets_work.pdf?sequence=1&isAllowed=y.

⁷¹ Sven Wunder, *Payments for Ecosystem Services: Some Nuts and Bolts* (2005) https://www.cifor.org/publications/pdf_files/OccPapers/OP-42.pdf.

⁷² For an overview of the different payment schemes and potential buyers/sellers, see Brown et al., *supra* note 11, at 361.

Vittel) paying farmers in north-eastern France to stop using chemicals, or the City of New York paying to protect watersheds in the Catskill mountains.”⁷³ In the past decades, MES/PES has become a popular mechanism thought to be cost-effective and sustainable for managing natural resources. Though empirical evidence is lacking, “many researchers have speculated that the element of conditionality and the direct compensation modality of [MES/PES] make this approach more effective than conservation approaches like Integrated Conservation and Development Projects, where the links between actions and payments are often vague or absent.”⁷⁴ Through MES/PES, ES has grown beyond a rhetorical tool, notably by shifting funding and partnerships.⁷⁵ In 2015, 12.3 billion USD flowed to nature-based solutions for managing water and watersheds, rehabilitating and protecting more than 365 million hectares of ecosystems, 7.3 billion USD of which directly compensated landowners for their conservation actions.⁷⁶ For example, Syngenta “collaborated with academia, NGOs, and government to develop PES as part of its Operation Pollinator to assist farmers in their biodiversity efforts.”⁷⁷ Or, regional habitat conservation plans under the Endangered Species Act often include programs funded by private actors to pay for protecting habitats.⁷⁸ As these examples show, ES prompts a shift in our understanding of the environment away from the view that it is a public good that must be protected in everyone’s interest, to the view that the environment is an economic good that people invest in privately, which supporters claim will more effectively preserve valuable ES.⁷⁹

A major deficiency of the ES narrative, however, is that not everything has a price and many things cannot be quantified.⁸⁰

⁷³ United Nations Development Programme (UNDP), *Payments for Ecosystem Services*, <http://www.undp.org/content/sdfinance/en/home/solutions/payments-for-ecosystem-services.html> (last visited Jun. 4, 2020).

⁷⁴ Jane Carter Ingram, David Wilkie, Tom Clements, Roan Balas McNab, Fred Nelson, Erick Hogan Baur, Hassanali T. Sachedina, David Dean Peterson & Charles Andrew Harold Foley, *Evidence of Payments for Ecosystem Services as a Mechanism for Supporting Biodiversity Conservation and Rural Livelihoods*, 7 *ECOSYSTEM SERV.* 10, 10 (2014); see also, Paul J. Ferraro & R. David Simpson, *The Cost-Effectiveness of Conservation Payments*, 78 *LAND ECON.* 339 (2002).

⁷⁵ Janet A. Fisher & Katrina Brown, *Ecosystem Services Concepts and Approaches in Conservation: Just a Rhetorical Tool?* 117 *ECOLOGICAL ECON.* 261, 268 (2015).

⁷⁶ United Nations Development Programme, *supra* note 73, at 2.

⁷⁷ *Id.*

⁷⁸ Barton H. Thompson Jr., *Managing the Working Landscape, in THE ENDANGERED SPECIES ACT AT THIRTY* 101, 115 (Dale D. Goble et al., eds., 2006).

⁷⁹ Thompson Jr., *supra* note 7, at 462.

⁸⁰ N. Small, M. Munday & I. Durance, *The Challenge of Valuing Ecosystem Services that Have no Material Benefits*, 44 *GLOBAL ENVIRONMENTAL CHANGE* 57 (2017). Though investing significantly into trying to quantify the seemingly unquantifiable,

Neoliberal models for measuring, valuing, and marketing resources may be effective in some contexts, but as McAfee and Shapiro point out, they “tend to falter when they encounter natural cycles and nonhuman agents that resist quantification and predictability.”⁸¹ The fact that nonhuman animals’ services are not properly quantified is a major hindrance to the effectiveness of ES, but it seems that there is no inherent difference between the complexity of human and non-human modes of living that would justify the stark differences in methodology and success. On this basis, one could argue that given the necessary time and interest, researchers will be able to find methods that can reliably measure and value animals’ services. This can then be used to inform and update policy, which leads to better protections for animals. Hence, ES still stands as a potentially useful approach, one that simply requires encompassing research and more stringent implementation.

c. *Conflicts with Human Interests*

The ES approach, as applied to animals, seems to produce significant benefits as projected by early proponents who argued that once nature is sufficiently valued, it would automatically be protected.⁸² But can ES account for climate change, the steady growth of human populations, and increasing competition between animals and humans for land and resources? To test the suitability of ES as a strategy to protect animals, we need to know if and how animals are protected under ES, especially when animal interests come into conflict with human interests.

the authors conclude: “Since current ES frameworks struggle to include non-material services, there is increasing recognition that either the ES frameworks should be amended to better account for the non-financial motivations and commitments beneficiaries have for the environment, or a completely new position should be taken to examine ‘culture’ and the many manifestations of value that arise from our interactions with nature.” *Id.* at 65.

⁸¹ Kathleen McAfee & Elizabeth N. Shapiro, *Payments for Ecosystem Services in Mexico: Nature, Neoliberalism, Social Movements, and the State*, 100 ANNALS OF THE ASS’N OF AM. GEOGRAPHERS 579, 580 (2010). *See also*, Kent H. Redford & William M. Adams, *Payments for Ecosystem Services and the Challenge of Saving Nature*, 23 CONSERVATION BIOLOGY 785, 786 (2009) (“Markets only exist for a certain range of ecosystem services, and some services are not amenable to pricing or valuation, such as fertilizing effect of atmospheric dust from the African Sahel carried across the Atlantic.”).

⁸² As Simpson argues, this seems “almost a mantra: if one totted up the real benefits of conservation and weighed them against the gains that would accrue if ecosystems were degraded or destroyed, advocates claim that conservation would dominate.” R. David Simpson, *Putting a Price on Ecosystem Services*, 13 ISSUES IN SCIENCE AND TECHNOLOGY (2016) (emphasis omitted), <https://issues.org/putting-a-price-on-ecosystem-services/>.

Since the ES approach is narrowly focused on furthering human interests, it often enables and actively encourages the killing of animals. Consider fish: the UN classifies fish as food and therefore, a provisioning service with direct market value.⁸³ Fish, the UN states, “provide one sixth of the total animal protein...consumed by humans” and secure “jobs for almost 35 million people worldwide.”⁸⁴ ES is concerned with marine resource extraction because fishery yields are declining.⁸⁵ ES’ goals align with classic rationales for environmental protection like sustainability, “that desired food species are again produced in abundance.”⁸⁶ Grazing, a process MA recognizes as a supporting service, is a similar concern. The UN argues that grazing supports a long list of services that contribute to human well-being, including the production of meat and milk; animal skins for tents; and wool from camels, sheep, and goats for household and farming necessities.⁸⁷ ES makes significant contributions to national economic activity, including marine fisheries (around 80 billion USD in 2000), marine aquaculture (57 billion USD in 2000), recreational hunting (50 billion USD a year in the U.S.), and fishing (24–37 billion USD a year in the U.S.).⁸⁸ The ES approach values and actively promotes the slaughter of animals, considering it a service to the ecosystem and humans. ES also actively promotes the killing of animals to regulate infectious disease in humans, domestic plant and animals,⁸⁹ and the killing of “invasive” animals for human benefits.⁹⁰ In essence, MES/PES is thus not designed to reduce, mitigate, or prevent lethal harm and injury done to animals.

⁸³ Patricia Balvanera, Sandra Quijas, Berta Martin-López, Edmundo Barrios, Laura Dee, Forest Isbell, Isabelle Durance, Piran White, Ryan Blanchard & Rudolf de Groot, *The Links Between Biodiversity and Ecosystem Services*, in ROUTLEDGE HANDBOOK OF ECOSYSTEM SERVICES 45, 47 (Marion Potschin, Roy Haines-Young, Robert Fish & R. Kerry Turner eds., 2016).

⁸⁴ MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at 52.

⁸⁵ See Søren Anker Pedersen, Hans Lassen & Hans Frost, *The Marine Ecosystem Services Approach in a Fisheries Management Perspective*, IFRO Working Paper 2015, http://okonomi.foi.dk/workingpapers/WPpdf/WP2015/IFRO_WP_2015_03.pdf.

⁸⁶ Les Kaufman & Paul Dayton, *Impacts of Marine Resource Extraction on Ecosystem Services and Sustainability*, in NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 275, 283 (Gretchen C. Daily ed., 1997).

⁸⁷ MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at 55.

⁸⁸ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 49. See, e.g., P. A. Lindsey, et. al., *Potential of Trophy Hunting to Create Incentives for Wildlife Conservation in Africa where Alternative Wildlife-based Land Uses May not Be Viable*, 9 ANIMAL CONSERVATION 283 (2006). “The potential for trophy hunting to create incentives for wildlife conservation and community development in Africa, in multiple countries, including those where ecotourism may not be viable, and in areas within well-visited countries that are off the tourist circuit.” *Id.* at 289.

⁸⁹ MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at 54.

⁹⁰ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 14; Ingram et al., *supra* note 74, at 10.

ES can also cause and perpetuate animal suffering in other ways, whether or not they are killed. According to the MA, animal tourism and recreation qualify as cultural, spiritual, and recreational services.⁹¹ Consequently, non-consumptive uses of animals, like safaris and whale watching, are accepted as legitimate services worthy of protection⁹² despite the fact that these services pose a real threat to animals and erode their quality of life.⁹³ Whale watching, for example, harms whales by compromising their sleep, interfering with their social habits, polluting the ocean, causing noise, and reducing their birth rates.⁹⁴ ES research will only increase the problem by pointing to new animal services that can be exploited. Cisneros-Montemayor et al., for example, argue that whale watching should expand to bring “the total potential for the whale-watching industry to over 2.5 billion USD in yearly revenue and employ 19,000 people.”⁹⁵ In these calculations, the costs borne by animals are not integrated or adequately weighed against human interests. ES proponents care only about problems evidenced by human costs and do not consider quality of life or other costs to animals, except insofar as they reduce the benefits generated for humankind. By this logic, MES/PES can legitimize the exploitation of animals. Similarly, zoos, though not integral to ecosystems, allocate a portion of their budgets to conservation projects.⁹⁶ They are often seen as ambassadors of animals threatened by extinction, playing a role in educating people and raising public awareness.⁹⁷ But, the education that zoos provide focuses on the availability of animals to serve human interests, and legitimates their confinement. Further, zoos rarely advance the larger goals of ecosystem protection, and many still capture wild animals by force, killing some during capture and transport before confining the survivors in zoos.⁹⁸

⁹¹ MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at 54.

⁹² MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 122.

⁹³ See Tim Pile, *The Good, Bad and Ugly Sides to African Safaris*, POST MAGAZINE, Jul. 21, 2017 (illustrating the negative effects of safaris on animals).

⁹⁴ J.B. MacKinnon, *It's Tough Being a Right Whale These Days*, THE ATLANTIC, Jul. 30, 2018. See also, Christine Erbe, *Underwater Noise of Whale-Watching Boats and Potential Effects on Killer Whales (Orcinus Orca), Based on an Acoustic Impact Model*, 18 MARINE MAMMAL SCI. 394 (2002); Peter J. Corkeron, *Humpback Whales (Megaptera novaeangliae) in Hervey Bay, Queensland: Behaviour and Responses to Whale-Watching Vessels*, 73 CAN. J. ZOOLOGY 1290 (1995).

⁹⁵ A.M. Cisneros-Montemayor et al., *The Global Potential for Whale Watching*, 34 MARINE POL. 1273 (2010).

⁹⁶ The World Association for Zoos and Aquariums (WAZA) suggests that zoos develop an operational budget that supports conservation over the long term (e.g. at least 3% of annual operating budget) and is not solely dependent on external donations. WORLD ASSOCIATION FOR ZOOS AND AQUARIUMS (WAZA), COMMITTING TO CONSERVATION: THE WORLD ZOO AND AQUARIUM CONSERVATION STRATEGY 32 (2015).

⁹⁷ See e.g., Jeremy Hance, *Zoos Could Become 'Conservation Powerhouses'*, THE GUARDIAN, Dec. 8, 2015.

⁹⁸ Note, also, that zoos have largely moved their conservation efforts from

These contradictions inherent in the ES approach can create a “peculiar moral schizophrenia of a culture that drives a species to the edge of extinction and then romanticizes the remnants.”⁹⁹

Why do animals and core ideals of environmentalism matter so little in the ES approach when...it emerged from a strong ecocentric position like that advocated for by Leopold? The traditional narrative underlying the ES concept was that we must cater to ecosystem processes within an ecological system, “irrespective of whether or not such processes are useful for humans.”¹⁰⁰ The point at which the original motivations behind ES and its lived political reality began to diverge was when proponents of the ES approach began to emphasize the “urgent challenge...to move from ideas to action on a broad scale.”¹⁰¹ For decades, broad ideas about environmental protection were exchanged, discussed, accepted, and preached, but none of these ideas had been mainstreamed into the day-to-day decisions that affected the environment. ES offered a welcome “refresh” on old takes from the CBD and other treaties, a “renaissance in the conservation community,” operating as a “metaphor to awaken society.”¹⁰² Whereas the economy had long been seen as the only source of marketable goods and services to maximize human welfare through gross domestic product, the environment suddenly became another powerful source of welfare maximization, calculated and valued through ES.¹⁰³ Rather than being seen as worthy of protection by itself, the environment became seen as a means to secure human welfare.

This shift in the rationale behind ES is reflected in current ES approaches. The MA, for example, intimately ties ES to human well-being, arguing that ES must be secured because they fundamentally influence human well-being, including:

- the basic material for a good life: access to resources for viable livelihood (including food and building materials) or the income to access these;

in situ to *ex situ*, to recover species through captive breeding. See Irus Braverman, *Captive for Life: Conserving Extinct in the Wild Species through Ex Situ Breeding*, in THE ETHICS OF CAPTIVITY 193-212 (Lori Gruen ed., 2014).

⁹⁹ DALE JAMIESON, MORALITY'S PROGRESS 178 (2002).

¹⁰⁰ Gómez-Baggethun et al., *supra* note 13, at 1213.

¹⁰¹ Gretchen C. Daily, *Securing Nature and People: Can We Replicate and Scale Successes?*, in ROUTLEDGE HANDBOOK OF ECOSYSTEM 304, 304 (Marion Potschin et al., eds., 2016).

¹⁰² Potschin et al., *supra* note 17, at 6.

¹⁰³ Robert Costanza, *Ecosystem Services in Theory and Practice*, in ROUTLEDGE HANDBOOK OF ECOSYSTEM SERVICES 15, 15 (Marion Potschin, Roy Haines-Young, Robert Fish & R. Kerry Turner eds., 2016).

- health: adequate food and nutrition, avoidance of disease, clean and safe drinking water, clean air, energy for comfortable temperature control;
- security: a safe environment, resilience to ecological shocks or stresses such as droughts, floods, and pests, secure rights, and access to ES;
- freedom of choice and action: the ability to influence decisions regarding ES and well-being;
- good social relations: the realization of aesthetic and recreational values, ability to express cultural and spiritual values, opportunity to observe and learn from nature, development of social capital, and avoidance of tension and conflict over a declining resource base.¹⁰⁴

As Ruhl and his fellow authors explain, ES' preoccupation with human well-being can be traced back to the distinction between *ecosystem functions* and *ecosystem services*: the former denote all services of ecosystems (regardless of who benefits from them), the latter denote only those services that benefit human populations.¹⁰⁵ Potschin and Haines-Young developed a cascade model that helps carve out these differences in more detail.¹⁰⁶ Ecosystems move and transform energy and materials through biophysical structures and processes that lead to an improved understanding of the functions that ecosystems perform, like providing habitat for other organisms.¹⁰⁷ Of these functions, some are directly relevant to human populations and qualify as ES; from these services, humans derive benefits and ascribe them a specific value. This is illustrated in the following cascade:

biophysical structure or process → *ecosystem function*
→ *ecosystem service* → *human benefit* → *human value*¹⁰⁸

The cascade illustrates that ES has become synonymous with human benefits generated from nature. A central problem with this narrow approach to ES is that it ignores the basic laws of ecology: ecosystems do not benefit only one species. The environment is not and was never designed to serve human interests only. This idea is illustrated by the myriad “ecosystem disservices” for humans: wetlands give rise to

¹⁰⁴ MILLENNIUM ECOSYSTEM ASSESSMENT (2005b), *supra* note 17, at 49.

¹⁰⁵ RUHL ET AL., *supra* note 47, at 15.

¹⁰⁶ Marion Potschin & Roy Haines-Young, *Defining and Measuring Ecosystem Services*, in ROUTLEDGE HANDBOOK OF ECOSYSTEM SERVICES 25, 26 (Marion Potschin, Roy Haines-Young, Robert Fish & R. Kerry Turner eds., 2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

diseases; wild animals kill humans; forests contribute to global warming; and so on.¹⁰⁹ Mainstreaming ES pushed us to ignore this underlying reality and significantly diverge from its original purpose.¹¹⁰ A visit back to the 1980s would remind us that the original narrative that supported the concept was that humans must focus on ecosystem processes within an ecological system, “irrespective of whether or not such processes are useful for humans.”¹¹¹ But today’s ES is too narrowly tailored to human interests in protecting nature and, consequently, too simplistic to deal with the prevailing environmental and economic complexities.¹¹² To be clear, the problem is not that ES is concerned with human well-being *per se*, mirroring the goals and legitimations of the human rights regime, but that ES is *exclusively* concerned with human well-being. This narrow focus is dangerous for animals because it values their modes of living and being only when humans derive value from them. As Costanza succinctly put it: “ecosystem services are, by definition, not ends or goals, but means to the end or goal of sustainable human well-being.”¹¹³ “This does not imply that ecosystems are not also valuable for other reasons, but that ecosystem services are defined as the instrumental values of ecosystems as means to the end of human well-being.”¹¹⁴ In short, ES is *purely anthropocentric*.¹¹⁵

Given its anthropocentric focus, it is unlikely that we can use the ES approach to effectively protect animals. ES seems to suggest that (a) the more animals work, the better, and that (b) animals do not deserve protection when their interests conflict with human interests in using them. Overall, we might end up with a scheme that does not declare inadmissible or reduce services that are adverse for animals, but indeed with one that legitimates and increases adverse service conditions for animals. As such, the ES approach is similar, if not identical to the current approaches in law. If the sole function of ES is to turn recipients

¹⁰⁹ Douglas J. McCauley, *Selling Out on Nature*, 443 NATURE 27, 27 (2006).

¹¹⁰ Gómez-Baggethun et al., *supra* note 13, at 1209.

¹¹¹ *Id.* at 1213.

¹¹² Norgaard argues that ES is a “complexity blinder.” Richard B. Norgaard, *Ecosystem Services: From Eye-Opening Metaphor to Complexity Blinder*, 69 ECOLOGICAL ECONOMICS 1219 (2010). When ES emerged, critical voices about the endorsement of ES were widespread. See Colin W. Clark, *Profit Maximization and the Extinction of Animal Species*, 81 J. POL. ECON. 950 (1973); Anthony Fisher, John Krutilla & Charles Cicchetti, *The Economics of Environmental Preservation*, 62 AM. ECON. REV. 605 (1972); David Pearce, *The Limits of Cost-Benefit Analyses as a Guide to Environmental Policy*, 29 KYKLOS 97 (1976); THE VALUE OF WATER IN ALTERNATIVE USES, WITH SPECIAL APPLICATION TO WATER USE IN THE SAN JUAN AND RIO GRANDE BASINS OF NEW MEXICO (Nathaniel Wollman ed. Univ. N.M. 1962).

¹¹³ Costanza, *supra* note 103, at 18.

¹¹⁴ *Id.*

¹¹⁵ Fisher & Brown, *supra* note 75, at 257; RUHL ET AL., *supra* note 47, at 15.

of services provided by fish, for example, into buyers of those services so that the costs of those services are internalized and fish stocks are not depleted,¹¹⁶ then ES will level off at a “sustainable” level of fishing, ensuring the demand for fish remains steady. Granted, the ES approach is sensitive to and seeks to internalize non-linear and potentially abrupt changes in ecosystems. When the “harvest” of animals exceeds sustainable levels, stocks are depleted and animals are placed at a risk of extinction, which reduces the food supply of people who depend on these resources. The ES approach is particularly interested in securing the current structure and function, hence it is concerned about the loss of species and genetic diversity, as well as decreases in the resilience of ecosystems.¹¹⁷ So while ES might somewhat limit (a), it does so only to the extent useful for humans, and it fully succumbs to (b), namely that animal interests can and should always be outweighed by human interests. To be clear, ES is not averse to balancing interests. Indeed, ES prides itself to use cost-benefit analyses (CBAs), adding up gains and subtracting losses, and then comparing the net gains across policy options. CBAs can help us find the most effective way to protect nature and is egalitarian by giving each person’s valuation the same weight, as Goulder and Kennedy maintain.¹¹⁸ The primary problem is that non-humans are not even granted entry into the circle of interest-holders under ES. As the authors maintain, the ES approach “doesn’t rule out making substantial sacrifices to protect and maintain other living things. But it asserts that we can assign value (and therefore help other forms of life) only insofar as we humans take satisfaction from doing so.”¹¹⁹ Ultimately, ES failed to change the course from ‘nature *for* people’ to ‘nature *and* people.’

d. Normative Grip and Economic Parameters

In addition to maintaining an anthropocentric focus, the ES approach favors utilitarian calculations and sits squarely within a neoclassical paradigm.¹²⁰ The most common indicator for measuring the existence of ES valuation is consumers’ willingness to pay.¹²¹ If willingness to pay is the key parameter guiding animal and environmental

¹¹⁶ Brown et al., *supra* note 11, at 329.

¹¹⁷ MILLENNIUM ECOSYSTEM ASSESSMENT (2005a), *supra* note 36, at 12.

¹¹⁸ Lawrence H. Goulder & Donald Kennedy, *Valuing Ecosystem Services: Philosophical Bases and Empirical Methods*, in *NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 23, 25 (Gretchen C. Daily ed., 1997).

¹¹⁹ *Id.* at 24.

¹²⁰ Fisher & Brown, *supra* note 75, at 261, 268.

¹²¹ LAURA E. HUGGINS, *ENVIRONMENTAL ENTREPRENEURSHIP: MARKETS MEET THE ENVIRONMENT IN UNEXPECTED PLACES* 25 (2013).

law, protection of nature and animals remains fragile because it depends on human goodwill and a stable economic basis. This fragility is evident if we consider species diversity. Like existing approaches in animal and environmental law, ES favors protecting animals with specific morphological traits, phylogenetic closeness to humans, or neotenic characteristics.¹²² Even when animals are covered by ES, the question emerges: what happens if we *do not pay*? What if, even if we want to, we *cannot pay*? There is a danger, as Huggins suggests in *Environmental Entrepreneurship*, that “if wildlife doesn’t pay, it doesn’t stay.”¹²³ Huggins speaks to the issue of species conservation here, but this logic applies to ES as a whole: if no-one pays for an animal to live, they do not stay; if no-one pays for an animal to be protected, they will have to suffer; if animals damage crops or compete with humans for other resources, they will become a liability to be avoided; if an animal is worth more dead than alive, they will be eliminated; etc. The central problem with this logic is that it deems nature and with it, animals only worthy of protection if a profit can be made.¹²⁴

Some claim that we really do not have a choice about whether to use profitability arguments if we want to protect nature and animals. As Pearce argues:

[T]he playing field is not level; rather it is tilted sharply in favor of economic development. Two things have to be done to correct this situation. First, one has to show that ecosystems have economic value indeed, that all ecological services are economic services. Second, a way has to be found to ‘capture’ the nonmarket values of ecosystems and turn them into real benefits for those who practice conservation.¹²⁵

Pearce sees ES as a reality that we must acknowledge to bring stakeholders to the table and convince them to more holistically protect service providers.¹²⁶ Advocates of ES praise it as a useful tool for accessing new economic markets and protecting nature at the same

¹²² Balvanera et al., *supra* note 83, at 52.

¹²³ HUGGINS, *supra* note 121, at 25.

¹²⁴ McCauley, *supra* note 109, at 28.

¹²⁵ David Pearce, *Auditing the Earth: The Value of the World’s Ecosystem Services and Natural Capital*, 40(2) ENVIRONMENT 23, 23 (1998).

¹²⁶ Costanza et al., *supra* note 30, at 255 (“although ecosystem valuation is certainly difficult and fraught with uncertainties, one choice we do not have is whether or not to do it.”); RUHL ET AL., *supra* note 46, at 31 (“Ecosystem services are real. They have measurable value to humans, and whether we know their precise economic value or not, the fact that society has to choose how to allocate natural resources necessarily requires valuation of ecosystem services in some form or another.”).

time.¹²⁷ This, however, is not necessarily true. Though argued to help advance environmentalism, framing the concept within market strategies often is counterproductive to core pillars like conservationism.¹²⁸ Empirical research by Fisher and Brown shows that while ES is more than a rhetorical tool causing a clear increase in private investment for conservation it “may actually prejudice the conservation movement’s ability to make a convincing, plural, and enduring rationale for conservation.”¹²⁹ More recent scholarship has uncovered further problems with the ES approach, including inequities in distribution and access to services, which results in dispossessing the world’s poor¹³⁰ despite contrary aspirations.¹³¹ McAfee argues that ES, as such, is part of “green developmentalism,” the dominant policy of environmentalism that rests on “the fantasy that we can ‘green the planet’ while continuing to grow along demonstrably unsustainable economic trajectories.”¹³² ES is presented as the only available solution, justifying the use of nature while promising society the impossible: both protecting animals and nature, and simultaneously exploiting them.¹³³ As critical scholars argue, ES has set the stage for valuing ecosystems only as exchange value and subjecting them to monetization and sale.¹³⁴ This fortifies the exclusive preoccupation with human interests, leading to market fundamentalism and, with it, to the total commodification of animals and nature.

In sum, the ES approach is incomplete by failing to recognize and value services that are meaningful to animals and by failing to internalize time elements; it is discriminatory by favoring some work by animals over others; and it is counterproductive by making animals worth

¹²⁷ Thompson Jr., *supra* note 7, at 461.

¹²⁸ Gómez-Baggethun et al., *supra* note 13, at 1209; Kosoy & Corbera, *supra* note 12, at 1228; Clive Spash, *How Much Is that Ecosystem in the Window? The One with the Biodiverse Trail*, 17(2) ENVIRONMENTAL VALUES 259 (2008); McCauley, *supra* note 109, at 27; Morgan M. Robertson, *The Neoliberalization of Ecosystem Services: Wetland Mitigation Banking and Problems in Environmental Governance*, 35 GEOFORUM 361 (2004); JOAN MARTINEZ-ALIER, THE ENVIRONMENTALISM OF THE POOR (2002).

¹²⁹ Fisher & Brown, *supra* note 75, at 264.

¹³⁰ McAfee & Shapiro, *supra* note 81, at 579; JENS CHRISTIANSEN, RONNIE HALL, HELEN CHANDLER, MARIKE TORFS, MARTA ZOGBI, SIMONE LOVERA & DENA LEIBMAN, NATURE FOR SALE: THE IMPACTS OF PRIVATIZING WATER AND BIODIVERSITY (2005).

¹³¹ Jeffrey D. Sachs et al., *Biodiversity Conservation and the Millennium Development Goals*, 325 SCIENCE 1502 (2009).

¹³² Kathleen McAfee, *Selling Nature to Save It? Biodiversity and Green Developmentalism*, 17 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 133, 151 (1999).

¹³³ LIVIA BOSCARDIN, SUSTAINABLE EXPLOITATION: THE POLITICAL ECOLOGY OF THE LIVESTOCK REVOLUTION (unpublished Ph.D. dissertation, University of Basel 2017).

¹³⁴ Gómez-Baggethun et al., *supra* note 13, at 1215.

more dead than alive. The reason for these structural deficiencies is ES's exclusive focus on human utility and economic value. By endorsing this approach, we risk turning away from normative and ethical arguments that underlie most successes in advancing the interests of animals. Thus, we need to ask if the AL approach does a better job at paving the way for more just relations to emerge between humans and animals.

III. ANIMAL LABOR

Both ES and AL aim to shift the public's attention from the goods that animals produce to the services that animals provide. Both aim to achieve broad recognition and fair assessment of the benefits of animal services. Though they pursue similar goals, the two approaches have fundamentally different starting points. Under ES, the services provided by animals are seen as naturally occurring,¹³⁵ and humans have a form of natural privilege that entitles them to derive benefits from these services. ES asserts that "the production of ecosystem goods and services requires no inputs of labor [...]."¹³⁶ The growing literature of AL criticizes this position and argues that animals are too quickly assumed to be goods subject to economic marketism, or natural resources that can freely be harvested.¹³⁷ AL emerges as a counternarrative to the intensification and proliferation of animal production¹³⁸ by recognizing animals as individual, sentient beings, and claiming that animals are workers in their own right, subject to mistreatment when goods are produced.¹³⁹ These considerations form the basis of the core argument of AL, namely that animals deserve robust rights as workers. In the following, I will examine these claims in detail to determine if AL holds higher promises for animals, using the same four factors as in the ES analysis.

a. Making Visible and Recognizing Animals and Their Services

Few people have considered recognizing animals as workers. After all, birds do not enter contracts with one another, deer do not

¹³⁵ Those "naturally arise from natural capital." Brown et al., *supra* note 11, at 375.

¹³⁶ *Id.* at 337.

¹³⁷ BRUCE A. WAGMAN & MATTHEW LIEBMAN, A WORLDVIEW OF ANIMAL LAW 297 (2011).

¹³⁸ In 2018, more than 73 billion farmed animals were slaughtered for human consumption, including 70 billion chickens, 1.5 billion pigs, 1 billion sheep and goats, and 300 million cows: FAOSTAT (search criteria "World" + "Meat Total" + "Producing Animals/Slaughtered" + "2018," available at <http://faostat.fao.org/> (last visited Jun. 4, 2020).

¹³⁹ BLATTNER ET AL., *supra* note 4; Cochrane, *supra* note 3; COULTER, *supra* note 5; Hribal, *supra* note 6, at 436; PORCHER, *supra* note 1.

take time off, horses do not participate in pension plans, and “working dogs” do not participate in a wage system. Most humans would agree that animals do not organize their lives around work and that work is not important or meaningful to them. They may feel that animals do the opposite of work: dogs sleep away their days; cows just eat all day and watch the hours pass; and, horses enjoy a few spring days on the meadow. Animals naturally seem to do right what we do wrong. They laze about while we work hard even though we despise it.

However, what if an animal wants to work or is required to do so? What if a dog is trained as a guide for the blind or to sniff out landmines? Or a horse is trained to perform in Olympic dressage competitions? What about a pig doing therapy work? Our certainty may begin to waiver. Some may consider the dog or the horse a working animal, but not the pig. Others may say that even trained animals do not really work because they lack the skill and intelligence along with the ability to plan, cooperate, and reciprocate that a job requires. Marx, a founding father of contemporary labor theories, famously argued that animals are guided by mere instincts and the necessities of survival, whereas humans can engage in conscious cooperative productive activity.¹⁴⁰ If animals are present in a workplace they are only tools or resources used by their handlers who are the real workers.¹⁴¹

This distinction might seem natural and necessary for many, especially in light of the ongoing struggle of many humans to be recognized for their work and given effective legal protections.¹⁴²

¹⁴⁰ KARL MARX, *CAPITAL* VOL. 1, 127 (Progress Publishers 1995) (1867), available at <https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf>. (“[W]e pre-suppose labour in a form that stamps it as exclusively human. A spider conducts operations that resemble those of a weaver and a bee puts to shame many an architect in the construction of her cells. But what distinguishes the worst architect from the best of bees is this, that the architect raises his structure in imagination before he erects it in reality.”).

¹⁴¹ *Id.* at 129 (“[A] particular product may be used in one and the same process, both as an instrument of labour and as raw material. Take, for instance, the fattening of cattle, where the animal is the raw material, and at the same time an instrument for the production of manure.”).

¹⁴² Agricultural workers are a prime example of workers still waiting for legal recognition and protection. Under the U.S. Fair Labor Standards Act (FLSA), general health and safety regulations, minimum wage and overtime requirements are all subject to exceptions for agricultural workers (29 U.S.C. § 213(a)(6) (2006)). The National Labor Relations Act (NLRA), the U.S.’ primary legislation governing the rights of workers to bargain collectively, excludes “agricultural laborers” from its definition of “employee” and its attendant protections (29 U.S.C. § 213(b)(12) (2006)). Migrant and domestic workers, too, belong to the specially vulnerable workers: Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 *COMP. LAB. L. & POL’Y J.* 95 (2013); James Lin, *A Greedy Institution: Domestic Workers and a Legacy of Legislative*

However, the same arguments that underlie these speciesist views of labor have been used for centuries to deny recognition and rights to women as workers.¹⁴³ Domestic and care work, typically jobs done by women, do not produce surplus value in a capitalist system and are thus labeled “unproductive.”¹⁴⁴ For Marx, these forms of labor figured as natural acts, not as evidence of distinctively human activity.¹⁴⁵ Historically, both the political, economic, and legal definitions of labor have been androcentrically and anthropocentrically organized, and focused almost exclusively on male/human experiences. The central idea underlying AL is that we need to shed these narrow, unjustifiable prejudices and broaden our understanding of work so that labor can become a site of justice for all.

The call for recognizing animals as workers is not as new and unsettling as many would like to think. Before animal agriculture was industrialized, farmed animals were widely viewed as working animals.¹⁴⁶ As Hribal notes:

Since the 17th century, a great many animals have been put to work, they have produced large monetary profits, and they have received little to no compensation or recognition for their efforts. The farms, factories, roads, forests, and mines have been their sites of production. Here, they have manufactured hair, milk, flesh, and power for the farm, factory, and mine owners. And here, they are unwaged.¹⁴⁷

Exclusion, 36 FORDHAM INTERNATIONAL JOURNAL 706 (2013). For an excellent overview of how labor law has historically excluded racial minorities, see Eric Arnesen, *Up from Exclusion: Black and White Workers, Race, and the State of Labor History*, 26 REVIEWS IN AMERICAN HISTORY 146 (1998).

¹⁴³ This is, while women always worked, they were denied entry into paid work, and domestic work was not recognized as “true” work: Kendra Strauss & Judy Fudge, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work*, TEMPORARY WORK, AGENCIES AND UNFREE LABOUR: INSECURITY IN THE NEW WORLD OF WORK 1-25, 2 (Judy Fudge & Kendra Strauss eds., 2014).

¹⁴⁴ See Paddy Quick, *Feudalism and Household Production*, 74 SCIENCE & SOCIETY 157 (2010) (For an excellent overview of this debate).

¹⁴⁵ WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 193 (2002).

¹⁴⁶ Klaus Petrus, *Arbeit*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN 38, 38 (Arianna Ferrari & Klaus Petrus eds., 2015); Brett Mizelle, *The Visibility and Invisibility of Pigs*, Faunalytics Blog (Mar. 14, 2012) <https://faunalytics.org/the-visibility-and-invisibility-of-pigs-part-one-pigs-in-the-city>.

¹⁴⁷ Hribal, *supra* note 6, at 436.

Even Adam Smith, one of the earliest defenders of free trade, stated in *The Wealth of Nations*: “No equal capital puts into motion a greater quantity of productive labour than that of the farmer. Not only his labouring servants, but his labouring cattle are productive labourers.”¹⁴⁸

Today, we generally think of working animals as animals trained or forced to perform certain tasks for the military, the police, private companies, or individuals.¹⁴⁹ Animals provide labor by guiding the blind, rescuing victims of avalanches or fires, assisting in therapy, or providing emotional support.¹⁵⁰ Guide dogs, assistance dogs, rescue dogs, truffle hogs, draft horses, donkeys, oxen, llamas, camels, reindeer, and elephants all perform tasks that are too risky, difficult, burdensome, or repetitive for us,¹⁵¹ including transporting goods, delivering messages, packing goods, pulling vehicles, searching and retrieving, herding or shepherding, and treating or providing therapy to humans.¹⁵² The research industry uses animals to perform cognitive tests that provide results for the biomedical, pharmaceutical, psychological, and social sciences.¹⁵³ Animals also work for the entertainment industry. Wild cats, elephants, dogs, horses, monkeys, orcas, seals, dolphins, and other animals perform at circuses, zoos, rodeos, and media productions.¹⁵⁴

¹⁴⁸ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 149 (1884).

¹⁴⁹ See Jocelyne Porcher, *Animal Work*, in *THE OXFORD HANDBOOK OF ANIMAL STUDIES* 302 (Linda Kalof ed., 2017) (providing an overview of “animal work”).

¹⁵⁰ Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals*, Southwest ADA Center (2014), https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_final.pdf; See also, D. Marks, *Monkey Helpers Lend a “Helping Hand”*, CBS NEWS, Jan. 14, 2006 (discussing the use of monkeys to help disabled individuals); See also, Aubrey H. Fine, *HANDBOOK ON ANIMAL ASSISTED THERAPY: THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE* (3d ed. 2010) (discussing animal assisted therapy).

¹⁵¹ Norbert Benecke, *Urgeschichte*, in *MENSCH UND TIER IN DER GESCHICHTE EUROPAS* 1-28, 18 (Peter Dinzelsbacher ed., 2000).

¹⁵² PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 42-3 (2011).

¹⁵³ See Jonathan L. Clark, *Labourers or Lab Tools? Rethinking the Role of Lab Animals in Clinical Trials*, in *THE RISE OF CRITICAL ANIMAL STUDIES: FROM THE MARGINS TO THE CENTRE* 139, 160 (Nick Taylor & Richard Twine eds., 2014) (“[R]ethinking the labour process should be understood as part of the broader posthumanist project of rethinking agency, a project that promises to deliver a far humbler understanding of what it means to live in a more-than-human world.”).

¹⁵⁴ Many of the scholars working in the area refer to these animals as “working animals” and their lifetime as a “career.” See e.g. Peggy W. Larson, *Rodeo Is Cruel Entertainment*, 16 PACE ENVTL. L. REV. 115 (1998); G. Agoramoorthy & M.J. Hsu, *Use of Nonhuman Primates in Entertainment in Southeast Asia*, 8 J. APPL. ANI. WEL. SCI. 141 (2005); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 395 (2003).

Some of these animals are now explicitly recognized as workers by the law, such as in Estonia,¹⁵⁵ Norway,¹⁵⁶ Croatia,¹⁵⁷ the United Kingdom,¹⁵⁸ and more. The Estonian Animal Protection Act, for example, states that farmed animals are “producing animal products.”¹⁵⁹ In 2013, the Nottingham Police awarded a pension of £500 to all police dogs upon retirement. Upon inaugurating the pension scheme for police dogs, the Nottingham Police and Crime Commissioner Paddy Tipping publicly stated: “We look after the people who work for us who have been police officers and staff, they get a decent retirement and I think it’s important the same is done for the dogs. These animals work hard for the police and they are officers in their own right.”¹⁶⁰ In 2008, the Norway Supreme Court determined that police dogs are public servants under the law, so any assault on a police dog amounts to assaulting a police officer.¹⁶¹ Under Croatian law, authorities must issue a work permit before dogs may perform work.¹⁶² Animals are frequently honored for their accomplishments. After the terrorist attacks in Paris in 2015, Diesel, a seven-year-old Belgian shepherd that died from injuries received during the attack, was posthumously awarded the Dickin Medal the equivalent of the Victoria Cross for animals.¹⁶³ Director-General Jan McLoughlin, who awarded the medal, explained, “[a]s guardians of the world’s most prestigious animal awards programme, we were inundated by messages from members of the public to recognise his heroism.”¹⁶⁴

Animals with such special skills or animals that perform work that is highly valued, too risky, or impossible for humans to do are likely to become recognized as workers by law.¹⁶⁵ However, animals that

¹⁵⁵ Animal Protection Act, 32/332, RT 2001 3, 4, §2 (Est.).

¹⁵⁶ Supreme Court June 4, 2008, HR-2008-972-A, case no. 2008/642, criminal appeal against judgment (Nor.).

¹⁵⁷ Zakon o zaštiti životinja [Animal Protection Act] Art. 3 Paragraph 21 (Croat.).

¹⁵⁸ Cochrane, *supra* note 3, at 15.

¹⁵⁹ Animal Protection Act, 32/332, RT 2001 3, 4, §2 (Est.).

¹⁶⁰ Cochrane, *supra* note 3, at 15.

¹⁶¹ Supreme Court June 4, 2008, HR-2008-972-A, case no. 2008/642, criminal appeal against judgment (Nor.). *See also*, PORCHER, *supra* note 1, at 118.

¹⁶² Zakon o zaštiti životinja [Animal Protection Act] Art. 3 Paragraph 21 (Croat.).

¹⁶³ Ryan Hooper, *Diesel the Dog Gets Bravery Award after He Was Killed in Paris Attacks Terror Siege*, THE MIRROR (Dec. 28, 2015, 2:50 PM), <https://www.mirror.co.uk/news/world-news/diesel-dog-gets-bravery-award-7080999>.

¹⁶⁴ *Id.*

¹⁶⁵ Eisen makes a particularly strong argument in this regard: “An argument for social inclusion that seeks these goods for police dogs and carriage horses through a lens that hives off the problems of animal agriculture strikes me as materially under-inclusive. Of course, attention to a relevant category of social life (e.g. the lives of police dogs and carriage horses) as warranting ideological transformation does not

provide services for ecosystems may not be accorded the same status. Skeptics, including ES proponents, would argue that animals forming part of an ecosystem are just living their lives and do not deserve to be recognized as workers. They have a hard time imagining that crows that engage in activities like nest building, raising their young, and foraging for food are laboring, much less that they have a claim to labor rights.¹⁶⁶ But as Hribal suggests, our attitude would quickly change if we looked at the daily lives of wild animals from their perspective.¹⁶⁷ Animals in the wild must find food and water, locate appropriate shelter, and protect themselves and their kin from adverse weather conditions and predators.¹⁶⁸ They must face competitors, diseases, and other threats.¹⁶⁹ Wild animals also perform care work, particularly for their own or the community's offspring. They educate their young, take care of their sick, and support and empower those close to them.¹⁷⁰ To survive, they build homes, keep them clean, repair them, find food and transport it, process it, and feed it to their young. Wild animals gather information about and adapt to human intrusion, including land-planning, hunting, trapping, or spreading toxins.¹⁷¹ They are vulnerable to fluctuations in climate and its immediate consequences on soil, water, food, etc., and must migrate to more suitable environments where they and their families can thrive.¹⁷² From a human perspective, the work of wild animals may not be obvious, but from the animals' perspective, it's hard to imagine life without work. In sum, AL makes animal services more

necessarily require that all aspects of every related social problem be captured by a proposed transformative lens. But since we know that farmed animals are a particularly, and perhaps paradigmatically, debased constituency, we should be cautious of theories of animal inclusion that seem not to embrace this category. This is especially so where the proposed mechanism for inclusion is already recognized as labour is as having exclusionary or marginalizing effects on those left out." Jessica Eisen, *Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism*, in *ANIMAL LABOUR: A NEW FRONTIER OF INTERSPECIES JUSTICE?* 139, 152 (Charlotte E. Blattner, Kendra Coulter & Will Kymlicka eds., 2020).

¹⁶⁶ *Id.*

¹⁶⁷ See Hribal, *supra* note 6, at 436.

¹⁶⁸ *Hard Work of Wild Animals*, *supra* note 50; Coulter, *supra* note 49, at 203.

¹⁶⁹ *Hard Work of Wild Animals*, *supra* note 50.

¹⁷⁰ Coulter, *supra* note 49, at 203.

¹⁷¹ PETER BAOFU, *THE FUTURE OF POST-HUMAN MIGRATION: A PREFACE TO A NEW THEORY OF SAMENESS, OTHERNESS, AND IDENTITY* 178 (2012); Coulter, *supra* note 49, at 202.

¹⁷² Christine Ro, *The Animals that Will Survive Climate Change*, BBC FUTURE, Aug. 5, 2019. For an in-depth analysis of how climate change will impact the lives of migrating and non-migrating animals across the world, see Charlotte E. Blattner, *Global Migration Crises, Non-human Animals, and the Role of Law*, in "LIKE AN ANIMAL": CRITICAL ANIMAL STUDIES APPROACHES TO BORDERS, DISPLACEMENT, AND OTHERING (Natalie Khazaal & Núria Almiron eds., forthcoming).

broadly visible and places them in a richer context than ES. But can AL protect animals? And if so, how?

b. Establishing Protections for Animals

The main motivation driving AL scholarship is to protect animals, or, at the least, to improve their legal and political environment. The promise of work, Porcher argues, is “the good life” both for humans and animals: a life that is “less hard for everyone than it would have been if they had not been together.”¹⁷³ For Coulter, too, AL is not only a potential source of new knowledge or an invitation for conceptual advancement. By asking “what’s in it for the animals,” Coulter uses the lens of labor to make a meaningful difference for animals’ work and work-lives.¹⁷⁴ Cochrane uses an “interest-based” approach to animal labor, arguing that animals have an interest in not being made to suffer, in not being killed, and in being recognized as a member of the community whose interests count in the determination of the public good.¹⁷⁵ This approach, he claims, “opens up valuable new ways of thinking about just human-animal relations.”¹⁷⁶ Also Blattner et al. appeal to the “transformative effect” of animal labor as “an exemplary case of how to secure both rights and relationships with animals.”¹⁷⁷

These motivations are commendable, but intentions alone are insufficient to better protect animals. The idea that AL can elevate the status of animals is suspect because animal labor has been a site of intense instrumentalization, exploitation, and degradation. If animals throughout history have been exploited as workers, why should AL protect them? Indeed, critics may accuse AL of permitting “humane” use and harm of animals for human benefit, so long as it does not require unnecessary suffering.¹⁷⁸ Most states take this approach when they regulate our treatment of animals. Animal protection acts condemn the “unnecessary” suffering of animals, but the most profound harms to animals’ interests in life and liberty have been judged “necessary” to satisfy the most trivial human interests in entertainment, culinary pleasure, or recreational activity.¹⁷⁹ To these critics, the AL approach,

¹⁷³ PORCHER, *supra* note 1, at 23-24.

¹⁷⁴ COULTER, *supra* note 5, at 2, 3.

¹⁷⁵ COCHRANE, *supra* note 3, at 22-24.

¹⁷⁶ *Id.* at 29.

¹⁷⁷ Charlotte E. Blattner, Kendra Coulter & Will Kymlicka, *Introduction: Animal Labour and the Quest for Interspecies Justice*, in *ANIMAL LABOUR: A NEW FRONTIER OF INTERSPECIES JUSTICE?* 1, 4 (Charlotte E. Blattner, Kendra Coulter & Will Kymlicka eds., 2020).

¹⁷⁸ *Id.* at 3.

¹⁷⁹ See David Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in *ANIMAL RIGHTS: CURRENT*

while well-meaning, reinvigorates the welfarist position and facilitates, even perpetuates animal suffering.¹⁸⁰

Those who would equate AL with welfarism, however, are mistaken. The AL literature is heterogeneous and markedly distinguished from welfarist positions.¹⁸¹ Most notably, it calls for the abolition of “bad” work. Damaging and fatal work, or any form of violence against animals in the name of work, are ruled out,¹⁸² in line with the demands of animal abolitionism. But AL disagrees with abolitionists who argue that justice requires the gradual extinction of domesticated animals because they have been molded through selective breeding to serve human purposes, and so can only live in a state of unhealthy and deeply exploitative dependence.¹⁸³ Instead, AL scholarship acknowledges that animals have a right to exist and form their own relationships.¹⁸⁴ As part of the much-discussed “political turn” in animal studies,¹⁸⁵ AL scholarship looks for examples of interspecies relations that are based on the ideas of shared membership and cooperation relationships undergirded by robust rights to protection, provision, and participation.¹⁸⁶ Animal labor could become a site of social membership, personal meaning, and material security, if as the second demand goes opportunities for “good” work for animals are fostered and expanded.¹⁸⁷ Examples of good work

DEBATES AND NEW DIRECTIONS 205, 205-33 (Cass Sunstein & Martha Nussbaum eds. 2004); As a result, animal protection laws have not prevented, but have actively condoned the rise of the “animal industrial complex.” See also, BARBARA NOSKE, BEYOND BOUNDARIES: HUMANS AND ANIMALS 22 (1997).

¹⁸⁰ As Blattner et al., notes: “exploiting animal labour is one of the paradigmatic ways in which humans use animals, and the historical and ongoing treatment of animals as disposable ‘beasts of burden’ is a perfect illustration of the limits of a welfarist approach. Animal labour has been a site of intense instrumentalization, exploitation, and degradation, and so some animal advocates have concluded that animal liberation requires abolishing all uses of animal labour.” Blattner et al., *supra* note 173, at 4.

¹⁸¹ This is, with the exception of a few writers like Porcher. See PORCHER, *supra* note 1.

¹⁸² See Cochrane, *supra* note 3, at 24-25; Kendra Coulter, *Humane Jobs: A Political Economic Vision for Interspecies Solidarity and Human-Animal Wellbeing*, 3 POLS. & ANIMALS 31, 33 (2017) (hereinafter *Humane Jobs*).

¹⁸³ See GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? 1, 103-4 (2010).

¹⁸⁴ See Sue Donaldson & Will Kymlicka, *Animals in Political Theory*, in THE OXFORD HANDBOOK OF ANIMAL STUD. 43, 50 (Linda Kalof ed., 2017).

¹⁸⁵ See THE POLITICAL TURN IN ANIMAL ETHICS (2016); see also, Tony Milligan, *The Political Turn in Animal Rights*, 1(1) POLS. & ANIMALS 6-15 (2015); See also, Svenja Ahlhaus & Peter Niesen, *What is Animal Politics? Outline of a New Research Agenda*, 40(4) HIST. SOC. RESEARCH 7-31 (2015).

¹⁸⁶ BLATTNER ET AL., *supra* note 4; Cochrane, *supra* note 3, at 23; SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS 101, 153 (2011).

¹⁸⁷ Blattner et al., *supra* note 173, at 5.

could include care work, therapy work, sheep-herding, fetching water, conservation efforts, or participation in sports.¹⁸⁸

The means used to abolish bad work and secure good work for animals are *rights at work*, like the right to remuneration, safe working conditions, retirement, medical care, and collective bargaining to negotiate the form and amount of remuneration.¹⁸⁹ If established and enforced, these protections will be much more robust and reliable than what the ES approach promises animals. ES offers protection on the basis of an assumed decrease in demand for animal labor as the costs of the end product rise. This promise depends on market forces, which can be highly volatile and vulnerable to changing political climates that may force animals into dangerous, damaging, and even fatal work. ES is also not sophisticated enough to distinguish between good and bad forms of work, so it could wind up banning many forms of rewarding and just relationships with animals. AL, by contrast, is more nuanced, offers a framework that withstands economic and political pressure, and guards against bias by ensuring animals' interests are included in the determination of the common good.¹⁹⁰

c. Conflicts with Human Interests

As with the ES approach, the worthiness of AL can only be ascertained by examining how it deals with conflicts between human and animal interests. To what extent does AL protect animals when humans have a paradigmatic interest in exploiting them? Unlike ES, AL is a young, emerging concept that has not yet made its way into policy and governmental decision-making. AL has been examined from the perspective of various disciplines, each of which has its strengths and weaknesses. There are two important areas in which the AL literature is vague, which risks facilitating the exploitation of animals. First, though AL scholarship claims to protect animals, in the literature the definition of 'protection' varies greatly and there is no clear commitment to ensuring animals can maintain their bodily and mental integrity at work. Second, AL does not call for legal processes and institutions to ensure animals' voices are heard at work.

Most workers in the Western hemisphere are guaranteed safe working conditions. Like humans, animals can suffer work accidents that can and must be prevented by workplace design, processes, and training.¹⁹¹ But the most unsafe conditions for animal laborers are not a

¹⁸⁸ COULTER, *supra* note 5, at 1, 3.

¹⁸⁹ Cochrane, *supra* note 3, at 27; DONALDSON & KYMLICKA, *supra* note 182, at 101, 153, 140.

¹⁹⁰ Cochrane, *supra* note 3, at 23.

¹⁹¹ Consider, e.g., guide dog Palm who was suddenly caught by an

consequence of work accidents or hazards; they are the result of systematic violations of their bodily and mental integrity at the workplace. For example, the employer of a hen that “produces” eggs may cut a large piece of her mouth off, which is a form of maiming her body and causes her extreme pain.¹⁹² Further, unlike human laborers, who typically enjoy a right to retirement, animals must work until their death, be it because they are valued only as dead bodies or be it because they are killed once they fail standards of efficiency and productivity. Some AL scholars do not consider this structural difference problematic; indeed, they argue that death can and should be part of the equation of animal labour. Porcher, for example, maintains that death is no harm to animals and that taking their life is no act of violence, if it is done according to the principles of *élevage*, i.e., animal husbandry.¹⁹³ She justifies this on the basis of “the gift theory”: animals are given a chance to live a life in a human world and profit from human achievements, gaining benefits that vastly exceed the cruel world outside animal husbandry.¹⁹⁴ In return for this gift, animals “offer” their work and their lives.¹⁹⁵ For Porcher, death is an integral part of the animal’s “gift” and is legitimate if the animals’ lives were not reduced “to almost nothing” and if society recognizes “at least to some degree, that there was an animal.”¹⁹⁶ Porcher’s gift theory aligns with the ‘humane meat’ and ‘locavore’ movements, which claim that producing, using, rearing, and killing chickens, goats, and other animals in our backyard reduces our ethical footprints and helps create a food system that is more sustainable than industrial animal agriculture.¹⁹⁷ Without being reared and slaughtered, these animals would never have existed; working for the organic industry secures them existence and

automatically closing door on a Canadian train: Laurence Braun, *Guide Dog Dragged by Skytrain Sustains Severe Injuries*, CANADA WEST, Oct. 3, 2010.

¹⁹² “Debeaking” or “beak trimming” denote the removal of 1/3 to 1/2 of the beak of hens, done to prevent feather pecking and cannibalism in layers, broiler breeders, and turkeys. This is a standard practice in the egg and poultry industry despite the fact that it is extremely painful for affected individuals and is done under no use of anesthetics or analgesics. H. Cheng, N.L. Horn & C. Wilcox, *Infrared Beak Treatment vs. Hot-Blade Beak Trimming: Effects on Laying Hen Wellbeing*, 38 INTERNATIONAL SOCIETY OF APPLIED ETHOLOGY 195 (2004).

¹⁹³ For an in-depth discussion of what criteria husbandry must follow to render animals’ death acceptable in this view, see PORCHER, *supra* note 1, at 13-14.

¹⁹⁴ *Id.* at 14.

¹⁹⁵ *Id.* at 13-15.

¹⁹⁶ *Id.* at 14.

¹⁹⁷ See Justin Kay, *Animal Liberation, Movement Building, and Solidarity: Organizing at the Intersections*, RESISTANCE ECOLOGY 42, 45 (2014) (criticizing the ‘humane meat’ and ‘locavore movement’); Jon Sanbonmatsu, *Capitalism and Speciesism*, in ANIMAL OPPRESSION AND CAPITALISM VOLUME 1 1, 10 (David Nibert ed., 2017); Vasile Stănescu, *New Weapons: “Humane Farming,” Biopolitics, and the Post-Commodity Fetish*, in ANIMAL OPPRESSION AND CAPITALISM VOLUME 2 209, 219 (David Nibert ed., 2017).

protects them from predators they would face in the wild.¹⁹⁸

Imposing these arguments onto AL means offering *new justifications for old schemas of exploitation* rather than forging ways towards a just interspecies world.¹⁹⁹ Now we do not kill animals simply because we want their meat; we kill them “because we love them.” In the *élevage* world, animals remain available to humans, disposable and killable at their whim; they are still a product and not a subject. Though presented as a critique of factory farming, the rise of ‘local meat’ or ‘local milk’ has neither displaced nor reduced factory farming.²⁰⁰ Locavorism has operated in perfect tandem with factory farming by creating new forms and techniques for justifying the oppression of animals, thereby making factory farming more productive and lucrative.²⁰¹

If AL wants to provide an avenue out of the welfarism/abolitionism dilemma and empower animals rather than subjugate them, the bare minimum is securing safe working conditions for them. Routine violation of the bodily and mental integrity of animals at work must be made illegal through labor laws, including banning the de-beaking of hens, castration of pigs (with or without anesthesia), dehorning of cows, the killing or slaughter of animals, tearing apart of animal families, etc. As AL scholar Coulter argues, “normalizing violence in contemporary exploitative industries is dire, deeply disturbing, and unjustifiable.”²⁰² Further, if we take labor rights for animals seriously, then they, like all of us, must be entitled to retirement.

The second weakness of AL as it stands is that it is too narrowly focused on worker welfare, including the rights to remuneration, safe working conditions, retirement, and medical care.²⁰³ These rights flow naturally from the idea of animal labor and they help us envision more just relations with animals. However, these rights alone do not suffice to ensure that work is transformed into a place of happiness and meaningfulness for animals. In the case of humans, workers are empowered to evade exploitation at work by the right to freely choose their occupation and the concomitant prohibition of forced labor.²⁰⁴ But some AL scholars argue that animals have no intrinsic interest in liberty

¹⁹⁸ Kay, *supra* note 197, at 45; Sanbonmatsu, *supra* note 197, at 10; Stănescu, *supra* note 197, at 219.

¹⁹⁹ See generally, Nicolas Delon, *The Meaning of Animal Labour*, in *ANIMAL LABOR: A NEW FRONTIER OF INTERSPECIES JUSTICE?* 160 (Charlotte E. Blattner, Kendra Coulter & Will Kymlicka eds., 2020).

²⁰⁰ Kay, *supra* note 197, at 45; Sanbonmatsu, *supra* note 197, at 10; Stănescu, *supra* note 197, at 219.

²⁰¹ *Id.*

²⁰² *Humane Jobs*, *supra* note 182.

²⁰³ Cochrane, *supra* note 3, at 27.

²⁰⁴ International Labour Organisation, Declaration on Fundamental Principles and Rights at Work, adopted at its 86th Sess. Geneva, June 1998.

and thus need not be granted rights to liberty, autonomous decision-making, or self-determination, nor are they entitled to decide about whether they want to work or not, or what type of labor they want to perform.²⁰⁵

If labor is to become a route toward interspecies justice, animals need rights to enter and exit the labor relationship, to freely choose their work, and not to be subjected to forced labor.²⁰⁶ Animals are harmed by unfreedoms to a far greater extent than currently acknowledged. Researchers have found that having choices has a considerable positive effect on animals. Giant pandas,²⁰⁷ polar bears,²⁰⁸ goats and sheep,²⁰⁹ and many other animals had less stress and made positive behavioral changes when given, e.g., more space, access to different rooms, or a choice about where to spend time. In another study, rhesus monkeys preferred completing a series of cognitive tasks in a self-chosen order rather than an assigned order.²¹⁰ Even when not delivering a specific benefit, choice and control considerably increased animals' well-being, showing that they have intrinsic interests in self-determination and require rights to secure the fulfillment of those interests.²¹¹ Research with giant pandas and polar bears²¹² shows that animals preferred having options even when they did not take advantage of them. Chimpanzees and gorillas responded positively to having the option to go outside, by demonstrating positive social behavior like grooming, lower cortisol levels, a steep drop in signs of anxiety and restlessness, even if they chose to stay inside.²¹³ These findings, which have only recently received

²⁰⁵ Cochrane, *supra* note 3, at 20-21 (Cochrane grants animals non-intrinsic interests in liberty, but argues that these can be accounted for through laws that ensure animals do not suffer).

²⁰⁶ See generally, Charlotte E. Blattner, *Animal Labour: Toward a Prohibition of Forced Labour and A Right to Freely Choose One's Work*, in ANIMAL LABOR: A NEW FRONTIER OF INTERSPECIES JUSTICE? 91-115 (Charlotte E. Blattner, Kendra Coulter & Will Kymlicka eds., 2020) (hereinafter *Animal Labour*).

²⁰⁷ Megan A. Owen, Ronald R. Swaisgood, Nancy M. Czekala & Donald G. Lindburg, *Enclosure Choice and Well-being in Giant Pandas: Is It All about Control?*, 24 ZOO BIOLOGY 475 (2005).

²⁰⁸ Stephen R. Ross, *Issues of Choice and Control in the Behaviour of a Pair of Polar Bears*, 73 BEHAVIOURAL PROCESSES 117 (2006).

²⁰⁹ Ursula S. Anderson, Marcie Benne, Mollie A. Bloomsmith & Terry L. Maple, *Retreat Space and Human Visitor Density Moderate Undesirable Behavior in Petting Zoo Animals*, 5 JOURNAL OF APPLIED ANIMAL WELFARE SCIENCE 125 (2002).

²¹⁰ B.M. Perdue, T.A. Evans, D.A. Washburn et al., *Do Monkeys Choose to Choose?* 42 LEARNING & BEHAVIOR 164 (2014).

²¹¹ *Animal Labour*, *supra* note 206, at 109.

²¹² Owen et al., *supra* note 207; Ross, *supra* note 208.

²¹³ Laura M. Kurtycz, Katherine E. Wagner & Stephen R. Ross, *The Choice to Access Outdoor Areas Affects the Behavior of Great Apes*, 17 JOURNAL OF APPLIED ANIMAL WELFARE SCIENCE 185 (2014).

broad scholarly attention,²¹⁴ have far-reaching consequences for our evaluation of animal labor, suggesting that animals have broad, solid, and intrinsic interests in self-determination, which require protection through the law.²¹⁵

If AL commits itself to protecting the lives, and bodily and mental integrity, of animals, and their interests in self- and co-determination, its starting position will be vastly different from that of ES. Under ES, only human benefits matter, but AL can posit that animals, too, must become the beneficiaries of labor. Whereas ES accepts that even the most peripheral human benefits trump fundamental interests of animals, AL can establish reliable safeguards against this overreach. For example, Potschin and Haines-Young's cascade model for analyzing ES draws on biophysical structures or processes, some of which have ecosystem functions from which services are derived, to show that the ES approach considers only human benefits.²¹⁶ Human benefits dominate ES's conceptual framework and limit its potential to change adverse conditions. In contrast, an ideal AL approach would be process-based, rather than outcome-based, precisely because it acknowledges animals' rights to self- and co-determination at work.²¹⁷ As such, AL leaves room for animals to determine whether, and for which purposes, they want to work and does not demand that their work benefit humans or conform to human views. They may choose not to work for or with humans, work primarily with each other, or develop new forms of work that humans have not yet imagined.

d. Normative Grip and Economic Parameters

While AL may fare better than ES when it comes to recognizing animal work and protecting animals even if there are conflicting human interests, it too is vulnerable to economic parameters. Even if meat, fish, eggs, and dairy are declared illegal under AL, in a market society, animals' labor as therapists, care-takers, sniffers, providers of manure, etc. will still be commodified. A central lesson drawn from the failure of ES should be, as McCauley noted, that humans must protect nature and with it, animals rather than insisting they turn a profit.²¹⁸ If AL, like ES,

²¹⁴ See generally Laura M. Kurtycz, *Choice and Control for Animals in Captivity*, 11 THE PSYCHOLOGIST 892 (2015) (discussing the various recent research on giving animals choices).

²¹⁵ See further *Animal Labour*, *supra* note 206.

²¹⁶ Potschin & Haines-Young, *supra* note 106, at 26.

²¹⁷ Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y 29 (2007) (arguing that rights to self- and co-determination are primarily process-based).

²¹⁸ McCauley, *supra* note 109, at 28.

devolves into economic jargon devoid of moral content, it cannot work to the benefit of animals. A similarly degraded AL approach runs the risk of becoming merely a ‘refresh’ of ES and being used to marketize and trade animals instead of protecting them. Just as we should not argue for civil rights while only attending to economic efficiency, we should not refer to economics to protect animals. If, as critical scholars in ES suggest, it would be better to stop “repackaging existing commodities [and] creating new ones”²¹⁹ and “resisting the spread of market norms,”²²⁰ how can we avoid commodifying animals’ work through AL?

In 1919, the Peace Treaty of Versailles laid down its guiding principle: “labour should not be regarded merely as a commodity or article of commerce.”²²¹ Twenty Five years later, the International Labour Organisation (ILO), established by the Versailles Treaty and determined in its founding Declaration of Philadelphia that “labour is not a commodity.”²²² State parties were aware that human labor would enter the market and be traded not *as*, but *like* a commodity.²²³ The phrase “labour is not a commodity” is thus best translated as “labour should not be regarded merely as a commodity,” as initially determined by the Treaty of Versailles.²²⁴ This principle operates as a constant reminder of the main functions and goals of labor law: behind the commodity relationship, there are individuals whose lives matter.²²⁵

From human labor, we know that, depending on the socio-economic infrastructure, work can either be subject to total erosion by the economic market or it can be relatively shielded from it. In Europe, for example, employees are guaranteed non-negotiable, absolute protections under the law, whereas in the U.S., workplace benefits like unemployment, maternity/paternity leave, and paid time off are part of the total compensation package negotiated between employer and

²¹⁹ Kosoy & Corbera, *supra* note 12, at 1234.

²²⁰ JOHN O’NEILL, *MARKETS, DELIBERATION AND ENVIRONMENT* 45 (Tony Lawson ed., 2007).

²²¹ Peace Treaty of Versailles, art. 427, Jun. 28, 1919, 13 AM. J. INT’L L. SUPP. 151, 385 (1919).

²²² International Labour Organisation (ILO), 26th Sess., Declaration Concerning the Aims and Purposes of the International Labour Organization, (1944), Annex I(a) to the ILO Constitution [1944 Declaration of Philadelphia], article 1 lit. a.

²²³ As Judy Fudge argues, “labour is a ‘fictitious’ commodity: neither is it produced as a commodity, nor is its production governed by an assessment of its realization on the market. Labour is embodied in human beings who are born, cared for, and tended in a network of relations that operate outside of the direct discipline of the market.” Judy Fudge, “*Labour Is Not a Commodity*”: *The Supreme Court of Canada and the Freedom of Association*, 67 SASK. L. REV. 425, 446 (2004).

²²⁴ GUY DAVIDOV, *A PURPOSIVE APPROACH TO LABOUR LAW* 61 (2016).

²²⁵ See LISA RODGERS, *LABOUR LAW, VULNERABILITY AND THE REGULATION OF PRECARIOUS WORK* 4 (Edward Elgar Publ’g, Inc., 2016).

employees²²⁶ and subject to economic volatility. If AL follows the U.S.-American model, it will be as structurally weak as ES; ES relies on the consumers' willingness to pay, but AL would rely on the employers' willingness to pay. But if AL is robustly designed, positing animal labor not as a commodity, but requiring a solid infrastructure and access to social welfare, humans can contain the commodification of animal labor to a minimum and thereby create the possibility for more just relations to emerge.

IV. CONCLUDING REMARKS

Both AL and ES invest considerably into *making animals visible and recognizing them as subjects and service providers*. Whereas ES has an intricate system of classification that helps us grasp animal services (provisioning, regulating, cultural, and supporting services), AL takes the perspective of animals to determine if what they do qualifies as work. AL's challenge is to overcome speciesist conceptions of labor, whereas ES's challenge is to make visible services of animals that do not directly benefit humans.

In their own ways, both ES and AL promise to change the status quo and *offer animals better protections*. Protections established under ES are mainly market-driven. Recognizing animal activities as ES prompts decision-makers to accurately quantify the value of these services; this, in turn, increases the price of their services, which decreases the use of services and, presumably, animal exploitation. ES's main weakness in this regard is that many services provided by animals cannot readily be quantified and, hence, are left unprotected. AL, by contrast, directly aims to establish legal protections for animals. AL posits that animal work could serve as a paradigmatic instance to secure their rights and relationships at work and as a site of social membership, personal meaning, and material security. The main challenge for AL is to show how animals can reliably access decent jobs and labor rights alongside human workers.

Proposals to change human-animal relationships for the better stand and fall on their ability to cope with conflicting interests of humans. ES fares poorly in this regard; it categorizes animal suffering and slaughter as ES, supports the trade in animals and their body parts, and declares these activities legal. Though it could theoretically establish limits, ES' exclusive preoccupation with human well-being makes this unlikely. AL has not yet reached this anthropocentric point of no return,

²²⁶ *Which Countries in Europe Offer the Fairest Paid Leave and Unemployment Benefits?*, GLASSDOOR, https://www.glassdoor.com/research/app/uploads/sites/2/2016/02/GD_FairestPaidLeave_Final.pdf (last visited Jun. 4, 2020).

but it is at a crossroad where it must choose the path that demonstrates its worthiness as a means to secure more just relations with animals. AL must commit to protecting the animals' bodily and mental integrity and their rights to self- and co-determination. If it fails to do this, it will be of as little use to animals as the ES approach is.

Under ES, the normative promises for animals depend heavily on consumers' willingness to pay, which means humans risk fully commodifying animals and making them vulnerable to economic parameters. Animals also do not escape market forces under the AL approach, which reduces, but does not eliminate, the problem of commodification. But just as human workers can be shielded from commodification through strong employment laws and collective labor rights, humans can provide the same protections to animals.

Both ES and AL teach humans important lessons about the role of labor in mixed interspecies society. While AL is the stronger candidate for enabling just relations with animals, there are good reasons to believe that both approaches, in different ways, provide valuable insights. This raises the question of whether it is time to fruitfully combine the two but this question cannot be answered in isolation without also addressing and embedding it in the broader, slow, but gradual rapprochement of animal law and environmental law. In either case, the challenge lies in remaining vigilant against implicit biases, forms of oppression, and stigma.

ADDING TOOLS TO THE CONSERVATION TOOLBOX: CAN INTERNATIONAL TRADE POLICIES THAT UNDERTAX MONGOLIAN CASHMERE PROVIDE RELIEF TO MONGOLIA'S OVERTAXED GRASSLANDS?

MICHAEL R. EITEL*

I. INTRODUCTION

Mongolia lies at the epicenter of a global crisis—the destruction of temperate grassland ecosystems.¹ Temperate grasslands, or steppes, cover about nine million square kilometers, of which only five percent are protected, and these ecosystems are among the world's most altered and threatened ecosystems.² Central Asia includes an outsized portion of these grasslands,³ and Mongolia contains the largest remaining intact grassland ecosystem in the world—the 827,000 km² Gobi-Steppe Ecosystem.⁴ In these areas, anthropogenic actions are taking their toll. Large-scale industrial mining, infrastructure development, urbanization, agriculture, and other similar actions are altering habitats and compromising nutrient cycling, oxygen production, methane consumption, pollination, pest and disease regulation, water filtration, and other ecosystem functions.⁵ Put simply, humans are altering the capacity of these grasslands to sustain biodiversity and buffer plants and animals against climate fluctuations and change.

Researchers in Mongolia are focusing on the effects of livestock grazing on grassland ecosystems. Following Mongolia's transition from communism to a democratic, free-market economy in the early 1990's, the mining sector flourished and substantially contributed

¹ Int'l Union for Conservation of Nature, *Towards a Conservation Strategy for the World's Temperate Grasslands* (2010), <https://www.iucn.org/content/towards-conservation-strategy-worlds-temperate-grasslands> (last visited Feb. 28, 2020).

² *Id.*; see also Clinton Carbutt et al., *Global Plight of Native Temperate Grasslands: Going, Going, Gone?*, 26 *BIODIVERSITY & CONSERVATION* 2911, (2017).

³ See Carbutt, *supra* note 2.

⁴ Nyamsuren Batsaikhan et al., *Conserving the World's Finest Grassland Amidst Ambitious National Development*, 28 *CONSERVATION BIOLOGY* 1736, (2014).

⁵ *Id.*; see also Ben P. Werling et al., *Perennial Grasslands Enhance Biodiversity and Multiple Ecosystem Services in Bioenergy Landscapes*, 111 *PROCEEDINGS OF THE NAT'L ACAD. OF SCI.* 1652-57 (2014); Biodiversity Information System for Europe, *Ecosystem Services*, <https://biodiversity.europa.eu/topics/ecosystem-services> (last visited Dec. 11, 2019).

to Mongolia's economic growth.⁶ But other sectors of the economy, including the livestock and crop production industries, struggled from losing State capital and support.⁷ This economic instability spurred many Mongolians to search for new ways to meet their economic and subsistence needs. Under the Mongolia Constitution, each citizen has the legal right to access shared pasturelands throughout Mongolia.⁸ Mongolians capitalized on this "open access" system; they purchased and proceeded to graze cattle, sheep, goats, horses, yaks, and camels to obtain food for subsistence and agricultural products for sale.⁹ In the early 1990s, an estimated 147,507 herders grazed a little over 25 million livestock across 80% of Mongolia; by 2018, over 300,000 herders were raising nearly 66.5 million livestock across the country.¹⁰

The dramatic influx of herders burdened the open-access pasturelands and deteriorating environmental conditions exacerbated these effects. In the late 1990's and early 2000's, Mongolia entered a cycle of summer droughts, rising air temperatures, and more frequent and severe *dzuds*.¹¹ Worsening climate conditions and intensifying *dzuds* killed millions of livestock and left many herder households destitute.¹²

⁶ Kevin C. Cheng, *Growth and Recovery in Mongolia During Transition* (IMF Working Paper WP/03/217 Nov. 2003), <https://www.imf.org/external/pubs/ft/wp/2003/wp03217.pdf>.

⁷ *Id.*

⁸ The Const. of Mong., Jan. 13, 1992, ch. 1, art. 5-6.

⁹ The World Bank, *Mongolia-Country Partnership Strategy for the Period FY2013-2017*, THE WORLD BANK, (2012), <http://documents.worldbank.org/curated/en/687471468053969480/pdf/675670CAS0P1250Official0Use0Only090.pdf> [hereinafter *Mongolia Partnership*].

¹⁰ Neil Pederson et al., *Three Centuries of Shifting Hydroclimatic Regimes Across the Mongolian Breadbasket*, AGRIC. & FOREST METEOROLOGY, Sept. 2013, at 10-20; Livestock Inventory Data, NAT'L STATS. OFF. OF MONGOLIA, http://www.1212.mn/stat.aspx?LIST_ID=976_L10_1; NAT'L STAT. OFF. OF MONGOLIA, MONGOLIA STATISTICAL YEARBOOK 2017 at 469 (A. Ariunzaya et al., eds., 2019), <http://1212.mn/BookLibraryDownload.ashx?url=yearbook.2017.last.pdf&ln=Mn>, [hereinafter, *2017 Yearbook*].

¹¹ Pederson, *supra* note 10 (A *dzud* is "an extremely snowy winter in which livestock are unable to reach grass through the snow cover, and large numbers of animals die due to starvation and the cold."); *see also* MINISTRY OF ENVTL. & GREEN DEV., MONGOLIA SECOND ASSESSMENT REPORT ON CLIMATE CHANGE-2014, 1-36 (Damdin Dagvadorj et al. eds., 2014), http://www.jcm-mongolia.com/wp-content/uploads/2015/11/MARCC_2014_summary_eng1.pdf [hereinafter *Mongolia Climate Assessment*] (last visited Feb. 28, 2020); Deborah Rasmussen & Dorlig Shombodon, *Mongolia: Improving Feed And Fodder Supply For Dzud Management* xii, (2011), <http://documents.worldbank.org/curated/en/158631468274239063/pdf/702180ESW0P1200ussen000June02102011.pdf>.

¹² Mukund Palat Rao et al., *Dzuds, Droughts, and Livestock Mortality in Mongolia*, 10 ENVTL. RES. LETTERS 074012 (2015); Maria E. Fernández-Giménez et al., *Cross-Boundary and Cross-Level Dynamics Increase Vulnerability to Severe*

In 2005, the agricultural sector employed 45.7% of the population; by 2018, the number plummeted to 29.8% as herders abandoned their livestock and moved to urban centers to find work.¹³

Economic factors and environmental conditions thus converge to place Mongolia on a precipice. Mongolia must address its overreliance on the mining industry and diversify its economy.¹⁴ With Mongolia's extensive grasslands and production of valuable agricultural commodities like cashmere and meat, the livestock industry could effectively diversify the economy. But Mongolia's grassland ecosystems are already overtaxed.¹⁵ In some areas, scientists estimate the grasslands are approaching ecological and social tipping points—the point at which ecological degradation becomes permanent and precludes the ability of the land to support social functions, like livestock grazing.¹⁶ And global climate change threatens the viability of Mongolia's grasslands and the industries that rely on them.¹⁷ Researchers have found that average air temperatures have risen 1.5°C since the early 1980s, seasonal precipitation totals have decreased 5% since the 1980s, and droughts and *dzuds* are becoming more frequent and severe.¹⁸ In accord, vegetation

Winter Disasters (Dzud) in Mongolia, 22 GLOBAL ENVTL. CHANGE, 836-51 (2012); Dorjburegdaa Lkhagvadorj et al., *Pastoral Nomadism in The Forest-Steppe of the Mongolian Altai Under a Changing Economy and a Warming Climate*, 88 J. OF ARID ENVIRONMENTS 82-89 (2013); see also Rasmussen & Shombodon, *supra* note 11.

¹³ *Mongolia Country Data*, UNITED NATIONS, <http://data.un.org/en/iso/mn.html> [hereinafter *UN Data*] (last visited Feb. 28, 2020); Daniel J. Murphy et al., *From Kin to Contract: Labor, Work and the Production of Authority in Rural Mongolia*, 42 J. OF PEASANT STUD. 397-424 (2015); see also Stefan Partelow et al., *Privatizing the Commons*, 13 INT'L J. OF THE COMMONS 747-776 (2019).

¹⁴ Int'l Monetary Fund, *Greening Growth in Mongolia* (Dec. 10, 2019), <https://www.imf.org/en/News/Articles/2019/12/09/na121019-greening-growth-in-mongolia>; see also Borgford-Parnell, N., *Mongolia: A Case for Economic Diversification in the Face of a Changing Climate*, 2 SUSTAINABLE DEVELOPMENT LAW & POL'Y 54 (2010).

¹⁵ Maria E. Fernández-Giménez et al., *Exploring Linked Ecological and Cultural Tipping Points in Mongolia*, 17 ANTHROPOCENE 46 (2017).

¹⁶ *Id.*

¹⁷ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE: FOURTH ASSESSMENT, SUMMARY FOR POLICYMAKERS 2 (2007), <https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg1-spm-1.pdf> (Researchers analyzing tree-ring data have concluded that the drought in the early 2000s was matched in scale and intensity only by the drought that contributed to the rise of Genghis Khan's empire in the early 1200s); see also Pederson, *supra* note 10 (Scientists predict that these events will recur in higher frequencies in the future); see also M. Bálint et al., *Cryptic Biodiversity Loss Linked to Global Climate Change*, 1 NATURE CLIMATE CHANGE 313 (2011); see also Jos Barlow et al., *The Future of Hyperdiverse Tropical Ecosystems*, 559 NATURE 517 (2018).

¹⁸ Shree Dangal et al., *Synergistic Effects of Climate Change and Grazing on Net Primary Production of Mongolian Grasslands*, 7 ECOSPHERE e01274 (2016); see also Thomas Hilker et al., *Satellite observed widespread decline in Mongolian*

productivity and biomass is declining and compromising Mongolia's grasslands ability to support both livestock and native plant and animal species.¹⁹

Against this backdrop, urgency exists to adopt and implement policies that address the economic status of Mongolia's herders and the ecological health of Mongolia's grasslands. International trade policies have that potential; under certain circumstances, trade policies can positively affect conservation efforts addressing threatened ecosystems.²⁰ The United States' Senate and House of Representatives recently introduced the Mongolia Third Neighbor Trade Act—trade legislation that removes tariffs for processed Mongolian cashmere products, thereby encouraging domestic cashmere processing in Mongolia.²¹ Despite laudable objectives of aiding cashmere processors and protecting grassland ecosystem, a critical question arises. Does the Third Neighbor Act “ensure the protection of [Mongolia's] grasslands and prevent overgrazing of cashmere goats,” while also conferring a benefit to Mongolia's cashmere industry?²²

This article addresses that question by first identifying the economic and environmental context of modern Mongolia²³ followed by an introduction into the Mongolia Third Neighbor Act.²⁴ The article then evaluates whether the Third Neighbor Act is likely to advance conservation objectives in Mongolia, in view of the ecological requirements of Mongolia's grasslands.²⁵ The article concludes that the proposed legislation fails to meet conservation objectives in Mongolia; it provides incentives unlikely to meaningfully address the many factors responsible for the precarious status of Mongolia's steppes.²⁶ Lawmakers therefore should examine legislative changes that can transform the Third Neighbor Act into a model law that benefits Mongolians and safeguards the country's imperiled temperate grasslands.²⁷

grasslands largely due to overgrazing, 20 *GLOBAL CHANGE BIOLOGY* 418 (2014).

¹⁹ *Id.*

²⁰ Fischer, C., *Does Trade Help or Hinder the Conservation of Natural Resources?*, 4 *R. OF ENVTL. ECON. & POL'Y* 103 (2009).

²¹ Mongolia Third Neighbor Trade Act, H.R. 2219, 116th Cong. (2019) [hereinafter *Third Neighbor Act*]; *see also*, Mongolia Third Neighbor Trade Act, S. 1188, 116th Cong. (2019).

²² H.R. 2219, 116th Cong. 16, § 2(9) (2019).

²³ *See Id.* at § II.A., B.

²⁴ *See Id.* at § II.C.

²⁵ *See Id.* at § III.A.

²⁶ *See Id.* at § III.B.

²⁷ *See Id.* at § II.C.2.

II. BACKGROUND

Mongolia is a land of contradictions. Its venerable history includes the Mongol Empire founded in 1206 by Genghis Khan, which eventually covered a contiguous land area of 23 million square km.²⁸ Today, Mongolia covers just over 1.5 million square km and is home to about two people per square km. It also exists within a nascent political and economic developmental stage, having transitioned to a parliamentary democracy and free market economy in 1992.²⁹ Mongolians are highly educated. Their country boasts a 98% literacy rate, where over 90% of the school-age population enroll in primary and secondary education.³⁰ At the same time, over 28% of the population lives below the national poverty line, and rural residents struggle to obtain basic services like access to electricity and clean water.³¹ The progressive Mongolian Constitution provides each citizen the “right to healthy and safe environment and to be protected against environmental pollution and ecological imbalance.”³² The Constitution also asserts that “[i]t is a sacred duty for every citizen...to protect nature and the environment.”³³ But the Mongolian government helps to destroy natural resources

²⁸ See Encyclopedia Britannica eds., *Mongol Empire* (Nov. 7, 2019), <https://www.britannica.com/place/Mongol-empire>; see also European Union, *EU in Figures*, https://europa.eu/european-union/about-eu/figures/living_en (last visited Nov. 19, 2019) (the Mongol empire covered a land area larger than the size of modern-day Russia and the 27 European Union countries combined); see also Yuri V. Medvedkov et al. *Russia*, ENCYCLOPEDIA BRITANNICA (2019), https://www.britannica.com/place/Russia_

²⁹ UN Data, *supra* note 13; see also The World Bank, *Mongolia Country Data*, THE WORLD BANK, <https://data.worldbank.org/country/mongolia> [hereinafter *World Bank Data*]; see also Owen Lattimore et al., *Mongolia*, ENCYCLOPEDIA BRITANNICA (2019), <https://www.britannica.com/place/Mongolia>; see also Thomas Lum & Ben Dolven, CONG. RES. SERV., IF10926, MONGOLIA (2019), <https://crsreports.congress.gov/product/pdf/IF/IF10926>; see also *Population data 2019*, NAT'L STATS. OFF. OF MONGOLIA, http://www.1212.mn/stat.aspx?LIST_ID=976_L03 (as of 2018, Mongolia's population reached 3.23 million people, about 2% growth from 2017).

³⁰ *Id.*

³¹ The World Bank, *Mongolia's 2018 Poverty Rate Estimated at 28.4 Percent*, THE WORLD BANK (June 21, 2019), <https://www.worldbank.org/en/news/press-release/2019/06/21/mongolias-2018-poverty-rate-estimated-at-284-percent> (between 2010 and 2018, the urban poverty rate ranged from 18.8% to 33.2%, while the rural poverty rate ranged from 26.4% to 49%); see also The World Bank, *Mongolia—Renewable Energy for Rural Access Project*, THE WORLD BANK, 1-25 (2018), https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ppar_mongoliareap.pdf.

³² The Const. of Mong., Jan. 13, 1992, ch. 2, art. 16, § 2.

³³ *Id.* at ch. 1, art. 5, § 5 (“The livestock of the country is national wealth and subject to state protection.”); *id.* at ch. 2, art. 17, § 2 (“It is a sacred duty for every citizen ... to protect nature and the environment.”).

through policies that promote large-scale industrial mining operations.³⁴ And Mongolia's capital contains some of the worst air quality in the world, leading organizations to declare an urgent humanitarian crisis in Ulaanbaatar.³⁵

These contradictions reflect Mongolia's relative infancy as a democratic government and highlight the country's struggle to find its identity in the modern world. With sound economic and environmental policies, however, the contradictions also underscore Mongolia's potential to emerge as an economically robust country that preserves its ecological heritage.

a. Mongolia's recent economic status and trends

Since emerging from communism in the early 1990's, Mongolia's economy has ebbed and flowed with the country's mining industry. Mongolia boasts some of the largest mineral reserves in the world, with vast deposits of copper, uranium, coal, iron ore, and gold.³⁶ The new democratic government actively promoted the mining industry, liberally permitting foreign involvement in the domestic mining industry.³⁷ These policies improved Mongolia's economy. Between 2006 and 2016, the economy grew by an average annual rate of 8%, with peak annual growth rates of over 17% in 2011.³⁸ As the mining industry slowed down, so did the economy. In 2016, GDP dropped to 1%.³⁹ But the economy rebounded with an annual growth rate of 5.3% in 2017 and 6.9% in 2018.⁴⁰

The mining industry's contributions to the economy increased the general welfare of Mongolians. Rural poverty rates as high as 49% in 2010 have steadily declined to 30.8% in 2018.⁴¹ While the unemployment

³⁴ Batsaikhan, *supra* note 4; John Farrington et al., *The Impact of Mining Activities on Mongolia's Protected Areas: A Status Report with Policy Recommendations*, 1 INTEGRATED ENVTL. ASSESSMENT AND MGMT.: AN INT'L J., 283 (2005).

³⁵ Adrian Gheorghe et al., MONGOLIA'S AIR POLLUTION CRISIS: A CALL TO ACTION TO PROTECT CHILDREN'S HEALTH (2018), https://www.unicef.org/eap/sites/unicef.org/eap/files/press-releases/eap-media-Mongolia_air_pollution_crisis_ENG.pdf.

³⁶ *Mongolia Partnership*, *supra* note 9.

³⁷ *Id.*

³⁸ The World Bank, *The World Bank in Mongolia*, THE WORLD BANK (Sep. 28, 2018), <https://www.worldbank.org/en/country/mongolia/overview>.

³⁹ Mongolia Country Data, United Nations, <http://data.un.org/en/iso/mn.html>; The World Bank, *Mongolia Country Data*, THE WORLD BANK, <https://data.worldbank.org/country/mongolia>.

⁴⁰ DataBank, *World Development Indicators*, THE WORLD BANK (2019), <https://databank.worldbank.org/reports.aspx?source=2&country=MNG#>.

⁴¹ The World Bank, *Mongolia's 2018 Poverty Rate Estimated at 28.4 Percent*, THE WORLD BANK (Jun. 21, 2019), <https://www.worldbank.org/en/news/>

rate increased from 3.3% in 2005 to 6.2% in 2019, per capita gross domestic product also increased from \$1,158.0 USD in 2005 to \$3,620 USD in 2019.⁴² Life expectancy improved by 6.1% for males and 7.4% for females since 2005, and infant mortality rates declined by over 56% since 2005.⁴³ Rural residents' quality of life now includes greater access to clean drinking water, sanitation facilities, and electricity.⁴⁴ Key measures of gender equality also improved. In one example, women held only 3.9% of parliamentary seats in 2010, a number that increased to 17.1% by 2019.⁴⁵

Despite these gains, Mongolia's economy lacks diversity. This presents the problem of "Dutch disease," an economic theory providing that countries experiencing rapid development and growth in resource extraction sectors often experience declines in the other sectors through appreciation of domestic currency and inflation.⁴⁶ Over reliance on natural resource exploitation can jeopardize long-term economic stability through commodity price volatility, unemployment outside the resource extraction industry, corruption, decreased foreign investment and trade, domestic social instability, and inequality.⁴⁷ The effects of Dutch disease are being observed in Mongolia; coextensive with the increase in mining exports like coal and copper, meat, cashmere fibers, clothing and other agricultural exports declined.⁴⁸ The Mongolian government is exploring ways to moderate these long-term risks associated with Dutch disease, including building up the agricultural sector and diversifying the economy.⁴⁹

press-release/2019/06/21/mongolias-2018-poverty-rate-estimated-at-284-percent.

⁴² *UN Data*, *supra* note 13.

⁴³ *Id.* (evaluating the percentage difference between 2005 and 2019).

⁴⁴ *Id.*; see also Benjamin Sovacool et al., *Gers Gone Wired: Lessons from the Renewable Energy and Rural Electricity Access Project (REAP) in Mongolia*, 15 *ENERGY FOR SUSTAINABLE DEV.*, 32, 32-40 (2011).

⁴⁵ Mongolia Country Data, United Nations, <http://data.un.org/en/iso/mn.html>.

⁴⁶ See Paul Collier & Benedikt Goderis, *Commodity Prices, Growth, and the Natural Resource Curse: Reconciling a Conundrum*, (2007), https://ora.ox.ac.uk/objects/uuid:31e5918a-8aca-40e0-b9ce-e542a77a982b/download_file?file_format=pdf&safe_filename=2007-15text.pdf&type_of_work=Working+paper. This and other studies have found strong evidence that short-term economic gains in resource extraction and commodity industries often lead to adverse long-term economic impacts.

⁴⁷ *Id.*; see also Mongolia Partnership, *supra* note 9; Thorvaldur Gylfason, *Natural Resources and Economic Growth: From Dependence to Diversification*, *ECON. LIBERALIZATION & INTEGRATION POL'Y*, 201, 201-231 (Springer, Berlin, Heidelberg ed., 2006).

⁴⁸ See The World Bank, *Mongolia Systematic Country Diagnostic*, THE WORLD BANK, (2018), <http://documents.worldbank.org/curated/en/576101543874150141/pdf/mongolia-scd-final-version-november-2018-11282018-636792121231072289.pdf> [hereinafter *Mongolia Diagnostic*].

⁴⁹ See Gylfason, *supra* note 47; *Mongolia Diagnostic*, *supra* note 48; See

b. The growth of Mongolia's livestock industry

The agricultural sector represents a culturally important yet underperforming sector of Mongolia's economy. Mongolia enjoys a premier assemblage of temperate grasslands (or steppes).⁵⁰ Over 80% of Mongolia consists of grassland ecosystems characterized by short growing seasons and harsh winters, where only about 1% of the land is arable.⁵¹ The country's landscapes are highly conducive to raising livestock—a practice performed by nomadic herders to meet economic and subsistence needs since before the reign of Genghis Khan in the 1200s.⁵²

i. Shifts in livestock production practices associated with the transition to a free-market economy

Before the transition to a market economy in 1992, livestock production occurred through herder cooperatives (*negdels*), where the government regulated the livestock industry and also supplied fodder, transported livestock between seasonal ranges, funded veterinarian care, and performed other key services for the industry.⁵³ The government compensated herders through salaries and afforded herders the right to own small numbers of livestock.⁵⁴ With the shift to a democratic government, the livestock industry transformed.⁵⁵ The State disbanded herder cooperatives and privatized livestock production and services.

also Suvdantsetseg Balt, et al., *Early Warning System for Pastoral Herders to Reduce Disaster Risk by Using a Mobile SMS Service*, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS, 185, 185-189 (2015); M. Unurzul, *Mongolian High Quality Cashmere is in Demand by International Brands*, MONTSAME (Jun. 25, 2019), <https://montsame.mn/en/read/193898>; Munkhchimeg Davaasharav, *Mongolia Aims to Globalize Cashmere Trade via Joint Platform with China's Bohai*, REUTERS (Mar. 30, 2018), <https://www.reuters.com/article/us-mongolia-cashmere-china/mongolia-aims-to-globalize-cashmere-trade-via-joint-platform-with-chinas-bohai-idUSKBN1H60L1>; Fernández-Giménez, *supra* note 12; Rasmussen & Shombodon, *supra* note 11.

⁵⁰ Batsaikhan, *supra* note 4, at 1736. For context, the Gobi-steppe Ecosystem is more than double the size of the State of California. John Moen, *U.S. States by Size*, WORLD ATLAS, <https://www.worldatlas.com/aatlas/infopage/usabysiz.htm>.

⁵¹ Richard P. Reading et al., *Conserving Mongolia's Grasslands, with Challenges, Opportunities, and Lessons for North America's Great Plains*, 20 GREAT PLAINS RES. 85, 86 (2010); Rao, *supra* note 12, at 3, 8-9.

⁵² URGUNGE ONON, *THE SECRET HISTORY OF THE MONGOLS: THE LIFE AND TIMES OF CHINGGIS KHAN* (2005).

⁵³ María E. Fernández-Giménez et al., *Sustaining the Steppes: A Geographical History of Pastoral Land Use in Mongolia*, 89 THE GEOGRAPHICAL REV. 315, 315 (1999).

⁵⁴ María E. Fernández-Giménez, *The Effects of Livestock Privatization on Pastoral Land Use and Land Tenure in Post-Socialist Mongolia*, 5 NOMADIC POL'Y 49 (2001).

⁵⁵ *Id.*

Without economic support from the government, non-herder households rapidly entered the livestock industry to meet their subsistence needs.⁵⁶ The Mongolian Constitution facilitated citizen movement to the livestock industry by identifying livestock as a protectable national asset and designating most of the grassland ecosystems as open, public resources. The inputs for livestock production—land, feed, water—were free and readily accessible to the population. The 147,508 herders raising livestock in 1990 thus ballooned to 421,392 herders by 2000.⁵⁷

The increase in herders led to a spike in the number of livestock on the range.⁵⁸ Livestock numbers increased from 25.8 million head in 1990 to 66.4 million head by 2018.⁵⁹ The growth was not linear; livestock numbers substantially increased until a winter *dzud* culled the herd, followed by rebuilding periods.⁶⁰ During this boom and bust cycle, the composition of the livestock herd in Mongolia also changed. Herders derive much of their cash income from cashmere produced from Kashmir goats.⁶¹ Mongolian cashmere also remains in high demand; Mongolia is the second largest supplier of cashmere in the world behind China.⁶² So herders struggling in poverty conditions increased the

⁵⁶ Batsaikhan Usukh et al., FOSTERING SUSTAINABLE LIVELIHOODS OF HERDERS IN MONGOLIA VIA COLLECTIVE ACTION (2010), https://www.researchgate.net/profile/Raffael_Himmelsbach/publication/279041424_Fostering_the_Sustainable_Livelihoods_of_Herders_in_Mongolia_via_Collective_Action/links/55891bb80aed6bff80b3338.pdf. Mongolia's grasslands are State-owned, and the Constitution provides for open access to the grasslands for livestock production and use. See The Const. of Mong., Jan. 13, 1992, ch. 1, art. 6, §§ 1-3, 5. That said, some forms of privatization are occurring (leasing winter sites), so that the rangelands are characterized open access or "semi-open access" lands. See Y. Zhang & A. Amarjargal, *Evolution of common resource tenure and governing: evidence from pastureland in Mongolia Plateau*, BUILDING RESILIENCE OF MONGOLIA RANGELANDS (2015).

⁵⁷ 2017 Yearbook, *supra* note 10 at 469.

⁵⁸ *Id.* at 469. Livestock Inventory Data, *supra* note 10. Reading, *supra* note 51, at 87-90.

⁵⁹ Livestock Inventory Data, *supra* note 10; 2017 Yearbook, *supra* note 10 at 458.

⁶⁰ Fernández-Giménez, *supra* note 12, at 847-48. See Figure 1, *infra*.

⁶¹ Lkhagvadorj, *supra* note 12, at 83, 86-87. In fact, many rural households own fewer than 100 head of livestock, which is too few to sustain a household. *Mongolia Partnership*, *supra* note 9. Efforts are being made to mitigate the substantial losses of livestock in *dzuds*, such as the sale of livestock insurance. Rao, *supra* note 12, at 3. But these programs focus on the individual household, which can conflict with the herders' cultural ethic of sharing resources between households during times of disaster or loss. Eric D. Thrift & Byambabaatar Ichinkhorloo, *Management of Dzud Risk in Mongolia: Mutual Aid and Institutional Interventions*, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS 136 (2015).

⁶² The World Bank, *Mongolia Central Economic Corridor Assessment, A Value Chain Analysis of the Cashmere-Wool, Meat, and Leather Industries*, THE WORLD BANK, 33 (Working Paper AUS0000216, 2019) <http://documents.worldbank.org/curated/en/951491558704462665/pdf/Mongolia-Central-Economic-Corridor>

percentage of goats in the herd. From 1990 to 2007, the national goat herd increased by 361% from, while sheep numbers increased by 113% and cattle, horses, and camel numbers declined slightly.⁶³ Since 2007, the number of sheep in the herd slightly outpaced goats.⁶⁴

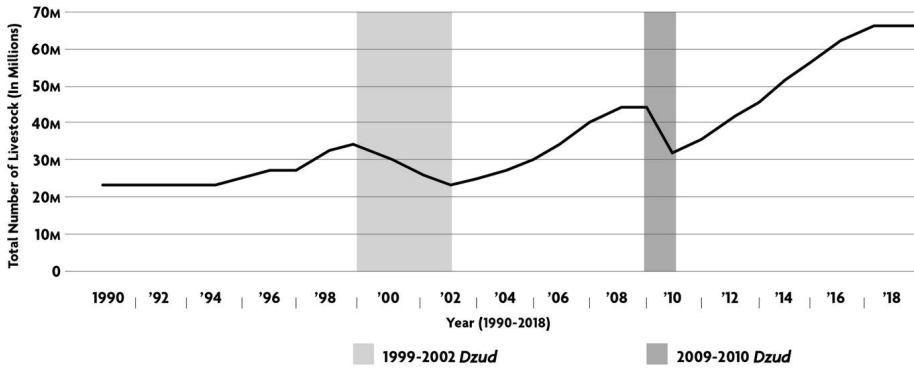


FIGURE 1. Total livestock in Mongolia from 1990 to 2018 (in millions), with dates of two major *dzud* events that killed over 20 million livestock.⁶⁵

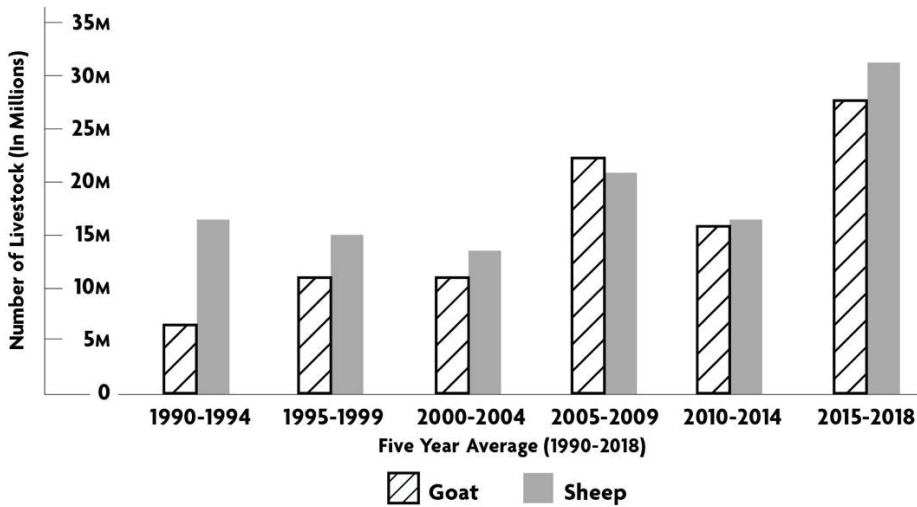


FIGURE 2. Five-year average number of sheep and goats in Mongolia from 1990 to 2018 (in millions).⁶⁶

Assessment-A-Value-Chain-Analysis-of-Wool-Cashmere-Meat-and-Leather-Industries.pdf.

⁶³ Reading, *supra* note 51, at 88.

⁶⁴ See Figure 2, *infra*.

⁶⁵ Data obtained from Livestock Inventory Data, *supra* note 10.

⁶⁶ *Id.*

ii. Contribution of the livestock industry to Mongolia's economy

Mongolia's agricultural sector was responsible for between 13.2% and 17.9% of Mongolia's gross domestic product from 2005 to 2018,⁶⁷ and cashmere production represents a "product of strategic importance" to Mongolia's economy.⁶⁸ Three categories of exports highlight the importance of cashmere production to Mongolia's economy: (1) "fine animal hair, not carded or combed, of kashmir (cashmere) goats" (HS 510211); (2) "fine animal hair, carded and combed, of kashmir (cashmere) goats" (HS 510531); and (3) "Jerseys, pullovers, cardigans, waistcoats, and similar articles, knitted or crocheted, of fibres from kashmir (cashmere) goats" (HS 611012).⁶⁹ Unprocessed cashmere (HS 510211) represented the main export (81%), virtually all of which goes to China.⁷⁰ Slightly processed cashmere (HS 510531) constitutes 16% of Mongolia's cashmere exports, with Italy receiving most of the carded or combed cashmere.⁷¹ Cashmere processed into end-consumer products, like scarves and sweaters, constitute a small fraction of exports (3%), with Japan and the United Kingdom importing the highest volume of these processed products.⁷² The three categories of cashmere exports

⁶⁷ *UN Data*, *supra* note 13.

⁶⁸ World Trade Organization, Mongolia-Export Duties on Raw Cashmere: Communication from Mongolia, WTO Doc. WT/GC/W/638 G/C/W/652 (Sept. 27, 2011), *available at* https://docs.wto.org/dol2fe/Pages/FE_DownloadDocument.aspx?Symbol=G/C/W/652&Language=English&CatalogueId=49841&Context=ShowParts (cashmere sales in 2011 represented 6.3% of the gross domestic product).

⁶⁹ Trade Map Database, INTERNATIONAL TRADE CENTRE, <https://www.trademap.org/Index.aspx>; United Nations, Harmonized Commodity Description and Coding Systems (HS) (2017), <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS> ("The Harmonized System (HS) is an international nomenclature of the classification of products. It allows participating countries to classify traded goods on a common basis for customs purposes.").

⁷⁰ Trade Map, *supra* note 69 (search criteria: product HS 510211; country Mongolia; exports, yearly time series) (For HS 510211, Mongolia exported \$109,151 million USD to China in 2010, which increased to \$277,835 million USD by 2018); *see also* The World Bank, *supra* note 62, at 4-5 (Mongolia's low export numbers of unprocessed cashmere track limitations in the cashmere industry in Mongolia, such as poor infrastructure that limits the volume of raw cashmere that the industry can process for sale or export).

⁷¹ Trade Map, *supra* note 69 (search criteria: product HS 510531; country Mongolia; exports, yearly time series) (for HS 510531, Mongolia exported \$24,037 million USD to Italy in 2010, which increased to \$46,657 million USD by 2018).

⁷² *Id.* (search criteria: product HS 611012; country Mongolia; exports, yearly time series) (for HS 611012, Mongolia exported \$310,000 USD to Japan and \$6,300 to the United Kingdom in 2010, which increased to \$2,813 million USD for Japan and \$2,703 million USD for the United Kingdom in 2018).

steadily increased from over \$181,272,000 USD in 2010 to over \$344,379,000 USD in 2018, which accounted for 4.9% of the country's total exports, \$7,011,758,000.00 USD, in 2018.⁷³

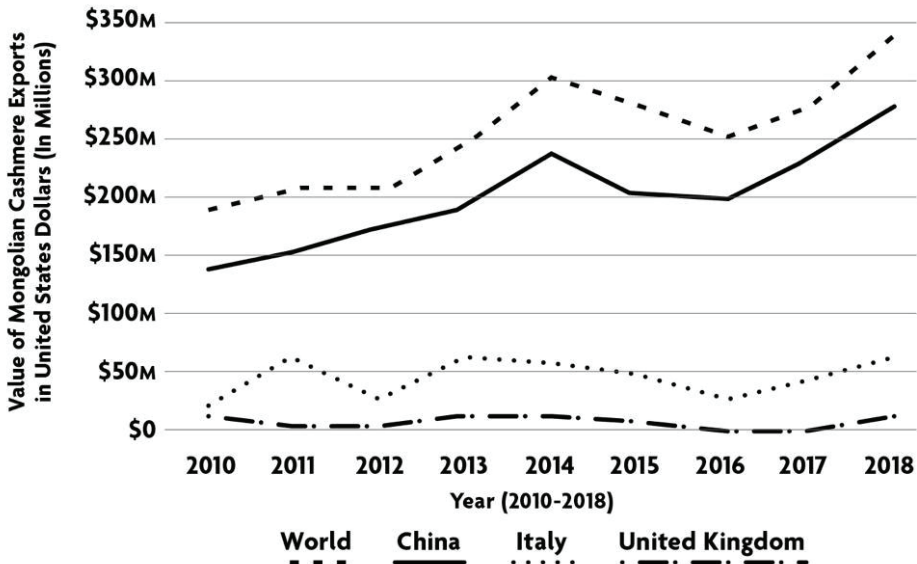


FIGURE 3. Value (in USD) of Mongolian exports of three categories of cashmere products (HS codes 510211, 510531, 611012) distributed to the world, China, Italy, and the United Kingdom between 2010 and 2018.⁷⁴

Mongolia must overcome significant challenges before the livestock industry can reach its potential. Mongolia lies next to China, the largest meat consuming nation in the world, but Mongolia struggles to export beef due to poor domestic production and distribution networks, inadequate ports and trade infrastructure, and prevalent disease and food-safety concerns.⁷⁵ Processed cashmere products have more value and are more profitable commodities than raw cashmere, yet Mongolia exports most of its cashmere to China without processing.⁷⁶ Mongolia's land-locked status and sparse supply chain infrastructure impede the country's ability to capitalize on foreign trade opportunities.⁷⁷ These

⁷³ *Id.* (search criteria: all products; country Mongolia; exports, yearly time series); see also Statistical Country Customs Foreign Trade Statistics, NAT'L STATS. OFF. OF MONGOLIA, <http://1212.mn> (search criteria: statistics, foreign trade, export, export by country, year); see also Figure 3, *infra*.

⁷⁴ Data obtained from Trade Map, *supra* note 69.

⁷⁵ The World Bank, *supra* note 62, at 20.

⁷⁶ *Id.* at 34; see also Vera Songwe et al., *Mongolia Cashmere Trade Policy* 36-37, World Bank (Mar. 11, 2003), http://siteresources.worldbank.org/INTISPMA/Resources/Training-Events-and-Materials/Training_Mar11,2003_Songwe_MongoliaCashmereTradePolicy.pdf.

⁷⁷ The World Bank, *supra* note 62, at 3-4.

constraints are exacerbated by price volatility and lack of investment in the domestic livestock industry.⁷⁸ And the effect of livestock grazing on Mongolia's natural resources could bring the industry to its breaking point.

iii. The Effect of livestock grazing on Mongolia's grasslands

The explosive growth of the livestock industry has generated much research into the effects of grazing on Mongolia's grasslands. Not all of the research, however, is congruent.

Several studies conclude that grassland degradation is widespread and associated with grazing intensity.⁷⁹ These studies find that the effects of livestock grazing are most visible in desert and dry steppes, as well as in the transition zones between desert steppes and steppe ecosystems.⁸⁰ Based on these and other studies, the Mongolian government estimates that upwards of 65% to 70% of the country's grasslands are degraded.⁸¹

Other researchers dispute these estimates of widespread rangeland decline, finding neutral to positive changes in land cover and vegetation trends at various locations,⁸² subtle shifts in vegetation characteristics associated with grazing intensity,⁸³ and overgrazing in 37% or less of grazing lands.⁸⁴ The researchers thus concluded that basic

⁷⁸ Daniel J. Murphy, *Booms and Busts: Asset Dynamics, Disaster, and the Politics of Wealth in Rural Mongolia*, 1 *ECON. ANTHROPOLOGY* 109–122 (2014) (Other factors also constrain the industry, such as the aging herder community, increased urbanization of herder households, lack of organized marketing and cooperatives, among others.); see also The World Bank, *supra* note 62.

⁷⁹ Hilker, *supra* note 18; Dennis P. Sheehy & Damiran, *Assessment of Mongolian Rangeland Condition and Trend* 17–22, World Bank (2012), https://www.researchgate.net/profile/Daalkhaijav_Damiran/publication/234046912_MongolianRangeland_Comparative_Study/links/02bfe50e88c28c24f6000000.pdf.

⁸⁰ Sheehy & Damiran, *supra* note 79, at 17–22.

⁸¹ Mongolia, *Intended Nationally Determined Contribution* (Sept. 24, 2015), https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Mongolia/1/150924_INDCs%20of%20Mongolia.pdf; Mongolia Diagnostic, *supra* note 48 at 23.

⁸² Sandra Eckert et al., *Trend Analysis of MODIS NDVI Time Series for Detecting Land Degradation and Regeneration in Mongolia*, 113 *J. OF ARID ENVTL.* 16–28 (2015); Jamiyansharav Khishigbayar et al., *Mongolian Rangelands at a Tipping Point? Biomass and Cover are Stable but Composition Shifts and Richness Declines After 20 Years of Grazing and Increasing Temperatures*, 115 *J. OF ARID ENVTL.* 100–112 (2015).

⁸³ C. Jamsranjav et al., *Applying a Dryland Degradation Framework for Rangelands: The Case of Mongolia*, 28 *ECOLOGICAL APPLICATIONS* 622–42 (2018) (further noting that about 55% of Mongolia's rangelands are far removed from concentrated livestock areas, which suggests most of the land's grazing areas are not degraded).

⁸⁴ W. Gao et al., *Is Overgrazing a Pervasive Problem Across Mongolia? An*

ecosystem functions are intact and able to support diverse plant and animal life.⁸⁵

Varied assessments of rangeland decline can frustrate the ability of “the science of ecology...to support and inform robust and successful policy.”⁸⁶ Fortunately, several researchers integrated research on rangeland health, where the weight of the evidence shows Mongolia’s grasslands to be at risk. Fernández-Giménez et al. (2017), for example, analyzed historical evidence and found that the effects of human-mediated livestock grazing caused substantial ecosystem-level effects over the past 5,000 years.⁸⁷ The researchers did not find evidence that the ecosystems have reached ecological tipping points—*i.e.*, those levels where the ecosystem can no longer support native plant and animal diversity under changing climate conditions.⁸⁸ But they did find substantial data that livestock grazing reduces ecological function and portions of the rangelands are approaching ecological tipping points.⁸⁹ When considering the dramatic increase in livestock numbers throughout Mongolia over the past two decades and the ongoing impact of climate change, a clear picture emerges—livestock numbers on the range present a conservation problem for Mongolia.

iv. The threat to Mongolia’s livestock and grasslands posed by climate change

The risks associated with livestock grazing are amplified when considering how climate change degrades rangeland conditions across Mongolia. Over the past 75 years, mean annual air temperatures over Mongolia increased by more than 2°C.⁹⁰ Annual precipitation patterns are shifting temporally or decreasing in volume. Analyzing tree-ring data, Pederson et al. (2014) concluded that the drought in the early 2000s was matched in scale and intensity only by the drought that contributed to the rise of Genghis Khan’s empire in the early 1200s.⁹¹ Similarly, Hessel et al. (2015) found that the 1996 to 2011 drought was one of the most severe droughts over the last 1100 years.⁹² Winter *dzuds* are

Examination of Livestock Forage Demand and Forage Availability from 2000 to 2014, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS, 35, 37 (2015) (also noting persistent overgrazing in only about 11% of the country).

⁸⁵ Khishigbayar, *supra* note 82.

⁸⁶ Ian Donohue et al., *Navigating the Complexity of Ecological Stability*, 19 *ECOLOGY LETTERS* 1172, 1185 (2016).

⁸⁷ Fernández-Giménez, *supra* note 15 at 46.

⁸⁸ *Id.* at 64-65.

⁸⁹ *Id.*; see also Dangal, *supra* note 18.

⁹⁰ Mongolia Climate Assessment, *supra* note 11 at 41.

⁹¹ *Id.*

⁹² Amy E. Hessel et al., *How Unusual Was the 21st Century Drought in*

increasing in frequency and intensity, and both *dzuds* and droughts are likely intensify over the next century.⁹³

These climatic changes led to economic ruin for many Mongolian herders. Repeated droughts combined with winter *dzuds* left millions of livestock dead and many herders destitute.⁹⁴ Not only do these conditions inflict economic harm, but they present a real challenge for maintaining the herder's physical and mental well-being.⁹⁵ Unlike nostalgia that refers to the sense of homesickness when separated from a homeland, "solastalgia" refers to "the distress that is produced by environmental change impacting on people while they are directly connected to their home environment."⁹⁶ Researchers have documented solastalgia among people living in areas affected by mining and widespread drought conditions,⁹⁷ and the effects of solastalgia can be severe. The "place-based distress" can cause loss of identity, decreased physical and mental health, financial distress, increased workload, isolation, fear for the well-being of others, community attrition, and other harms to the general well-being of community members.⁹⁸

Mongolians are facing conditions associated with solastalgia—more frequent and severe droughts, *dzuds*, rising air temperatures, decreased precipitation, and environmental degradation from mining, among others.⁹⁹ In several studies, herders routinely acknowledge the effects of climate change and overgrazing on the health of the land and the ability of the herders to continue their nomadic way of life.¹⁰⁰

Mongolia? Placing Recent Extremes in An 1100-Year Context, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS 80 (2015).

⁹³ *Id.*; Lkhagvadorj, *supra* note 12.

⁹⁴ Fernandez-Gimenez, *supra* note 15 at 837-38.

⁹⁵ *Id.* at 848.

⁹⁶ Glenn Albrecht et al., *Solastalgia: the Distress Caused by Environmental Change*, 15 AUSTRALASIAN PSYCHIATRY S95, S95 (2007).

⁹⁷ *Id.* at S96-97.

⁹⁸ *Id.*

⁹⁹ See, e.g., Tungalag Ulambayar et al., *Social Outcomes of Community-Based Rangeland Management in Mongolian Steppe Ecosystems*, 10 CONSERVATION LETTERS 317, 323-25 (2017).

¹⁰⁰ See Odgarav Jigsuren et al., *Evaluating the Impact of Climate Change Based on Herders' Observations and Comparing it with Hydro-Climatic and Remote Sensing Data*, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS 235, 235-242 (2015) (reporting herder perceptions of rangeland decline occurring incident to diminished precipitation and shorter growing seasons); Retta A. Bruegger et al., *Herder Observations of Rangeland Change in Mongolia: Indicators, Causes, and Application to Community-Based Management*, 67 RANGELAND ECOLOGY & MGMT. 119, 119-131 (2014) (similarly reporting evidence that herders perceive both the effects of climate change and rangeland decline); Arren Mendezona Allegretti et al., *Participatory Mapping and Herders' Local Knowledge on Mongolia's Landscapes and Socio-ecological Boundaries*, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS 222 (2015);

These studies show that the effects of solastalgia are likely present, and growing.¹⁰¹ Climate change cannot be relegated to a global phenomenon with diffuse local impacts; its impacts are being observed within Mongolia's grasslands and by those herders and their families who depend on the land.

Against this increasingly bleak outlook, a refreshing consistency has emerged. The Mongolia government, scholars, and even herder families recognize the imminent threat of climate change on the viability of Mongolia's grassland ecosystems. Unlike the United States, Mongolia's government has remained resolute in recognizing the effects of climate change and pursuing interim and long-term measures to address these impacts.¹⁰² Additionally, Mongolia participates in many international forums, develops policies and action goals,¹⁰³ and implement measures to address climate change.¹⁰⁴ And Mongolia herders understand the ramifications of ongoing climate change on the health of the grassland ecosystems.¹⁰⁵ The shared sentiment that climate change

M.E. Fernandez-Gimenez et al., *Integrating Herder Observations, Meteorological Data and Remote Sensing to Understand Climate Change Patterns and Impacts Across an Eco-Climatic Gradient in Mongolia*, BUILDING RESILIENCE OF MONGOLIAN RANGELANDS 228 (2015).

¹⁰¹ See also Jessica Hresc et al., *Mining Project's Economic Impact on Local Communities, as a Social Determinant of Health: A Documentary Analysis of Environmental Impact Statements*, 72 ENVTL. IMPACT ASSESSMENT REV. 64, 64-70 (2018).

¹⁰² Intended Nationally Determined Contribution, *supra* note 81 (Mongolia's government has been at the forefront of this debate, recognizing the effects of climate change and working to secure interim and long-term measures that meaningfully address the causes and impacts of climate change).

¹⁰³ *Id.*; see also UN-REDD Mongolia National Programme, *Mongolia's Forest Reference Level submission to the UNFCCC* (Jan. 15, 2018), https://redd.unfccc.int/files/2018_frel_submission_mongolia.pdf (These international forums include the Mongolia Action Programme on Climate Change (2011), the Green Development Policy (2014), the State policy on Energy (2015), and the Intended Nationally Determined Contribution (INDC)).

¹⁰⁴ *Mongolia's the World's First Boreal Country to Submit a Reference Level to the UNFCCC, Food and Agricultural Organization of the United Nations* (Feb. 4, 2018), <http://www.fao.org/mongolia/news/detail-events/en/c/1113230/>; *Mongolia has Started to Implement its NDCs, International Climate Initiative* (Jan. 23, 2018), https://www.international-climate-initiative.com/en/news/article/mongolia_has_started_to_implement_its_ndcs/; Battserreg Namdag, Minister of Environment, Green Development and Tourism of Mongolia, Speech to the United Nations Climate Change Conference, Kyoto Protocol (2015), https://unfccc.int/sites/default/files/cop21cmp11_hls_speech_mongolia.pdf. See Intended Nationally Determined Contribution, *supra* note 81 (As is often the case, Mongolia is slow to implement all of the key measures needed to address climate change. Mongolia, for example, identifies actions and measures to reduce greenhouse gas emissions by 14%, but it also admits that the actions needed to yield these reductions depend on new technologies and funding).

¹⁰⁵ Fernandez-Gimenez, *supra* note 15 at 837-38, 848.

is affecting Mongolia's natural resources provides the opportunity for Mongolians and the international community to come together and develop policies aimed at addressing both the viability of Mongolia's grasslands and the industries that depend on them.

c. The Mongolia Third Neighbor Trade Act

The United States' Senate and House of Representatives recently introduced the Third Neighbor Act to promote Mongolia's economic and environmental welfare.¹⁰⁶ The Act's foundation is the United States' existing Generalized System of Preferences (GSP) program—a trade program that allows for reduced or eliminated tariffs for certain commodities from developing countries.¹⁰⁷ Mongolia is an eligible party under the United States' GSP, but processed cashmere products are not eligible for tax-free treatment.¹⁰⁸ The Third Neighbor Act would bridge that gap and extend the GSP program's benefits to cashmere products produced and processed in Mongolia,¹⁰⁹ as long as Mongolia meets specified conditions and remains eligible under the broader GSP program.¹¹⁰ The authorization for tax-free treatment extends only through December 21, 2025.¹¹¹

One purpose of the legislation is to improve the United States' foreign and economic relations with Mongolia.¹¹² Since 1987, the United States has fostered a “third neighbor” relationship with Mongolia to promote Mongolia's independence from its proximate neighbors, China and Russia.¹¹³ This relationship benefits the United States through aid and support on foreign and security policies.¹¹⁴ It has also benefited the United States economically. The United States imported \$707 million USD in goods from Mongolia in 2012, but trade with Mongolia declined precipitously to \$131 million USD in 2018.¹¹⁵ Concerned with declining

¹⁰⁶ H.R. 2219, 116th Cong. (2019); S. 1188, 116th Cong. (2019). *See, e.g.*, Mongolia Third Neighbor Trade Act, H.R. 6636, 115th Cong. (2018); Mongolia Third Neighbor Trade Act, S. 3470, 115th Cong. (2018) (Congress introduced similar legislation in 2018, but the proposed legislation stalled).

¹⁰⁷ *See, e.g.*, H.R. 2219, 116th Cong. § 3(c) (2019).

¹⁰⁸ *GSP-Eligible Products*, Office of the United States Trade Representative (June 2018), <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-program-i-0>.

¹⁰⁹ H.R. 2219, 116th Cong. § 3(a), (b) (2019).

¹¹⁰ *Id.* at § 3(c).

¹¹¹ *Id.* at § 3(f); U.S. Const., art. I, § 8, cl. 3 (the stated authority for the legislation is Article 1, Section 8, Clause 3 of the United States Constitution, which provides authority for Congress to “regulate Commerce with foreign Nations”).

¹¹² H.R. 2219, 116th Cong. § 2(2)-(3).

¹¹³ Lum & Dolven, *supra* note 29.

¹¹⁴ H.R. 2219, 116th Cong. § 2(2) (2019).

¹¹⁵ Lum & Dolven, *supra* note 29. *See* Joint Statement of the United States-

exports to Mongolia, the United States seeks to improve overall bilateral trade relations with Mongolia by reducing the United States' dependence on Chinese cashmere goods.¹¹⁶

To advance the United States' interests, the Third Neighbor Act imposes trade measures intended to develop Mongolia's cashmere processing and garment industry.¹¹⁷ The Third Neighbor Act allows duty-free treatment for specific processed articles of cashmere. The articles must contain Mongolian produced cashmere of sufficient volumes; at least 23% of the weight of the article must consist of cashmere fibers, or the cashmere fibers must represent at least 51% of the article's appraised value.¹¹⁸ The raw material and direct processing costs also must represent over 50% "of the appraised value of the article."¹¹⁹ In essence, the Third Neighbor Act provides for duty-free imports of processed cashmere products produced in Mongolia, from Mongolian cashmere, where production efficiencies do not exist.

The Third Neighbor Act places restrictions on duty-free treatment, most of which already apply to Mongolian exports under the United States GSP program.¹²⁰ Mongolia must comply with the African Growth and Opportunity Act, which conditions trade benefits on Mongolia's adherence to labor rights and free-market policies.¹²¹ Congress also recognizes that it is "critical for Mongolia to take steps to ensure the protection of its grasslands and prevent overgrazing of cashmere goats,"¹²² given the combined influence of climate change, *dzuds*, and livestock grazing on Mongolia's grasslands.¹²³ The Third Neighbor Act thus conditions duty-free treatment on whether Mongolia effectively enforces its environmental laws and obligations, including international agreements relating to environmental and public health.¹²⁴ The draft legislation does not explain how its provisions are monitored or enforced.

Mongolia Trade and Investment Council, U.S. Embassy in Mongolia (Apr. 24, 2019), <https://mn.usembassy.gov/joint-statement-of-the-united-states-mongolia-trade-and-investment-council/> (Mongolia exports to the United States in 2018 were valued at around \$10.1 million USD, but Mongolia also receives over \$100 million USD per year in foreign direct investment from the United States).

¹¹⁶ H.R. 2219, 116th Cong. § 2(3), (7) (2019).

¹¹⁷ *Id.* at § 2(7), (8), (10).

¹¹⁸ *Id.* at § 3(b)(1)(B), (C), (D). *See also id.* § 3(b)(2).

¹¹⁹ *Id.* at § 3(b)(1)(E).

¹²⁰ *Id.* § 3(c)(1)(A) (citing 19 U.S.C. § 3703(a) (2015)).

¹²¹ *Id.* (instituting a fair legal system, reducing poverty, providing for education and health care, combating corruption and bribery, securing worker and labor rights, enforcing human rights, and so on).

¹²² *Id.* at § 2(9).

¹²³ *Id.* at § 2(5)-(6).

¹²⁴ *Id.* at § 3(c)(2).

III. DISCUSSION

The Mongolian cashmere industry could become the centerpiece of a vibrant Mongolian economy. But Mongolian herders are struggling. Many are living in poverty with inadequate access to the knowledge and services required to raise livestock sustainably. Rangelands are burdened by excessive livestock, which reduces the quantity and quality of Mongolia's famed steppes. These impacts are likely to intensify over the next decade.¹²⁵ As Mongolia's government acknowledges, global climate change threatens substantial harm to both the grasslands and the hundreds of thousands of herders who rely on them to feed their families and to generate income.¹²⁶

Against this backdrop, various government policies aim to improve the plight of Mongolia's herders and grasslands.¹²⁷ The Third Neighbor Act is one of them. It proposes to liberalize trade of Mongolia-produced cashmere products with one of the world's largest consumer markets—the United States.¹²⁸ This draft legislation has garnered bipartisan support in the United States and the support of Mongolia's government and many cashmere and garment entities.¹²⁹ But as with most economic and environmental policies, the effects of the Third Neighbor Act on Mongolia's herders and grasslands are not so straightforward.

The proposed legislation would economically benefit Mongolian cashmere processors by increasing market access within the United States, which historically accounted for a small fraction of Mongolian cashmere exports. In 2010, Mongolia exported \$5,000 USD in cashmere

¹²⁵ See, e.g., Pederson, *supra* note 10 at 10-11.

¹²⁶ Miodrag Stevanović et al., *The Impact of High-End Climate Change on Agricultural Welfare*, 2 SCI. ADVANCES 1, 1 (2016).

¹²⁷ See, e.g., Rao, *supra* note 12 at 10 (discussing government policies to establish "protected areas"); Fernandez-Gimenez, *supra* note 15 at 849-50 (disaster relief policies, like livestock insurance); Intended Nationally Determined Contribution, *supra* note 81 at 2-3 (identifying various policies to reduce the impact of the agricultural sector on global climate change).

¹²⁸ H.R. 2219, 116th Cong. § 2(6), (7), (10) (2019).

¹²⁹ Jonathan S. Addleton, *Cashmere from Mongolia: One Way to Smooth Out Washington's Partisan Divide?*, GLOBAL ATLANTA (Sept. 6, 2018), <https://www.globalatlanta.com/cashmere-from-mongolia-one-way-to-smooth-out-washingtons-partisan-divide/> (last visited Feb. 28, 2020); The Gobi Corporation, *The Largest Cashmere Manufacturer of Mongolia Comes to the USA*, THE BEACHWOOD REP. (Oct. 3, 2019), www.beachwoodreporter.com/people_places_things/the_largest_cashmere_manufactu.php (last visited Feb. 28, 2020) ("This duty-free treatment would open a tremendous opportunity for Mongolia to diversify its economy."); Beth Wright, *Mongolian Cashmere Giant Backs US Trade Bill*, JUST-STYLE (July 31, 2019), https://www.just-style.com/news/mongolian-cashmere-giant-backs-us-trade-bill_id136740.aspx (last visited Feb. 28, 2020).

goods, which increased to \$950,000 USD by 2018.¹³⁰ Despite the modest increase, Mongolian exports to the United States pale in comparison to the over \$405 million USD worth of cashmere products the United States imports from other countries, mainly China.¹³¹ As shown by the United States' overall imports of cashmere, preferential trade policies between the United States and Mongolia should increase demand for Mongolian cashmere products and confer an economic benefit to hundreds of cashmere processing companies.¹³² These benefits could be substantial. Some sources estimate, for example, that the Third Neighbor Act will likely create over 40,000 jobs filled mainly by women.¹³³

The Third Neighbor Act would provide economic benefits to processing companies and the workforce employed by them, and therein lies the problem. The Mongolian government intervened to support the cashmere processing industry by banning and then taxing raw cashmere exports.¹³⁴ These policies, biased toward subsidizing processors, contributed to widespread poverty among the over 300,000 herders and extensive rangeland degradation throughout Mongolia.¹³⁵ The Third Neighbor Act takes the same producer-biased approach and is likely to lead to the same destructive results.¹³⁶ It likely would increase domestic cashmere production without large-scale improvements to the economic income of herder households or attention to the persistent overgrazing and decline of Mongolia's grasslands. The rush to benefit Mongolia through the Third Neighbor Act may fail, which is why Congress should revisit the legislation to benefit herders and better address grassland degradation.¹³⁷

¹³⁰ Trade Map, *supra* note 69 (search criteria: product HS "611012"; country "Mongolia"; exports, yearly time series).

¹³¹ *Id.* (search criteria: product HS "611012"; country "United States of America"; imports, yearly time series).

¹³² See Batnasa Namsrai, *Enhancing the Contribution of Preferential Trade Agreements to Inclusive and Equitable Trade: The Case of Mongolia*, United Nations Economic and Social Commission for Asia and the Pacific [ESCAP], (Apr. 15, 2019), <https://www.unescap.org/sites/default/files/DA9-03%20Mongolia%20country%20study%20-%20Namsrai.pdf>; Press Release, American Chamber of Commerce in Mongolia, Mongolia Third Neighbor Trade Act Introduced to the U.S. Congress (Apr. 15, 2019), <http://www.amcham.mn/mtnta/>; see also B. Batchimeg, *Cashmere Producers Highlight Export Possibilities*, MONTSAME (May 17, 2018), <https://montsame.mn/en/read/135138> (identifying 298 factories operating in Mongolia that employ 5200 in cashmere industry); Gobi Corp., *supra* note 129 (noting the Gobi Corporation has over 2,800 employees, of which 80% are female).

¹³³ Wright, *supra* note 129; Press Release, Ben Cardin, U.S. Senator for Md., Cardin, Sullivan Reintroduce Bill to Increase Trade with Democratic Ally Mongolia (Apr. 11, 2019), <https://www.cardin.senate.gov/newsroom/press/release/cardin-sullivan-reintroduce-bill-to-increase-trade-with-democratic-ally-mongolia>.

¹³⁴ Songwe, *supra* note 76, at iii, 22-23.

¹³⁵ See § III.A, *infra*.

¹³⁶ See § III.B, *infra*.

¹³⁷ See § III.C, *infra*.

a. Previous biases for subsidizing cashmere processors hurt Mongolian herders and Mongolia's grasslands.

Trade policies can advance economic and environmental objectives, or they can frustrate them. Berger et al. (2015) notes that a critical conservation issue is the “extent to which external forces and financial incentives might change pastoral practices to accommodate the conservation of wildlife.”¹³⁸ The authors argued that western demand for cashmere products was linked to increased goat production and the decline of native ungulates.¹³⁹ While von Wehrden et al. dispute that analysis as correlative and overly simplistic,¹⁴⁰ the base point in Berger et al. remains sound; trade policies can spur growth in domestic livestock production industries in ways that weaken the ability to conserve natural resources.¹⁴¹

Many cashmere producing Mongolians have firsthand experiences with the destructive impacts of domestic trade policies. In the early 1990s, many processing companies were State-owned or controlled,¹⁴² so the government promoted policies to ensure “more stable operations of domestic cashmere producers.”¹⁴³ First, the government banned raw cashmere exports and, in 1997, replaced the ban with a 30% ad valorem export tax.¹⁴⁴ The export ban/tax altered the price gap between domestic and international cashmere products, which effectively increased the supply of below market value cashmere inputs for domestic processors.¹⁴⁵ The government’s pre-capitalism bias

¹³⁸ Joel Berger et al., *The Cashmere Connection, Biodiversity, and Climate: Response to von Wehrden et al. 2014*, 29 CONSERVATION BIOLOGY 290, 292 (2015).

¹³⁹ *Id.*

¹⁴⁰ Henrik von Wehrden et al., *Correlation of Trends in Cashmere Production and Declines of Large Wild Mammals: Response to Berger et al. 2013*, 29 CONSERVATION BIOLOGY 286, 288 (2015).

¹⁴¹ See John Reilly & Neil Hohmann, *Climate Change and Agriculture: The Role of International Trade*, 83 THE AM. ECON. REV. 306, 311-12 (1993).

¹⁴² The Gobi Corporation represents one of the largest cashmere processing companies in Mongolia and was not fully privatized until 2007. See Gobi Corp., *supra* note 129.

¹⁴³ World Trade Organization, *supra* note 68.

¹⁴⁴ See World Trade Organization, *Report of the Working Party on the Accession of Mongolia*, WT/ACC/MNG/9, ¶ 24 (June 27, 1996), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=11805,13126&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (committing to lift the ban and replace with an export tax that would last no more than 10 years); see also World Trade Organization, *Mongolia-Export Duties on Raw Cashmere*, WT/L/695 (Aug. 1, 2007), <https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3A%2Fwt%2F1%2F695.doc&> (at Mongolia’s request, the World Trade Organization allowed Mongolia to maintain export duties on raw cashmere until

toward subsidizing processors led to three main effects on the cashmere industry.

First, by limiting herders' access to international markets, the export ban/tax artificially depressed the price of raw cashmere. Herders either sold raw cashmere to domestic processors at below market prices or incurred similar losses by smuggling their products to China.¹⁴⁶ The export ban/tax merely shifted income from herders to processors, widening a growing inequality gap between the small rural herders and larger herding operations and domestic processing companies.¹⁴⁷

Second, the export ban/tax led to inefficient processing operations that emphasized quantity of cashmere over quality, which also reduced herders' income. Export taxes often "lead to domestic inefficiency in the downstream industries because the price of the product is artificially low at home."¹⁴⁸ This occurred in Mongolia. Cashmere processors often failed to differentiate between high- and low-quality cashmere when buying raw cashmere.¹⁴⁹ Because herders received similar prices for cashmere irrespective of quality, they lacked incentives to produce high quality cashmere. Herders thus failed to engage in breeding practices required to maintain high quality cashmere products, such as selective breeding, culling older goats from the herd, and so on.¹⁵⁰ Combined with other pre-capitalism policies that also favored increasing the volume of agricultural products, the quality of the national goat herd declined. So, too, did the value of Mongolian cashmere.¹⁵¹

January 29, 2012); Ad Valorem Tax, Black's Law Dictionary (11th ed. 2019) (an "ad valorem" tax is a tax on a commodity "proportional to the value of the thing taxed"); World Trade Organization, *supra* note 68 (noting the government eliminated the export tax in 2009).

¹⁴⁵ M. Mendez-Parra et al., *Export Taxes and Other Restrictions on Raw Materials and Their Limitation Through Free Trade Agreements: Impact on Developing Countries* (European Parliament, Directorate-General for External Policies Policy Department, Apr. 28, 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/534997/EXPO_STU\(2016\)534997_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/534997/EXPO_STU(2016)534997_EN.pdf); Joanna Bonarriva et al., *Export Controls: An Overview of Their Use, Economic Effects, and Treatment in the Global Trading System* (Working Paper U.S. International Trade Commission, No. ID-23, Aug. 2009), <https://www.usitc.gov/publications/332/ID-23.pdf>.

¹⁴⁶ Songwe, *supra* note 76, at i.

¹⁴⁷ See Bernard Hoekman & Alessandro Nicita, *Trade Policy, Trade Costs, and Developing Country Trade*, 39 *WORLD DEV.* 2069 (2011); see also Bonarriva, *supra* note 145 at 7; Mendez-Parra, *supra* note 145; Murphy, *supra* note 78 at 110.

¹⁴⁸ Bonarriva, *supra* note 145 at 7; Mendez-Parra, *supra* note 145 at 30.

¹⁴⁹ See Songwe, *supra* note 76 at 30. Other researchers suggest that Mongolian companies now differentiate between quality cashmere in purchasing decisions, but Chinese companies do not. See Donald Lecraw, et al., *A Value Chain Analysis of the Mongolian Cashmere Industry* (USAID, May 2005), <https://www.eri.mn/download/mkndhl1c>. In any event, the effect is the same—the price of raw cashmere is dictated more by volume than by quality.

¹⁵⁰ See Songwe, *supra* note 76 at 22.

¹⁵¹ The Schneider Group, *Cashmere Market Indicators*, <https://www.>

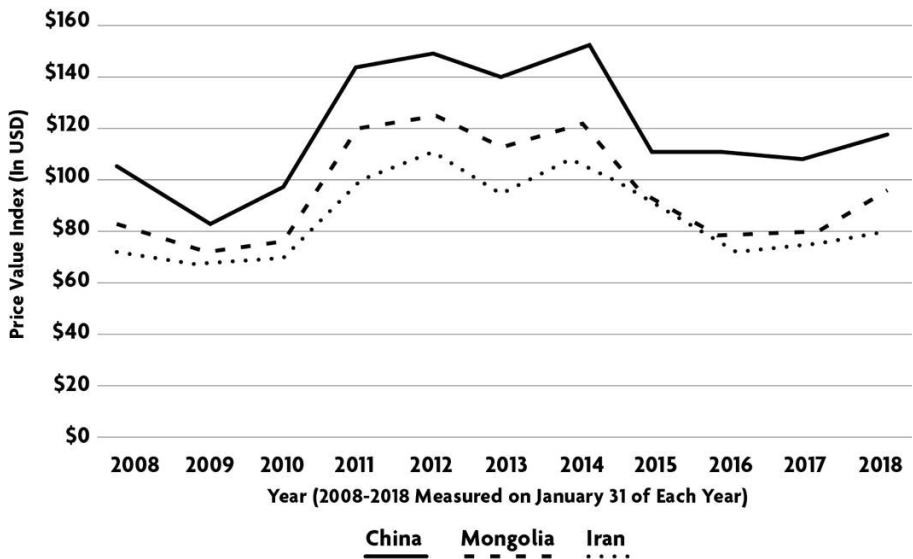


FIGURE 4. Comparative price index of cashmere produced from Mongolia, China, and Iran from 2008 to 2018, measured on January 31 of each year.

Source: Data derived and figure adapted from The Schneider Group, Cashmere Market Indicators, www.gschneider.com/market-indicators/.

Third, inefficient processing operations allowed inefficient and unsustainable herding operations to continue unabated. During the transition to a market-based economy in the early 1990s, the Mongolian government directed many of its laws and policies toward encouraging livestock production.¹⁵² The Mongolian Constitution states that livestock are a “national wealth...to be protected by the State,”¹⁵³ and Mongolia’s laws prohibit large scale privatization of Mongolia’s rangelands.¹⁵⁴ Every Mongolian has cost-free access to inputs required to raise livestock—the land to graze livestock, feed provided by rangelands, and water

[gschneider.com/market-indicators/](http://www.gschneider.com/market-indicators/). In September 2019, the index value for Chinese cashmere was 124.90, while the value for Mongolian cashmere was 103.80. This gap has fluctuated in size but largely remained consistent over the past two decades. *Id.*

¹⁵² United Nations Development Programme, *Human Development Report Mongolia 2000* (2000), at 12-13, 31-21, available at http://hdr.undp.org/sites/default/files/mongolia_2000_en.pdf.

¹⁵³ The Const. of Mong., Jan. 13, 1992, ch. 1, art. 5, § 5.

¹⁵⁴ *Id.* at ch. 1, art. 6; Law of Mongolia on Land, June 7, 2002, art. 6, § 6.2.1 (Under the 2002 law, “pasturelands, water points in pasturelands, wells and salt licks” are subject to government regulation and available for common use); *id.* at art. 28, §§ 28.1-28.1.3 (the 2002 law further provides that the government may privatize land for household needs, government organizations, and companies or industries); *id.* at art. 29, §§ 29.1-29.4 (for household needs, private land may not exceed 0.07 hectares, and up to 0.1 hectares “may be given for possession to citizens for cultivating vegetables, fruits, berries, and fodder plants”).

resources.¹⁵⁵ Faced with widespread unemployment during the transition to a democratic government, many Mongolians entered the livestock industry to meet their economic and subsistence needs.¹⁵⁶ This contributed to substantial increases in livestock production through the 1990's and 2000's.¹⁵⁷ Coextensive with the growth of the livestock industry, herder support services declined.¹⁵⁸ Communist control provided for livestock rotations, transportation of livestock and products, fodder, veterinary care, and other support services.¹⁵⁹ Few Mongolians remained in these industries when the government stopped supporting them.¹⁶⁰

These laws and policies contributed to the unsustainable movement of novice herders into the livestock sector. The herders increased the national herd and shifted the herd composition to include more goats, since goats are among the easiest livestock to raise and provide cash income to herder households.¹⁶¹ At the same time, herders ceased sustainable practices like seasonal rotation of livestock because of financial pressures and resource limitations. Researchers estimate that two-thirds of herders either do not move livestock or make only two or three moves per year, a practice that contributes substantially to pasture degradation.¹⁶² Maintenance and construction of water wells stopped or, equally problematic, were managed in ways that allowed for perennial grazing of formerly seasonal winter pastures.¹⁶³ Herders require fodder to sustain herds during dry and harsh winter conditions, but fodder decreased by over 70% from 1989 to 2016.¹⁶⁴ These factors contributed to creating a livestock industry that is not economically or environmentally sustainable.¹⁶⁵

The government's export ban/tax contributed to, and worsened, these impacts. By providing similar cash value to raw cashmere, regardless of quality, the export ban/tax allowed inefficient herders who could not survive under a robust cashmere economy to maintain a presence on the landscape.¹⁶⁶ Indeed, instead of market forces limiting

¹⁵⁵ *Id.*

¹⁵⁶ *See Mongolia Partnership, supra note 9; see Pederson, supra note 10.*

¹⁵⁷ Lum & Dolven, *supra note 29*; Songwe, *supra note 76*; *see also* Cheng, *supra note 6.*

¹⁵⁸ María E. Fernández-Giménez et al., *Sustaining the Steppes: A Geographical History of Pastoral Land Use in Mongolia*, 89 *THE GEOGRAPHICAL REV.* 315, 315 (1999).

¹⁵⁹ *Id.*; *see also* Rasmussen & Shombodon, *supra note 11.*

¹⁶⁰ *Id.*

¹⁶¹ Lkhagvadorj, *supra note 12*; *Mongolia Partnership, supra note 9*; *see also* Songwe, *supra note 76.*

¹⁶² Lkhagvadorj, *supra note 12.*

¹⁶³ *Mongolia Partnership, supra note 9*; *see also* Songwe, *supra note 76.*

¹⁶⁴ *See* Rasmussen & Shombodon, *supra note 11.*

¹⁶⁵ *See* discussion *supra* Section II.B.2-II.B.4.

¹⁶⁶ Songwe, *supra note 76.*

the numbers of herders and livestock, environmental factors like severe droughts, winter *dzuds*, and rangeland degradation now perform that role.¹⁶⁷ Each year harsh winters cause substantial livestock mortality, while winter *dzuds* between 1999 and 2002 and again in 2009 and 2010 killed over 20 million livestock.¹⁶⁸ After each event, many herders exited the industry and migrated to urban centers, increasing poverty rates there.¹⁶⁹ But the livestock industry still rebounded and continues to grow.¹⁷⁰ By removing market incentives for inefficient herders to exit the industry, the export ban/tax contributed to the unsustainable trajectory of the modern livestock industry.

b. The Third Neighbor Act carries forward prior biases favoring processors, to the detriment of herders and grasslands

The Third Neighbor Act carries forward prior policies biased toward subsidizing inefficient processors and is unlikely to benefit Mongolia's steppes.¹⁷¹ The legislation would provide processors with duty-free access to a critical, high demand consumer market, the United States.¹⁷² But the express condition of this duty-free access is that the target processing companies remain inefficient. The Third Neighbor Act grants duty-free access only when "the sum of the cost or value of cashmere components of the article is not less than 51% of the appraised value of the article at the time it is entered."¹⁷³ By targeting inefficient processors, the legislation acts as a subsidy; it confers a benefit not accorded to efficient cashmere processing companies or herders and herder cooperatives engaged in the sale of cashmere products.

Through this subsidy, the Third Neighbor Act likely would cause many of the same effects as the Mongolian government's prior export ban/tax. Because the legislation applies only to products produced with low profit margins,¹⁷⁴ it allows inefficient processors to generate profits through high-volume sales of substandard products. Like the practice that existed with the export ban/tax, processors focusing on high-volume sales are unlikely to distinguish between high-quality and low-quality cashmere in their purchasing decisions.¹⁷⁵

¹⁶⁷ See *supra* notes 11-13.

¹⁶⁸ Rao, *supra* note 12.

¹⁶⁹ Fernandez-Gimenez, *supra* note 15 at 48, 59; Reading, *supra* note 51 at 90-91.

¹⁷⁰ See *supra* Figure 1.

¹⁷¹ See, e.g., H.R. 2219, 116th Cong. § 3(b)(1)(C)(ii) (2019).

¹⁷² H.R. 2219, 116th Cong. (2019).

¹⁷³ *Id.* at § 3(b)(1)(C)(ii); see also *id.* at § 2(7), (8), (10) (provisions focused on benefitting processors).

¹⁷⁴ *Id.*

¹⁷⁵ In this situation, the inefficient processors are likely to respond to the

Problematically, Mongolian herders are likely to respond in kind by producing high quantities of raw cashmere; the more cashmere herders can produce, the more profits they can generate.¹⁷⁶ Herders have little other choice. Mongolia's land-locked condition severely handicaps Mongolian herders and limits their ability to influence the sale price of raw cashmere.¹⁷⁷ As compared to countries with ports, researchers estimate that landlocked countries have 70% to 80% less trade and lowered annual growth rates.¹⁷⁸ The existing infrastructure within Mongolia exacerbates these constraints; herders struggle to get cashmere products to domestic market centers, much less to international market buyers.¹⁷⁹ Due to the land-locked nature of Mongolia and its limited trade opportunities, herders likely would obtain greater profits by increasing the production and sale of substandard cashmere for Mongolian cashmere processors than by attempting to export high-quality raw cashmere to countries, such as China, that may pay higher prices for quality cashmere products.¹⁸⁰

With the proposed subsidy on inefficient processing companies, herders would only obtain a benefit if they raised more livestock and produced higher volumes of raw cashmere.¹⁸¹ In this way, the Third Neighbor Act will not materially benefit herders' economic position. Herders will not receive similar tax or trade benefits as the processing companies subsidized by the Third Neighbor Act and must increase their inputs, the number of livestock, to increase their profits. Nor does the Act include incentives to reduce overall livestock numbers or

legislation by obtaining large quantities of raw cashmere inputs from local Mongolian herders. *See, e.g.,* Songwe, *supra* note 76.

¹⁷⁶ *See, e.g., id.*

¹⁷⁷ Gael Raballand, *Determinants of the Negative Impact of Being Landlocked on Trade: An Empirical Investigation Through the Central Asian Case*, 45 *COMPARATIVE ECON. STUD.* 520-536 (2003); Nuno Limao & Anthony J. Venables, *Infrastructure, Geographical Disadvantage, Transport Costs, and Trade*, 15 *WORLD BANK ECON. REV.* 451-479 (2001).

¹⁷⁸ Raballand, *supra* note 177 at 530.

¹⁷⁹ *See* Lkhagvadorj, *supra* note 12, at 86; *see also* The World Bank, *supra* note 62, at 4.

¹⁸⁰ *See* SUSAN V. LAWRENCE, CONG. RESEARCH. SERV., R41867, MONGOLIA: ISSUES FOR CONGRESS 7-8, 21 (2014) (If herders dramatically shift sales to Mongolian processors and limit exports to China, this situation could lead to economic losses for herders. China receives almost 90% of Mongolia's total exports, and China is the main importer of raw or unprocessed Mongolian cashmere. If the Third Neighbor Act provides increased market share to Mongolian processors, Chinese companies may suffer. To level the playing field, Chinese importers could impose tariffs on raw cashmere, lower the purchase cost on raw cashmere, or increase costs of raw cashmere exported to Mongolian processors. These actions could depress the price of raw cashmere produced in Mongolia.).

¹⁸¹ *Cf.* Mendez-Parra et al., *supra* note 145.

take other actions needed to address the current pressures placed on Mongolia's steppes.¹⁸² Rather, by subsidizing inefficient processors, the Act encourages high-volume cashmere processing and sales, which will encourage herders to raise more livestock under conditions that are not presently sustainable.¹⁸³

The Third Neighbor Act's benefits could be substantial for Mongolian processing companies and female workers, who would benefit from higher employment rates.¹⁸⁴ But these gains may not be sustainable as the Third Neighbor Act does not meaningfully address the economic plight of the over 300,000 Mongolian herders.¹⁸⁵ Without policies that will successfully induce herders to produce fewer livestock, the current overgrazed condition of Mongolian grasslands is likely to persist and worsen with climate change.¹⁸⁶ Mongolia has seen average temperatures rise by 2.14°C since the 1940s, as well as more pronounced warming in the winter and large reductions in seasonal and total precipitation.¹⁸⁷ Researchers expect that these effects of climate change, and the frequency and severity of *dzuds*, will continue to intensify and cause economic and environmental damage throughout Mongolia.¹⁸⁸ Given future climate change projections, encouraging herders to increase grazing intensity may increase the strain on already vulnerable ecosystems, which is a likely effect of the Third Neighbor Act.

c. The Third Neighbor Act should be modified to focus on herders and the protection of Mongolia's grasslands

The livestock industry cannot sustain itself without a shift in policies directed at more sustainably managing the grassland ecosystems. As discussed above, the Third Neighbor Act fails to constitute such a

¹⁸² See, e.g., Reading, *supra* note 51 at 94-98, 100-102.

¹⁸³ See The World Bank, *supra* note 62 (Or, perhaps worse, the Act could encourage herders to pursue supplemental strategies to improve incomes, such as increasing production of cattle for meat. The meat industry could become a major component of the economy, as Mongolia lies next to the largest consumer meat market in the world (China). Although many hurdles exist before the meat industry can become profitable, Mongolian herders may shift strategies if the economic gains from cashmere production remain depressed. The increased effort to produce meat would have cascading impacts on Mongolia's grasslands, which likely cannot sustain a surge in livestock numbers.).

¹⁸⁴ See, e.g., H.R. 2219, 116th Cong. § 2(6)-(8) (2019).

¹⁸⁵ Compare *id.* (identifying benefits of legislation to cashmere producers and the garment industry), with *id.* at § (2)(4)-(5) (acknowledging the broader scope of livestock industry and impacts to herders from *dzuds*, with identifying a direct benefit to herders).

¹⁸⁶ Pederson, *supra* note 10 at 2, 10-11.

¹⁸⁷ Dangal, *supra* note 18, at 2.

¹⁸⁸ *Id.*; see also Pederson, *supra* note 10, at 2.

policy change. This need not occur. Mongolia recognizes the urgency in addressing overgrazing, particularly considering emergent threats such as climate change.¹⁸⁹ Mongolia, for example, has identified the need to regulate livestock numbers, pasture use, and herd composition.¹⁹⁰ The United States also acknowledges that its economic policies can harm Mongolia's grasslands and opposes actions that contribute to grassland degradation.¹⁹¹ As the Third Neighbor Act states, "it is critical for Mongolia to take steps to ensure the protection of its grasslands and prevent overgrazing of cashmere goats."¹⁹² Mongolia and the United States share a common interest in protecting Mongolia's steppes; both countries recognize that their economic policies could further or frustrate this objective.¹⁹³

Given their shared objective, the United States should be free to modify the Third Neighbor Act to more competently address key environmental objectives, such as the protection of grassland ecosystems.¹⁹⁴ Because the United States is proposing to confer an economic benefit, it reasonably could place conditions on when the benefits are granted without unduly interfering in Mongolia's sovereign affairs. If Mongolian processors dislike or disagree with the conditions, they are free not to comply with the Third Neighbor Act. As a result, the United States has substantial flexibility to ensure that economic legislation, such as the Third Neighbor Act, does not cause unintended environmental consequences within Mongolia.¹⁹⁵ Congress therefore should revise the Act so that it addresses the stated environmental objectives of protecting Mongolia's steppes.

i. The Third Neighbor Act's compatibility with grassland conservation.

Before determining how Congress could modify the Third Neighbor Act to advance environmental objectives, it is necessary to determine whether conservation of grasslands is compatible with some modified version of the Act. The Third Neighbor Act purports to operate within the existing regulatory framework that provides herders with open access to rangelands and associated resources.¹⁹⁶ This leads to

¹⁸⁹ Intended Nationally Determined Contribution, *supra* note 81.

¹⁹⁰ *Id.*

¹⁹¹ H.R. 2219, 116th Cong. § 2(5), (6), (9) (2019).

¹⁹² *Id.* at § 2(9).

¹⁹³ *See id.*; Intended Nationally Determined Contribution, *supra* note 81.

¹⁹⁴ *See* H.R. 2219, 116th Cong. § 2(9) (2019).

¹⁹⁵ *See* U.S. Const., art. I, § 1, 8 (Congress has flexibility on laws it decides to pass).

¹⁹⁶ H.R. 2219, 116th Cong. § 2 (2019).

the first question—can grassland degradation be addressed within this open-access system? The Third Neighbor Act also assumes that trade incentives for cashmere production can be compatible with protecting Mongolia's grasslands.¹⁹⁷ A second question, therefore, is whether grassland conservation can be compatible with a robust domestic cashmere industry? The answer to both questions is yes.

First, a debate exists between privatization of overtaxed rangelands and maintaining the present open access framework within Mongolia.¹⁹⁸ Typically, open access to rangelands for economic gain works well when grassland resources are abundant and the size of the herd or the number of herder households is low. But some argue that regulated access is required when resources are scarce and livestock abundant.¹⁹⁹ This argument addresses the “tragedy of the commons,” a theory positing that each herdsman grazing livestock on a pasture “seeks to maximize his gain” and thus “is locked into a system that compels him to increase his herd without limit—in a world that is limited.”²⁰⁰ Privatization addresses these concerns by providing concrete incentives for the landowner to manage and protect his or her land.²⁰¹

Arguments to privatize rangelands are not tailored to the specific context of Mongolia, where policies that meaningfully address degraded grasslands should begin by focusing on the human capital available for conservation initiatives—the over 300,000 herders living on and working the land.²⁰² Privatization would put livestock in the hands of larger, wealthier entities with fewer incentives to protect and care for the land as an integrated rangeland resource or ecosystem. Larger livestock operations would lack the flexibility to respond to rapidly changing climatic and environmental conditions.²⁰³ Indeed, the attributes associated with nomadic pastoralism become more important, not less, when considering climate change. “If the climate become[s] more arid in Mongolia in the future, flexibility, mobility, and opportunistic management will be even more important to sustainable grassland management and herder livelihoods.”²⁰⁴

¹⁹⁷ *Id.* at § 2(9).

¹⁹⁸ *See, e.g.,* Zhang, *supra* note 56, at 165-68; *see, e.g.,* Schlager, *infra* note 201.

¹⁹⁹ *See generally* Zhang *supra* note 56, at 164-67.

²⁰⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

²⁰¹ *See* Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 *LAND ECON.* 249, 249, 256 (1992).

²⁰² *See* Pederson, *supra* note 10.

²⁰³ *See generally* Akira Kamimura, *Pastoral Mobility and Pastureland Possession in Mongolia*, in *THE MONGOLIAN ECOSYSTEM NETWORK: ENVIRONMENTAL ISSUES UNDER CLIMATE AND SOCIAL CHANGES* 187 (2013).

²⁰⁴ *Id.* at 201; *see also* Ian Hannam, *Legal and Policy Aspects of Rangeland*

Decision makers can effectively confront these challenges by respecting the nomadic culture in Mongolia. In Mongolia, the nomadic ethic is ingrained in the culture of the people, as reflected in the Constitution's provisions providing that livestock are a natural treasure and pasture land is a common good not to be privatized for economic gain: "[i]t is a sacred duty for every citizen... to protect nature and the environment."²⁰⁵ The herders' economic livelihoods and those of their families and relatives depend on conserving the land.²⁰⁶ Herders also possess the flexibility to respond to changing environmental conditions.²⁰⁷ Economic policies should focus on empowering herders to provide for their economic and social equality because "[g]ood relationships between protected area management and local people are critical to the achievement of protected area objectives."²⁰⁸

Second, economic policies should continue to focus on improving the rural herders' standing in the cashmere industry. "Given the high incidence of rural poverty in Mongolia, it is clear that agriculture must remain an important part of pro-poor strategy."²⁰⁹ Yet some researchers disagree. Berger et al. suggest that the cashmere industry reduces ecosystem functions and causes native ungulate declines throughout central Asia.²¹⁰ The authors recommend moving away from goats and moving toward raising camels and yaks; species that are more specialized feeders and less likely to compete with native ungulates.²¹¹ As with calls for privatization, these suggestions are an imperfect fit in Mongolia.

Mongolia's cashmere industry is economically critical for hundreds of thousands of Mongolians.²¹² At the herder level, cashmere provides the main source of cash income for over 300,000 herders and their families.²¹³ Likewise, the processing sector includes hundreds of processing companies that employ thousands of workers to produce products worth hundreds of millions of dollars.²¹⁴ The cashmere industry is important to the overall health of Mongolia's economy. It constitutes

Management: Mongolia, in *THE GOVERNANCE OF RANGELANDS*, 156, 178-189 (Pedro M. Herrera et al. eds., Routledge, 2014).

²⁰⁵ The Const. of Mong. Jan.13, 1992, at ch. 1, art. 5, § 5 ("The livestock of the country is national wealth and subject to state protection."); *id.* at ch. 2, art. 17, § 2 ("It is a sacred duty for every citizen ... to protect nature and the environment.").

²⁰⁶ Fernández-Giménez, *supra* note 15, at 1.

²⁰⁷ See Kamimura, *supra* note 203.

²⁰⁸ Carbutt, *supra* note 2, at 2916.

²⁰⁹ Namsrai, *supra* note 132, at 10.

²¹⁰ Joel Berger et al., *Globalization of the Cashmere Market and the Decline of Large Mammals in Central Asia*, 27 *CONSERVATION BIOLOGY* 679, 686 (2013).

²¹¹ *Id.*

²¹² See generally *Mongolia Partnership*, *supra* note 9; Rao, *supra* note 12.

²¹³ Lkhagvadorj, *supra* note 12, at 86.

²¹⁴ World Trade Organization, *supra* note 68, at 2.

an established industry that can help diversify Mongolia's overreliance on the mining industry.²¹⁵ The economic benefits of the cashmere industry to Mongolians cannot be easily dismissed or replaced by other industries.

Nor is goat production incompatible with grassland conservation. Von Whreden et al. persuasively argue that nomadic grazing of goats can be one solution to the decline of native ungulates and associated ecosystem function.²¹⁶ Addison et al. (2012) identified the dietary plasticity of goats in arguing against assertions that goats exert disproportionate grazing pressures on the landscapes.²¹⁷ Herders also can use goats to regenerate and restore altered ecosystems,²¹⁸ and goats "have positive effects on biodiversity by keeping wildlife corridors open."²¹⁹ With management and resources applied to implement sustainable grazing practices similar to those discussed in Reading et al., goat production can be compatible with conserving Mongolia's grasslands.²²⁰

ii. The Third Neighbor Act can be modified to address the factors leading to the decline of Mongolia's grasslands

Because the Third Neighbor Act is compatible with grassland conservation, lawmakers should modify it to better address herder poverty and grassland conservation in Mongolia. As one of eight countries that collectively control over 50% of the Earth's land area,²²¹ the United States has a disproportionate impact on the environment. It therefore should shoulder the responsibility to shape conservation priorities within and outside its borders through voluntary economic-benefit programs, like the Third Neighbor Act.

There is precedent for trade legislation crafted specifically to advance environmental objectives. One example is the European Union's

²¹⁵ See Reading, *supra* note 51.

²¹⁶ von Wehrden, *supra* note 140, at 287.

²¹⁷ Jane Addison et al., *A Critical Review of Degradation Assumptions Applied to Mongolia's Gobi Desert*, 34 THE RANGELAND J. 125, 134 (2012).

²¹⁸ K.A. Shankarnarayan et al., *The Goat: An Appropriate Animal for Arid and Semi-Arid Regions*, ECON. AND POL. WKLY. 1965, 1971 (1985).

²¹⁹ Jacob Lipson, *Environmental Implications of Livestock Series: Goats*, GATES OPEN RES. 3, 6 (Univ. of Wash. Evans School of Public Affairs, EPAR Brief No. 156, July 31, 2011).

²²⁰ Richard Reading et al., *Conserving Biodiversity on Mongolian Rangelands: Implications for Protected Area Development and Pastoral Uses*, in USDA FOREST SERV. PROCEEDINGS RMRS-P-39 15 (2006); Reading, *supra* note 51, at 100; Rosa García et al., *Goat Grazing, Its Interactions with Other Herbivores and Biodiversity Conservation Issues*, 107 SMALL RUMINANT RES. 49, 53 (2012).

²²¹ Laura E. Coristine et al., *National Contributions to Global Ecosystem Values*, 33 CONSERVATION BIOLOGY 1219, 1220 (2019).

Generalized Scheme of Preferences Plus (GSP+) program. This program reduces export tariffs for qualifying products from qualifying countries.²²² The GSP+ expands on the base program by further reducing or waiving export duties from developing countries that adhere to twenty one international treaties and conventions.²²³ Within the GSP+ requirements are active adherence to environmental and sustainability treaties, including the 1973 Convention on International Trade of Endangered Species of Wild Fauna and Flora,²²⁴ the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,²²⁵ the 1992 Convention on Biological Diversity,²²⁶ the 1992 United Nations Framework Convention on Climate Change,²²⁷ the 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change,²²⁸ and the 2001 Stockholm Convention on Persistent Organic Pollutants.²²⁹ Although monitoring and enforcement concerns exist,²³⁰ the GSP+ provides strong incentives for beneficiary countries to focus on their environmental and sustainability obligations.²³¹ Mongolia is a beneficiary country under the GSP+ and has a record of compliance with its international treaty obligations.²³²

²²² European Commission, *Generalized Scheme of Preferences (GSP)*, <https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>.

²²³ European Commission, *What is GSP+*, <https://trade.ec.europa.eu/tradehelp/gsp>.

²²⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar., 3 1973, 27 U.S.T. 1087, T.I.A.S., No. 8249.

²²⁵ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29.

²²⁶ Convention on Biological Diversity, opened for signature June 5, 1992, S. Treaty Doc. No. 103-20, 1760 U.N.T.S. 79.

²²⁷ United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

²²⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature Mar. 16, 1998, 2303 U.N.T.S. 162.

²²⁹ Stockholm Convention on Persistent Organic Pollutants, opened for signature May 23, 2001, 2256 U.N.T.S. 119, 40 I.L.M. 532.

²³⁰ See Axel Marx, *Integrating Voluntary Sustainability Standards in Trade Policy: The Case of the European Union's GSP Scheme*, 10 SUSTAINABILITY 4364 (2018) (Clear compliance problems have arisen for many beneficiary countries, particularly in the area of environmental protection and sustainable development. Indeed, the European Union has temporarily removed only one country from the GSP+ for noncompliance with one of the implementing treaties.).

²³¹ Under the GSP+, the incentives are economic. As the European Union has explained, the GSP+ provides incentives for beneficiary countries to meet international standards for environmental protection “by granting full removal of tariffs on over 66% of tariff lines covering a very wide array of products including, for example, textiles and fisheries.” European Commission, *European Union's GSP+ Scheme (Fact Sheet, May 2019)*, https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155235.pdf.

²³² *Id.*; see also International Labour Organization, *Support GSP+ Beneficiary Countries to Effectively Implement ILS and Comply with Reporting Obligations* –

The GSP+'s integration of economic and environmental policy highlights ways that governments can merge economic and environmental policies.²³³ Congress could use a similar framework to address the Third Neighbor Act's stated objective of protecting Mongolia's steppes.

1. *Sustainability Standards.* In Mongolia, a key environmental challenge is overgrazing on Mongolia's steppes. The Third Neighbor Act recognizes this environmental problem and stops there—it includes measures to ensure the economic incentives avoid environmental harm.²³⁴ This shortcoming is understandable. The main way to combat overgrazing is to reduce the number of livestock on the range, but the United States has no authority to directly regulate or reduce livestock numbers in Mongolia.²³⁵ A formidable challenge thus exists—how can the United States confer economic trade benefits to cashmere producers in Mongolia while encouraging Mongolian herders to raise fewer goats?

The GSP+ conditions trade benefits on compliance with international treaties and standards, including those focused on environmental protection.²³⁶ Congress should follow suit in the Third Neighbor Act by making the economic benefits of increased trade with the United States contingent on Mongolian herders raising goats in accordance with sustainability standards and best management practices.²³⁷ If Mongolian processing companies obtain greater profits when herders raise goats sustainably, they likely would direct more money and resources to herders and sustainability initiatives through the purchase price for raw cashmere.

Industry resources directed at sustainability initiatives can effectively address overgrazing in Mongolia. Added resources, for example, could target practices that improve the quality of the national goat herd, such as improving breeding practices and removing goats from the herd that produce substandard cashmere fibers, like

Mongolia, https://www.ilo.org/beijing/what-we-do/projects/WCMS_532898/lang-en/index.htm.

²³³ See European Commission, *supra* note 231.

²³⁴ H.R. 2219, 116th Cong. § 3(c)(2) (2019).

²³⁵ See U.S. Const., Art. I.

²³⁶ See European Commission, *supra* note 231.

²³⁷ Fernández-Giménez, *supra* note 12 (these methods include ensuring sound seasonal rotation of livestock, providing fodder to protect the grasslands and goats during harsh winter conditions, ensuring adequate access to water resources, limiting the number of livestock on the range, and other best management practices).

older goats.²³⁸ High-quality cashmere demands higher prices on the international markets, so a shift to maintaining a higher-quality goat herd would increase the competitiveness of the cashmere industry.²³⁹ As the cashmere industry becomes more competitive, herders could raise fewer goats to generate the same or increased profits for the cashmere industry. And a highly competitive and profitable industry likely would drive inefficient herders from the industry.²⁴⁰ The herders that leave the livestock production industry could then enter the herder support industry and provide key services for sustainably raising livestock, such as transporting livestock between seasonal pastures, producing and providing fodder to sustain herds through harsh winter conditions, maintaining water wells, combing and transporting raw cashmere fibers, and other support services.²⁴¹ A shift to producing higher-quality cashmere could lead to fewer livestock on the range, which would tangibly improve Mongolia's steppes. A focus on improving the quality of the national goat herd is merely one method to address overgrazing in Mongolia, other methods and strategies exist.²⁴² The salient point is that a growing and profitable cashmere industry dependent on herders sustainably raising livestock likely will invest in herders and sustainability initiatives.²⁴³

For these sustainability standards and initiatives to be effective, they should be developed collaboratively with local herder cooperatives and other government and non-governmental experts so as to address existing and forthcoming environmental challenges in Mongolia.²⁴⁴

For guidance on how to incorporate the sustainability standards into the Third Neighbor Act, Congress could look to the National Grazing Lands Coalition (NGLC, formerly, the Grazing Lands Conservation Initiative).²⁴⁵ This group functions as "a nationwide collaborative process of individuals and organizations working to maintain and improve the management, productivity, and health of the [United States'] privately owned grazing lands."²⁴⁶ The NGLC arose because the United States'

²³⁸ Songwe, *supra* note 76.

²³⁹ See generally The World Bank, *supra* note 62.

²⁴⁰ Songwe, *supra* note 76.

²⁴¹ *Id.*

²⁴² See, e.g., Reading, *supra* note 51; Reading, *supra* note 220 at 16.

²⁴³ The World Bank, *supra* note 62.

²⁴⁴ See Ram Nidumolu et al., *The Collaboration Imperative*, HARV. BUS. REV., Apr. 2014, at 76, 79.

²⁴⁵ Grazing Lands Conservation Initiative (GLCI), U.S. Dep't of Agric. Nat. Res. Conservation Serv., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/people/partners/glci/> (last visited Jan. 25, 2020). See also National Grazing Lands Coalition, U.S. Dep't of Agric. Nat. Res. Conservation Serv., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/landuse/rangepasture/?cid=stelprdb1068389> (last visited Jan. 25, 2020).

²⁴⁶ *Id.*

farm bills did not include money or provisions for technical assistance needed to carry out conservation programs.²⁴⁷ A diverse collaborative group emerged to fill this void. The NGLC's mission is to "[p]romote ecologically and economically sound management of all private grazing lands for all their adapted uses and multiple benefits to the environment and society."²⁴⁸ It fulfills that mission by developing technology and conservation tools, supporting research and education, and increasing technical assistance to landowners.²⁴⁹

Congress could take this domestic example and adapt it internationally. The United States Department of Agriculture's Natural Resources Conservation Service plays an integral role within the NGLC.²⁵⁰ Congress could task the Natural Resources Conservation Service with developing a conservation initiative for sustainable grazing lands in Mongolia, much like that agency's mission under the United States' farm bills. Congress, for example, provided that the Natural Resources Conservation Service "shall serve as the lead agency in developing and establishing technical standards and requirements for conservation programs," including developing "standards for conservation practices ...technical guidelines for implementing conservation practices...and standards for conservation plans."²⁵¹ Congress could impose similar requirements on the Natural Resources Conservation Service under the Third Neighbor Act, to address sustainable grazing practices in Mongolia. Any Third Neighbor Act reauthorization would then require compliance with the collaboratively developed sustainability standards as a precondition to duty-free access to the United States' markets.

Over time, if the cashmere industry in Mongolia benefits from increased market access to the United States, the cashmere industry can reinvest in herders and herder cooperatives to improve rangeland health and ecosystem functions.²⁵² Congress therefore should modify the Third Neighbor Act to incorporate sustainability standards and best management practices governing the production of raw cashmere used in the processed "articles" eligible for duty-free treatment under the Act.²⁵³

²⁴⁷ U.S. Dep't of Agric. Nat. Res. Conservation Serv., Sustainable Grazing Lands Providing a Healthy Environment, Strategic Plan 2010-2015 1, 6, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1_043496.pdf. (last visited on Jan. 25, 2020).

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at 5.

²⁵⁰ *Id.* at 6.

²⁵¹ 16 U.S.C. § 3841.

²⁵² James M. Bullock et al., *Restoration of Ecosystem Services and Biodiversity: Conflicts and Opportunities*, 26 *TRENDS IN ECOLOGY & EVOLUTION* 541, 544 (2011).

²⁵³ See generally H.R. 2219, 116th Cong. § 3(b)(1)(B), (C), (D), (E) (2019).

2. *Program Beneficiaries.* The GSP+ identifies broad program beneficiaries—the developing countries entitled to receive duty-free treatment on qualifying exports. The Third Neighbor Act is far more restrictive. In 2011, the government identified “13 deep processing factories, 25 primary processing factories, and more than 200 knitting, small to medium size enterprises, and family-run micro-factories,”²⁵⁴ where the largest processing company employs fewer than 3,000 workers.²⁵⁵ The Third Neighbor Act does not address this industry. Instead, it subsidizes a subset of processors—those inefficient processing entities producing a subset of cashmere products generated from Mongolian cashmere fibers.²⁵⁶ The Third Neighbor Act thus would confer a benefit to a fraction of the cashmere industry in Mongolia.

Congress should alter this scope and confer benefits to the entire cashmere industry operating in Mongolia. Protecting Mongolia’s steppes depends on the cashmere industry investing money to make livestock grazing more sustainable.²⁵⁷ Legislation that confers benefits to the entire cashmere industry can increase the profitability of more entities operating in Mongolia and improve the industry’s ability to support Mongolian herders and conserve Mongolia’s steppes.²⁵⁸ The United States, therefore, should modify the definition of entities eligible for duty-free treatment in Section 3(a) of the Third Neighbor Act to include all cashmere products produced in Mongolia from Mongolian cashmere fibers, including raw cashmere.²⁵⁹

²⁵⁴ World Trade Organization, *supra* note 68.

²⁵⁵ Gobi Corp., *supra* note 129.

²⁵⁶ H.R. 2219, 116th Cong. § 3(b)(1)(C)(ii) (2019).

²⁵⁷ *See generally* Reading, *supra* note 220; Reading, *supra* note 51.

²⁵⁸ Matthew McQueen, *Are EU Non-Reciprocal Trade Preferences Passé?*, 42 *INTERECONOMICS* 205, 218 (2007) (identifying empirical data showing the benefits of trade preferences depends on terms and conditions and predictability of incentives, with substantial gains to “small, vulnerable, and low income countries” possible, depending on the terms of the preference scheme).

²⁵⁹ H.R. 2219, 116th Cong. § 3(a) (2019); Songwe, *supra* note 76 at 35 (Box 4-1, discussing the steps in the cashmere production process, which include collection, where cashmere fibers are collected by combing or shearing; sorting and scouring, where coarse hair is hand sorted and fibers are washed to remove debris like dirt and grease; and dehairing, where the outer guard hair and other impurities are removed); *see also* Xinhua, *US Cashmere Apparel Company Executive Says Only Want to Work in China*, *ChinaDaily.com.cn* (June 21, 2019) <http://www.chinadaily.com.cn/a/201906/21/WS5d0c7686a3103dbf143298c1.html> (at present, the United States lacks the ability to process cashmere fibers, which limits the United States’ market for

3. *Research, Monitoring, and Enforcement.* The European Commission monitors the GSP+ beneficiary countries' compliance with the program's requirements. Marx observes that the GSP+ program suffers from the lack of clear compliance standards and ineffective enforcement authorities,²⁶⁰ as do many other government-sponsored incentive programs.²⁶¹ The Third Neighbor Act is no different because it relies on broad standards and discretionary oversight by United States regulatory agencies.²⁶²

Congress could address this shortcoming by developing a system under which third parties monitor and enforce the trade program's sustainability standards. Private organizations and nongovernmental organizations can cooperate in the management and enforcement of sustainability initiatives.²⁶³ Congress therefore could provide for third-party monitoring and reporting of the Third Neighbor Act's existing provisions requiring Mongolia to adhere to the Act's environmental laws and obligations.²⁶⁴ This monitoring and oversight would supply some measure of transparency and accountability to the Third Neighbor Act's objectives of protecting against environmental degradation of sensitive rangeland resources while the industry pursues sustainability standards and initiatives. Once sustainability standards or initiatives are collaboratively developed, the third parties could transition to monitoring and enforcing those standards.

Using third parties to monitor and enforce the Act's provisions and sustainability standards would provide an important secondary benefit—the opportunity for the organizations to assist herders in sustainably managing livestock. A key conservation priority in Mongolia is providing herders with the skills and resources to manage livestock sustainably.²⁶⁵ With the influx of new herders over the past two decades, the cashmere industry would benefit from obtaining additional knowledge about maximizing profitability and sustainably raising livestock, as well as the resources to carry out those objectives. Batsaikhan, for example,

raw cashmere, which could change if Congress eliminates tariffs for raw cashmere).

²⁶⁰ Marx, *supra* note 230 at 4.

²⁶¹ Sven Wunder et al., *Taking Stock: A Comparative Analysis of Payments for Environmental Services Programs in Developed and Developing Countries*, 65 *ECOLOGICAL ECON.* 834, 845 (2008).

²⁶² See, e.g., H.R. 2219 116th Cong. § 3(c)(2) (2019).

²⁶³ Eric F. Lambin & Tannis Thorlakson, *Sustainability Standards: Interactions Between Private Actors, Civil Society, and Governments*, 43 *ANN. REV. ENVTL. & RESOURCES* 369, 377-79 (2018).

²⁶⁴ H.R. 2219, 116th Cong. § 3(c)(2) (2019).

²⁶⁵ See generally Reading, *supra* note 220.

provides strong support for the proposition that sustainable livestock management in Mongolia depends on cooperative management models facilitated by governmental and non-governmental organizations.²⁶⁶ Partelow agrees that providing additional tools and resources to herders can promote management of livestock in ways that reduces degradation of grasslands and facilitates economic equity between small and larger herders.²⁶⁷ Herder cooperatives can allow for increased livestock density “without losing rangeland vegetation abundance and soil retention capacity,” thus highlighting the potential for cooperative mechanisms to facilitate dual economic and environmental objectives in Mongolia.²⁶⁸

Fortunately, Mongolia attracts hundreds of nongovernmental organizations that possess the capacity and resources needed to aid Mongolian herders and assist in oversight of the Third Neighbor Act’s objectives.²⁶⁹ These organizations include The Nature Conservancy,²⁷⁰ the Denver Zoo,²⁷¹ and the Wildlife Conservation Society.²⁷² Although not without challenge, a community-based approach to rangeland management coincides with cultural norms and could both conserve much-needed resources and improve sustainability practices within the Mongolian livestock industry.²⁷³

IV. CONCLUSION

The Third Neighbor Act could benefit the United States. Congress is concerned with its national security, declining United States exports to Mongolia, and its increased reliance on Chinese products.²⁷⁴ The Act could also benefit Mongolian processors, factory workers, and herders by increasing demand for Mongolian-produced cashmere products. These benefits are not trivial. But any economic gain from increased trade with the United States could be ephemeral and, over time, be offset by the incentives for herders to produce large volumes of livestock in

²⁶⁶ Usukh, *supra* note 56, at 7.

²⁶⁷ Partelow, *supra* note 13.

²⁶⁸ Robin S. Reid, *Do Formal, Community-Based Institutions Improve Rangeland Vegetation and Soils in Mongolia More Than Informal, Traditional Institutions?* 122, 123 (BUILDING RESILIENCE OF MONGOLIAN RANGELANDS, Conference Paper, 2015).

²⁶⁹ *Id.*; see also Tungalag Ulambayar et al., *Social Outcomes of Community-Based Rangeland Management in Mongolian Steppe Ecosystems*, 10 CONSERVATION LETTERS 317, 323-25 (2017).

²⁷⁰ The Nature Conservancy, *Mongolia*, www.nature.org/en-us/about-us/where-we-work/asia-pacific/mongolia/.

²⁷¹ The Denver Zoo, *Mongolia*, <https://www.denverzoo.org/mongolia/>.

²⁷² Wildlife Conservation Society, *Mongolia*, <https://mongolia.wcs.org/>.

²⁷³ Thrift & Ichinkhorloo, *supra* note 61, at 136.

²⁷⁴ H.R. 2219, 116th Cong. §§ 2(2), 2(3), 2(7) (2019).

ways that are destroying Mongolia's grasslands. Without major changes to the policy embodied in the Third Neighbor Act, this is a zero-sum game. As Mongolian processors and United States consumers benefit, Mongolian grasslands lose.

This need not be the case. Rather than focus on economic gains alone, those responsible for developing economic policy must pay greater attention to the environmental consequences of their policies. In accord, Congress should give greater attention to the precarious condition of Mongolia's grasslands when considering the passage of the Third Neighbor Act. Shaping the Third Neighbor Act to conserve Mongolia's grasslands is within the Act's stated objectives and is feasible, as the legislation enjoys wide bipartisan support. H.R. 2219, for example, has twenty-six republican and nineteen democratic cosponsors as of December 1, 2019.²⁷⁵

This article provides general ways that Congress could revise the Third Neighbor Act to benefit Mongolian cashmere producers, herders, and steppes. When developing specific revised program elements, Congress should identify policies that meaningfully contribute long-term economic improvement and environmental stability in Mongolia. To do so requires movement away from subsidizing inefficient processing companies and towards policies that improve the ability of herders to sustainably manage livestock. Mongolians and their grassland ecosystems deserve no less.

²⁷⁵ See H.R. 2219, 116th Cong. (2019). *see also*, Mongolia Third Neighbor Trade Act, S. 1188, 116th Cong. (2019) (S.1188 has 8 republican and 5 democratic cosponsors as of December 1, 2019).

THINK ABOUT MINK: EXAMINING THE GAP IN LEGAL PROTECTION FOR FUR-FARMED ANIMALS THROUGH THE LENS OF MINK FARMING

JAMES KENER

I. INTRODUCTION

It is a frigid winter day near a frozen local riverbank in the middle of January, and a lone American mink is looking for food. Less than two weeks removed from the nurturing confines of her mother's care, this mink has travelled more than five miles to get to this snowy riverfront in hopes of finding a small fish or frog for sustenance. Although mink are traditionally undersized, averaging only two feet in length including their tail and three pounds in weight, this mink relies on a combination of physical attributes and mental tenacity to survive.¹ As she begins the search for today's meal, this mink uses her webbed feet to traverse the riverfront, swimming through patches of ice and using her ability to hold her breath to dive up to 100 feet into the water in the search for food.² As she emerges from the river, her naturally oily chocolate-brown fur coat simultaneously repels water³ and insulates her body to keep her warm in the frigid temperatures.

Suddenly, a vicious bobcat jumps up from its snowy camouflage and pounces on the mink. Instinctively, the mink arches her back, hisses, and uses her speed and agility to temporarily avoid the clutches of the bobcat. Like all mink, this mink is a fearless and aggressive animal. Although the bobcat dwarfs the mink in size, the mink does not run away. Instead, the mink aggressively jumps at the face of the bobcat several times and stuns it with a piercing bite to the nose. While the mink has now freed herself to seek safety, she instead shows no mercy and relentlessly continues to attack the bobcat with incessant clawing, scratching, and biting. What at first appeared to be a routine lunch for the bobcat has escalated into a fight for its own life, and the bobcat narrowly escapes while the mink prepares to spray the bobcat with its skunk-like foul-smelling odor. The mink's tenacity and aggression has kept it alive for today, and usually proves to be effective against most of her predators.

¹ Corey Schuh, *American Mink*, NORTHERN STATE UNIVERSITY PRESS: THE NATURAL SOURCE BLOG (1997), <https://web.archive.org/web/20160727200001/http://www3.northern.edu/natsource/MAMMALS/Americ1.htm>.

² Alina Bradford, *Facts About Minks*, LIVESCIENCE (Sept. 13, 2016), <https://www.livescience.com/56071-mink-facts.html>.

³ *Id.*

A few weeks later, however, the mink encounters its most lethal and unrelenting predator when, during its routine riverbank surveillance for food, the mink falls into a disguised man-made pocket on the riverbank and into a trap. She begins to hiss, scratch, and claw but it is to no avail. The human being arrives to pick up the trap and the mink sprays its odor as a last-gasp defense mechanism, but it is ineffective. The human being is wearing a gas mask and is equipped with tools to keep the mink subdued and at a distance. Once captured, the mink is dumped into a battery cage no bigger than one and a half foot high and three feet deep.⁴ She fights to break free, but there is no amount of speed, agility, aggressiveness or tenacity that can help her now. She will live the remainder of her life in confinement, anxiously self-mutilating herself out of fear until one day she is removed from her cage. For a brief moment she can taste fresh air, free from the smell of other mink feces and odors, until she is placed in a makeshift cardboard box and administered carbon monoxide to put her to death. She holds her breath, as if she's back on the riverbed diving for a fish, but it is not enough. Within minutes she is dead, and her once most prized tool of survival—that oily chocolate-brown fur—is removed from her carcass and sold to the highest bidder. For years, human beings have been capturing, confining, and killing mink in the name of fashion and materialism.

Mink are completely defenseless against this unwarranted slaughter, both physically and legally. In fact, animals farmed for fur receive virtually no protection whatsoever. While there are laws that protect wild animals (State Wildlife, Fish & Game, Environmental Conservation Codes), cats and dogs (Criminal Code, Animal Cruelty Laws), and farm animals (Agriculture Code), there are no laws that exist to protect animals that are primarily farmed, raised, and killed for their fur. Although the federal statute governing fur farming classifies mink as “agricultural products,” they are not subject to the same legal protections as most agricultural animals. This is because almost every state has carved out exceptions to their agriculture laws to exempt animals like mink that are primarily farmed for their fur from being protected under these statutes.⁵ Instead, as prescribed in the above legislation passed in 1946, animals like fox and mink are deemed “domestic animals” and farming their pelts is considered an “agricultural pursuit,” meaning that these animals are exempt from any animal cruelty statutes that would protect them from suffering or abhorrent living conditions.⁶ Fur farms are primarily overseen by state and municipal governments, as is most

⁴ *Cruelty Uncaged: A Review of Fur Farming in North America*, BORN FREE USA, 1, 5 (Nov. 2009), <http://7a1eb59c2270eb1d8b3d-a9354ca433cea7ae96304b2a57fdc8a0.r60.cf1.rackcdn.com/FurFarmReport.pdf>.

⁵ 7 U.S.C. § 399 (1946).

⁶ *Id.*

agricultural law. However, this delegation of authority has not translated to consistent oversight and regulation, as many state ordinances reflect the same substantive lack of protection as the federal statute for fur farmed animals like mink. It is imperative to note that animals farmed for fur have virtually no legal protection and their abhorrent treatment on a widespread basis is indicative of a glaring lack of accountability across the board. The lack of legal protections for fur farmed animals has created an animal welfare disaster for mink and the current laws must be improved to require more accountability and oversight to prevent the continued systemic abuse of mink.

This inquiry into the fur trade was inspired by egregious mink farming practices taking place within the state of Utah. Ranked as the second worst state in the union in regard to fur farming according to an investigation conducted by animal welfare group Born Free USA, Utah has sixty-five fur farms that completely lack any oversight or governing body that would enforce fair farming practices.⁷ Similar to most other states in the union, the Utah State Code contains a specific provision that provides that animals kept for agricultural practices (fur farms) are specifically exempt from the animal cruelty statute.⁸ In fact, the only organization regulating the fur trade (not only in Utah, but nationwide) is Fur Commission USA (FCUSA), who while regulating the fur trade is also a direct beneficiary of its profits (they collect 15 cents per pelt sold) and actively markets the benefits of fur farming.⁹ In agricultural terms, FCUSA being designated as the lone regulator of the fur trade is like letting a fox watch the hen house. Even worse, FCUSA does not have any legal authority to enforce its regulations. The organization is composed only of fur farmers in the form of a non-profit lobbying group that represents United States mink farmers.¹⁰ The lack of federal oversight, combined with a haphazard delegation to state and municipal governments who are apathetic toward fur farming has resulted in a fur industry that cuts corners and puts their profitable asset, mink, in substandard conditions in an effort to maximize profits. Fur farming is an area of law that is critically underdeveloped, and until more stringent legal standards are adopted the fur industry will continue to exploit the unprecedented gap in legal protections for fur farmed animals like the mink.

This inquiry aims to fill the gap in legal protections for fur-farmed animals by discussing the genesis of and possible solutions to

⁷ BORN FREE USA, *supra* note 4, at 24.

⁸ Utah Code Ann. §§ 76-9-301 to 308 (West 2020).

⁹ *Mink Industry Thrives Despite Threats*, FUR COMM'N USA, <https://furcommission.com/mink-industry-thrives-despite-threats/> (last visited Dec. 4, 2019).

¹⁰ *About the Fur Commission USA*, FUR COMM'N USA, <https://furcommission.com/about-us-1-1/> (last visited Dec. 4, 2019).

the gap in the law in three parts: (1) discussing the abhorrent conditions mink and fur-farmed animals alike face on a large-scale basis and why scientific studies of these animals prove that these conditions lead to intense and unnecessary suffering; (2) how cultural attitudes among the general American populace have shifted away from fur usage—through an analysis of supply and demand in the fur industry and international public policy—and why it is time for the United States to adopt public policy that reflects that shift; and, (3) proposing several different solutions, including a ten-year phase out or humane-use guidelines that could close the fur farming gap in the law and end the animal welfare crisis that has been spawned by the lack of state and federal accountability of the fur trading industry.

Section I of the analysis contains the results of several investigations into actual mink farms and discusses why keeping mink in small battery cages surrounded by hundreds of other mink and subsequently euthanizing them by asphyxiation is an especially cruel practice and causes immense suffering to the mink from a scientific standpoint. The scientific analysis is accompanied by the Fur Commission USA standards for mink farms, and how the recommended mink farm specifications do not accommodate the minks' natural tendencies. Furthermore, the section encapsulates a brief history on the origins of mink farms and the fur trade, and why traditional mink use does not justify continued mink exploitation.

Section II will address the fur trading industry itself and the historical strength of the industry and its subsequent downward spiral into modern weakness as reflected by supply and demand of individual pelts and overall worth of the industry. A key component to closing the gap in modern fur farm legislation is identifying the needs and wants of the American people. Section II will illustrate how the past and present attitudes toward fur are illustrated by the economy, and how those economic trends will hopefully act as an indicator for updating the legislation that surrounds the fur trade and mink farming in particular. For example, the sharp rise in fur alternatives and synthetics are discussed as a viable alternative that consumers are using instead of fur. To effectively contextualize the American market, global perspectives of fur farming will be examined, including an analysis of international attitudes of fur on a spectrum that ranges from China, which has no regulation on fur whatsoever, to the United Kingdom and most of Europe, which have a complete ban of fur and fur farming.

Section III will discuss the limitations in the language of the current federal and state statutes regarding fur farmed animals while focusing on why labeling mink and other fur farmed animals as “domestic animals” is harmful and erroneous. Subsequently, solutions to the current gap in fur farming legislation will be proffered, including ideas

ranging from a ten-year phase out of all fur to a modified, respectful-use policy and all of the merits in-between. Additionally, the realities of political compromise will be addressed and discussed particularly in the form of a cost-benefit analysis of the proposed policies and the realistic chances of the solutions actually being implemented. The potential costs, tensions between advocacy and profits, and the outlook for fur farmed animals will be analyzed and discussed.

The bottom line is that in the current legislation, there is simply not enough protection for fur farmed animals like the mink. The lone federal statute has not been satisfactory in answering and attending to all of the welfare and accountability needs that this industry demands and leaves a significant gap in legal accountability for harmless animals. Regardless of who a potential resolution would benefit, there is a tremendous need for recognition at the federal level that fur farmed animals have fallen between an assortment of statutes and legislation that do not overlap.

II. FUR FARMS

a. Brief History

As of 2009, the United States ranked fifth in the world for mink production, as it accounted for approximately 5.8% of the global farmed mink production equating to an industry surpassing more than \$130 million dollars annually.¹¹ However, according to market research company Euromonitor International, that number has doubled over the last decade as fur sales in the United States jumped from \$219.8 million to over \$531 million, an increase of over 141%.¹² Although a bustling industry in recent times, mink farming has humble origins. Mink farming was pioneered in the United States more than 150 years ago in Lake Casadacka, New York during the Civil War.¹³ In the absence of technology to simulate fur for warmth, these early farmers farmed mink out of necessity and practicality to survive harsh Civil War winters, hardly a cause of vanity. Today, farmed mink is the single most important fur type produced in North America in terms of the total number of pelts produced.¹⁴ *Truth About Fur*, a pro-fur advocacy group, claims there are

¹¹ BORN FREE USA, *supra* note 4, at 14; Mink Farming, TRUTH ABOUT FUR, <https://www.truthaboutfur.com/en/mink-farming> (last visited Dec. 4, 2019).

¹² Elaine S. Povich, *Fur Clothing Bans Advance in More Cities and States*, PEW CHARITABLE TRUSTS (Sept. 5, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/05/fur-clothing-bans-advance-in-more-cities-and-states>.

¹³ *Mink Farming*, *supra* note 11.

¹⁴ *Id.*

245 mink farms spread across 22 states that produce about 3.3 million pelts per year.¹⁵ While many of these mink enter the farms through trapping, many more are born and live the entirety of their lives in captivity.¹⁶ Animals farmed specifically for fur, like mink and fox, have been farmed and held in captivity for approximately ninety years.¹⁷ This is significantly less time than other domesticated agricultural animals like cattle, pigs, and horses which have been farmed and possessed by humans for over 5,000 years.¹⁸ This discrepancy in the amount of time these animals have been domesticated is important because it takes a substantial amount of time for animals to be completely domesticated and evolve out of their wild instincts.¹⁹

b. Required Conditions vs. Natural Tendencies

Mink are highly active and inquisitive animals, that can cover long distances in a single day,²⁰ and are mostly solitary and keep to themselves.²¹ The average home range of a wild mink in the United States is at least three miles, with some home ranges covering an area as large as six miles.²² In captivity, however, the size of a typical mink farm cage is one foot high, one foot wide, and three feet deep,²³ as seen in Figure 1 below.

¹⁵ *Id.*

¹⁶ Caitlynn Dano, *Fur Farming in the U.S. is Alive and Well*, THE ODYSSEY (Jan. 29, 2018), <https://www.theodysseyonline.com/fur-farming-alive>.

¹⁷ BORN FREE USA, *supra* note 4, at 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Mink And Weasel Family*, WILDLIFE RESPONSE INC., <http://wildliferesponse.org/component/content/article?id=56:mink-and-weasel-family> (last visited May 14, 2020) (explaining that male minks “travel widely” and occupy as much as 2.5 miles of stream habitat, or 2,500 acres in wetland habitats. They can travel between several “homes” within that habitat. The time of year impacts the amount a mink will travel).

²¹ Kurt Schlimme, *Neovison vison: American Mink*, U. OF MICH. MUSEUM OF ZOOLOGY (2003), https://animaldiversity.org/accounts/Neovison_vison/.

²² Dennis C. Joyes, *American Mink*, Montana Outdoors, <http://fwp.mt.gov/mtoutdoors/HTML/articles/portraits/2017/mink.htm> (last visited Apr. 27, 2020).

²³ Canny, J., Galeuci, E., & LaBelle, J., *Mink Fur Farming: Adapting An Industry on the Rise*, DEBATING SCIENCE (Dec. 6, 2013), <https://blogs.umass.edu/natsci397a-cross/mink-fur-farming-final/> (last visited May 14, 2020).



FIGURE 1. Typical Mink Farm Cage

Original Source: Jennifer Guitare, *Environmental Hazard/Animal Cruelty—Mink Fur Farm Erecting in Haliburton, PEI*, care2 petitions, <https://www.thepetitionsite.com/314/389/959/environmental-hazardanimal-cruelty-mink-fur-farm-erecting-in-haliburton-pe/>

According to the Fur Commission USA Protocols (the previously mentioned mink farm governing body consisting of active fur farmers), the recommended dimensions for a cage housing a single female mink is a minimum height of fifteen inches with a minimum width of 7.5 inches.²⁴ In comparison, the average adult mink is two feet (twenty four inches) long.²⁵ A simple comparison of the dimensions make it clear that fitting a twenty four inch mink into a 15 x 7.5 inch cage is a tight squeeze. Even in a cage that is in full compliance with FCUSA standards, the mink would not even have the physical ability to stretch itself out completely, because life in a cage is a glaring departure from their natural preferential home range that average three miles in distance.²⁶ Cramming mink into tiny cages has shown to cause them extreme stress.²⁷ In some cases, the stress of confinement in small battery cages becomes so overbearing for the mink that they develop stomach ulcers, a physical manifestation of their discomfort and anxiety that can result in a loss of appetite and

²⁴ *Standard Guidelines for the Operation of Mink Farms in the United States 2019 Edition*, International Fur Federation, Fur Comm'n USA 1, 12 (2019), https://furcommission.com/wp-content/uploads/2019/10/SGOM-Book-1_Criteria-Forms-ProtocolsG.pdf.

²⁵ *Mink (Mustela vison)*, U. OF MINN. DELUTH NATURAL RESOURCES RESEARCH INSTITUTE, <https://www.nrri.umn.edu/carnivores-minnesota/species/mink> (last visited May 14, 2020) (male mink, on average, is 24.3 inches, and female minks have an average length of 20.2 inches.).

²⁶ Joyes, *supra* note 22.

²⁷ BORN FREE USA, *supra* note 4, at 5.

excruciating pain.²⁸ The unnecessary suffering of mink as a result of confinement is cruel and a violation of the minks welfare, a violation exacerbated by the fact that the FCUSA cage recommendations carry no legal force or meaning. The guidelines are simply a recommendation that the FCUSA has no legal or delegated authority to enforce. As the law currently stands, there are no legal consequences for using a cage of any size to house mink, and this gap must be filled to prevent the unnecessary suffering of mink.

In addition to being instinctively nomadic, mink are also semi-aquatic animals.²⁹ This means they are physiologically hardwired to seek large bodies of water for diving, hygiene, and food.³⁰ Once again, however, most mink farms are not structured nor required to accommodate this instinctive need. Similar to the effect of confinement in small cages, denying mink the ability to manifest the instinctive need to swim, play, and hunt can cause serious mental and physical anguish. To emphasize the importance of mink having access to a body of water, a study conducted by *Nature* concluded that mink in captivity rated a pool of water as their favorite and most valuable resource based on the amount of attention it attracted amongst other items, such as food and toys.³¹ The study found that the total expenditure of time and energy the mink spent on activities related to the pool were greater than any other resource, and that deprivation from the pool of water caused them the greatest stress of any of the resources.³² The study measured the levels of cortisol (the chemical produced by stress in mink) by taking urine samples of the seven male and female mink that were subjects of the study.³³ After being denied access to each of the resources including food, the pool of water, toys, an alternative nesting site, and a raised platform, the study showed the level of cortisol in the mink increased variably.³⁴ The study found that when the mink were denied access to food and the pool of water, the cortisol levels in the mink were indistinguishable from each other, but markedly above the cortisol levels of being denied the other resources in the cage.³⁵ The results indicate that being denied access to a pool of water can cause as much stress and panic as being

²⁸ *Id.*

²⁹ *American Mink*, THE HUMANE SOC'Y WILDLIFE LAND TR., <http://www.wildlifelandtrust.org/wildlife/close-ups/american-mink.html> (last visited Dec. 4, 2019).

³⁰ Kurt Schlimme, *Neovison vison: American Mink*, U. OF MICH. MUSEUM OF ZOOLOGY (2003), https://animaldiversity.org/accounts/Neovison_vison/.

³¹ Mason, G., Cooper, J. & Clarebrough, C., *Frustrations of Fur Farmed Mink*, 410 NATURE MARCH 2001, at 35-36.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

denied their most basic need of food. The current living conditions for mink in captivity are not conducive to their natural lifestyle and almost never include access to a pool of water to dive in. When mink are not allowed to manifest those instinctive tendencies, it can cause them to suffer physically and emotionally.³⁶ The study by *Nature* provides a scientific basis for the suffering mink are enduring in captivity due to an environment that is unaccommodating and claustrophobic,³⁷ as illustrated in Figure 2 below.



FIGURE 2. Minks in Stressed in a Basic Cage

Original Source: Malcolm Klimowicz, Animal Justice (Feb. 13, 2020), <https://www.animaljustice.ca/blog/whistleblower-faces-a-criminal-trial-for-exposing-mink-farm-suffering>

On the other hand, advocates for mink farming argue that mink are free to express their natural tendencies even in captivity. In defense of mink farming, *Truth About Fur*, published an article that explains how mink have the freedom to express natural behaviors in captivity.³⁸ The article states, “while raised in pens, farmed furbearers have considerable opportunity to express natural behaviors.”³⁹ The article cites several examples, including that although wild mink often “travel long distances in nature” they only do so in search for food.⁴⁰ The argument

³⁶ Malcolm Klimowicz, *Animal Justice* (Feb. 13, 2020), <https://www.animaljustice.ca/blog/whistleblower-faces-a-criminal-trial-for-exposing-mink-farm-suffering>.

³⁷ *Id.*

³⁸ *Fur Farming is Humane*, TRUTH ABOUT FUR, <https://www.truthaboutfur.com/en/fur-farming-is-humane> (last visited Dec. 4, 2019).

³⁹ *Id.*

⁴⁰ *Id.*

is that since food is provided to the mink, their instincts to travel are satisfied and that “once they have eaten, they spend most of their time (70-80%) in small, underground dens where they feel secure.”⁴¹ The article goes on to say that farmed mink spend a similar percentage of their time in their nest boxes and have the opportunity to go into “the attached, larger pens to eat, drink, exercise and play with balls or other objects.”⁴² Although *Truth About Fur* paints an optimistic picture, there is no mention or citation of scientific data or studies to back up their claim. Additionally, although some mink farms may provide an attached area for mink to play, like the one mentioned in the article, most do not and there is no minimum requirement, recommendation, or mention of an attached play area in the FCUSA protocols. While there are certainly some mink farms that treat mink better than others, there are still no legal repercussions against mink farmers who choose not to treat their mink with respect. Unfortunately, a gap in the legislation for fur farmed animals exists and there is a glaring need for standardized regulations that ensure the respectful treatment of animals that carry the force of law and can be effectively enforced.

c. Suffering & Euthanasia

Since mink are semi-aquatic animals, they have a genetically enhanced ability to hold their breath for diving. Mink have positively charged oxygen-binding proteins called myoglobin which allow them to store greater amounts of oxygen.⁴³ This increased oxygen capacity allows them to dive up to 114 feet.⁴⁴ Unfortunately, that means that when the mink are gassed, they can suffer for an extended period of time which prolongs their death because they are highly tolerant to hypoxia (low levels of oxygen).⁴⁵ The most common method of euthanasia among mink farms is asphyxiation, which occurs when the mink are placed into an air-tight container and administered poisonous carbon monoxide gas.⁴⁶ Since mink farming does not have mandated regulations and standards, an assortment of different gasses and methods are used to

⁴¹ *Id.*

⁴² *Id.*

⁴³ Jane J. Lee, *How Diving Mammals Stay Underwater So Long*, NAT'L GEOGRAPHIC (Jun. 15, 2013), <https://www.nationalgeographic.com/news/2013/6/130614-diving-mammal-myoglobin-oxygen-ocean-science/>.

⁴⁴ Bill Hobbs, *Nature Notes: Minks Semi-Aquatic Animals With an Impressive History*, THE DAY, Apr. 18, 2018, <https://www.theday.com/article/20180418/nws01/180419552>.

⁴⁵ *Animal Welfare Problems on Fur Farms*, FUR FREE ALLIANCE, <https://www.furfreealliance.com/wp-content/uploads/2018/08/Animal-Welfare-Problems-on-Fur-Farms.pdf> (last visited Dec. 4, 2019).

⁴⁶ *Fur Farming is Humane*, *supra* note 38.

kill the mink. Most of these methods are inhumane and can prolong the termination process. If any gas less than 100% pure Carbon Monoxide is used it can cause the mink to choke and delay the amount of time in which the mink loses consciousness.⁴⁷

The science behind mink euthanasia illustrates how different substances may affect the time of death of a mink. In a study completed by the British Veterinarian Journal on the Euthanasia of Mink by Means of Carbon Dioxide (CO₂), Carbon Monoxide (CO), and Nitrogen (N₂), researchers found that anything less than 100% Carbon Dioxide unnecessarily prolonged the euthanasia process for mink.⁴⁸ Furthermore, using less than 70% Carbon Dioxide was not practically possible to euthanize adult mink.⁴⁹ The average time of euthanasia from start to finish with 100% Carbon Dioxide was two minutes and thirty-three seconds.⁵⁰ After that, the times greatly increased based on the substance administered.⁵¹ This study highlights the importance for mandated standardization of the mink euthanization process because the only way to carry out a humane mink asphyxiation is to administer 100% Carbon Dioxide. Unfortunately, Fur Commission USA guidelines require much less for mink euthanasia. The study illustrates the science behind the importance of regulation and accountability, because without enforced industry standards there is no way to guarantee that mink will be treated with dignity and respect during euthanasia.

In response, *Truth About Fur* contends that “it is our responsibility to ensure that this is done humanely, with as little stress as possible to the animals.”⁵² To back up that mission statement, *Truth About Fur* states that “farmed mink are generally euthanized with bottled carbon monoxide gas” and that “the mink are placed into an air-tight, gas-filled container where they are rendered unconscious and die quickly and humanely.”⁵³ While it is quite possible that there are mink farms that execute conscientious and careful euthanasia of mink, the problem with the previous statement is twofold: 1) There is no way to ensure that each farm is following the stated protocols because Fur Commission USA has no legal or delegated authority to enforce them; and 2) the previously mentioned study conducted by the British Veterinarian Journal concluded that it was 100% Carbon Dioxide (CO₂) and not Carbon Monoxide (CO)

⁴⁷ N. Enggaard Hansen et al., *Euthanasia of Mink by Means of Carbon Dioxide, Carbon Monoxide and Nitrogen*, 147 *British Veterinary Journal* 140-146 (1991) <https://www.sciencedirect.com/science/article/pii/000719359190104U>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Fur Farming is Humane*, *supra* note 40.

⁵³ *Id.*

that was the only way to ensure a quick and pain free death for mink. Anything less, like Carbon Monoxide, could unnecessarily prolong the euthanization process. In all likelihood, without strict enforcement, standardized regulation, and adequate protocols, many mink will follow up a life of captivity with an unnecessarily prolonged and inhumane death.

In summation, mink have only been domesticated for 70 years, meaning that whether wild or “domesticated”, they still possess the same instincts and suffer immense stress when they are denied the freedom to act upon those instincts. Furthermore, the euthanization process is disorganized and subject to improvisation by individual mink farms on a case-by-case basis. The gap in protection for fur farmed animals, especially the mink, not only denies mink an opportunity to be treated with dignity and respect, but also enables their suffering as they continue to live in conditions that are ill-suited for their instinctive lifestyle. As the science and research indicates, the traditional mink farm houses several animal welfare issues, and the need for filling the gap in legal protections for fur farmed animals is severe.

III. FUR INDUSTRY

a. Historical Strength

In order to effectively understand the need for enhanced protections for fur farmed animals, it is important to understand how the public perception of fur and animal welfare has evolved. The need for fur has been necessitated by the existence of furless human beings and cold temperatures. Early civilizations of mankind began using fur out of necessity and survival.⁵⁴ Simply put, humans needed fur to stay warm. The genesis of mink fur in the United States began during the Civil War, in New York, in an effort to aid soldiers’ survival through harsh winters.⁵⁵ Given the strong utility value of mink fur back then, it is easy to see how the fur industry rooted itself within the agricultural economy.⁵⁶

The industry boomed in the 1950s and 60s, during which mink grew in popularity as a fashionable status symbol.⁵⁷ Further fueling the

⁵⁴ *History of fur in fashion*, INTERNATIONAL TALENT SUPPORT, https://www.itsweb.org/jsp/en/newsdetails/id_news-2016-11-17-History-of-Fur.jsp (last visited May 14, 2020).

⁵⁵ *Mink Farming*, *supra* note 11.

⁵⁶ *Fur*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/fur-animal-skin> (last visited May 14, 2020).

⁵⁷ Michael L. Geczi, *Mink Farming Is Growing More Scarce as Costs Rise and Fur Demand Declines*, WALL ST. J. (Oct. 27, 1975), <https://sites.oxy.edu/whitney/xaccess/ec101/mink.html>.

fashion frenzy were mink farmers who began to breed different colors of mink fur, yielding different fashion combinations that consumers viewed as collectibles.⁵⁸ For much of the 50s, 60s, 70s, and 80s, Hollywood actors, professional athletes, successful business people, and other status icons wore fur to flaunt their impressive wealth. With the advent of advanced faux fur in the 1950s, the idea of fur as a necessity was long gone, and the demand for mink fur was driven primarily by vanity within the fashion industry.⁵⁹ In 1966, there were approximately 6,000 mink farms operating within the United States that produced over 6.2 million pelts.⁶⁰ The booming fur industry can be blamed mostly on the need of American consumers for luxury goods, but the American consumer is also to blame for its sharp decline. By the 1970s, the complementary forces of increased animal activism and the growing knowledge of faux fur alternatives sparked a change in the public perception of mink fur.⁶¹ The social conscience of collective Americans began to awaken to the notion that killing animals just for the sake of fashion was cruel, which sparked demonstrations and increased activism.

b. Modern Vulnerability & Rejuvenation

The industry gradually rose in value throughout the 1980s and 90s, reaching an all-time high value of \$707.3 million dollars in 1999.⁶² However, a sudden change in public attitudes and the growing popularity of faux furs brought the mink fur industry to its knees. By 2008, only 2.7 million mink pelts were produced and the industry was worth only \$115 million dollars, down over \$592 million dollars from 1999, and \$70 million dollars from 2007 when the industry was worth \$185 million dollars while producing a similar number of pelts.⁶³ The downturn can be explained by the growing public sentiment in support of animal welfare among consumers as the industry dwindled in value for years leading up to that point.⁶⁴ Unexpectedly, however, the industry that was once facing extinction has experienced a resurgence over the past decade. In 2018, the industry was back to being worth over

⁵⁸ *Id.*

⁵⁹ *The Early History of Fur in Fashion*, <https://www.andrianafurs.com/our-blog/2016/02/the-early-history-of-fur-in-fashion/> (last visited Apr. 17, 2020).

⁶⁰ Geczi, *supra* note 57.

⁶¹ Alice Hines, *The History of Faux Fur*, SMITHSONIAN MAG. (Jan. 22, 2015).

⁶² Suzanne Kapner, *Bans on Fur Threaten an Industry's Rebirth*, WALL ST. J. (Apr. 14, 2019), <https://www.wsj.com/articles/bans-on-fur-threaten-an-industrys-rebirth-11555254000?mod=searchresults&page=1&pos=6>.

⁶³ *Market Data & Statistics*, FUR COMM'N USA, <https://furcommission.com/fur-industry-statistics/> (last visited Dec. 4, 2019).

⁶⁴ *Id.*

\$531 million, an increase of over 141% over the last decade.⁶⁵ Several theories that attempt to explain the resurgence vary from cold weather, new fashion trends, international popularity, and faux furs conflicting with environmentalism.

It is difficult to gauge exactly how most of the general public feels about the use of fur today. On one end, many fashion retailers cite decreased public support for furs to justify a shift in their policy away from selling genuine fur. For example, as recently as October 21, 2019, retailing powerhouse Macy's announced it was phasing out fur products and would be completely fur-free by 2021.⁶⁶ This news comes after many luxury retailers, among the likes of Gucci, Calvin Klein, Prada, and Lacoste, which also announced they would be committing to fur-free policies.⁶⁷ Although major retailers abandoning fur was a positive step for animal welfare as a mode of public policy, none were as powerful of a statement as when Queen Elizabeth II announced on November 6, 2019, that she would be going almost completely fur-free (except ceremonial robes and official garments lined with fur).⁶⁸ It is reasonable to infer that these retailers motivated by profits would not shift away from a valuable stream of revenue if they knew their products were still popular.

On the other end, the statistics speak for themselves. The fur industry more than doubled its value over the past decade, meaning that either most people still feel good about wearing fur and major retailers are out of touch with the American consumer or that another revenue stream is supporting the American fur industry. The answer is the latter, and international interest in luxury fur overseas has kept American mink farming business intact.

Recently wealthy countries like China, South Korea, and Russia have bolstered the fur industry for a comeback.⁶⁹ Driven by a hunger for luxury items and high-end clothing, the United States exports of

⁶⁵ Elaine S. Povich, *Fur Clothing Bans Advance in More Cities and States*, PEW CHARITABLE TRUSTS (Sep. 5, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/09/05/fur-clothing-bans-advance-in-more-cities-and-states>.

⁶⁶ Sapna Maheshwari, *Macy's, Home to \$8,000 Mink Jackets, Will Stop Selling Fur Products by 2021*, N.Y. TIMES, Oct. 21, 2019, <https://www.nytimes.com/2019/10/21/business/macys-fur-sales.html>.

⁶⁷ *Every Single Luxury Brand, Retailer and Magazine That Has Gone Fur-Free—So Far*, FASHIONISTA MAGAZINE (Nov. 18, 2019), <https://fashionista.com/2018/04/fur-free-designer-brands-magazines-retailers>.

⁶⁸ Neil Vigdor, *Queen Elizabeth II Will Go Fur Free (Sort Of)*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/world/queen-elizabeth-fur.html>.

⁶⁹ Rachael Bale, *Fur Farms Still Unfashionably Cruel, Critics Say*, NAT'L GEOGRAPHIC (Aug. 17, 2016), <https://www.nationalgeographic.com/news/2016/08/wildlife-china-fur-farming-welfare/>.

mink pelts to China alone surged to a record of \$215.5 million in 2012.⁷⁰ Similar to the American consumers of the 50s and 60s, middle-class Chinese consumers have acquired a taste in fur to represent a status symbol.⁷¹ In addition to the Chinese, Russia and South Korea amassed more than 11.8 million pelts in 2013 worth more than \$479 million worldwide to United States farmers and auction houses.⁷² The increase in international demand has kept mink farming alive and profitable in the United States. While the market for mink is robust, the total value of the fur industry is not an accurate litmus to measure how the American consumer feels about fur. Despite its rejuvenation, many Americans still believe that the fur industry is an unethical practice. Many have turned to nearly identical faux fur as an alternative to genuine fur, but even the synthetic fur replacements have received public backlash.

c. Synthetic Fur Solutions

Before the substantial change in public attitudes toward fur, faux fur was widely shunned and regarded as cheap and ephemeral.⁷³ Because fur was regarded as a social status symbol, wearing fake fur was embarrassing and socially ridiculed. Although the technology for faux fur has existed and has been continually improving since the 1950s, it was not until the 1990s that faux fur became more widely known and accepted.⁷⁴ While many retailers and fashion designers turning away from fur has helped popularize the idea of wearing faux fur, the industry has faced its fair share of challenges.

One of the strongest arguments to come from fur advocates is that faux fur poses a detriment to the environment. One study comparing natural and fake fur biodegradability showed that over a thirty-day testing period, natural fur biodegraded rapidly and at a similar rate to organic matter while fake fur did not show signs of biodegradation at all and could take hundreds of years to biodegrade, thus contributing to plastic landfill waste.⁷⁵ In addition, proponents of the fur industry are quick to point out that while faux fur may contribute negatively to

⁷⁰ *Furs Fly as Chinese Consumers Drive Boom in U.S. Mink Farming*, REUTERS (Apr. 15, 2013), <https://www.cnbc.com/id/100640822>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Phoebe Neuman, *The Future of Fur*, ROBB REPORT: MUSE (Oct. 12, 2018), <https://robbreport.com/muse/fashion-jewelry/future-of-fur-2821749/>.

⁷⁴ Sara Idacavage, *Fashion History Lesson: The Real Story Behind Fake Fur*, FASHIONISTA (Jan. 5, 2018), <https://fashionista.com/2018/01/fake-faux-fur-history>.

⁷⁵ Lies Debeer, High Solids Anaerobic Biodegradation and Disintegration Test of Undyed Mink Fur, Undyed Fox Fur, Dyed Mink Fur, Dyed Fox Fur and Fake Fur, *Organic Waste Systems* 19 (May 25, 2018), <https://www.wearefur.com/wp-content/uploads/2018/06/RA.MNI-1.Rev00-OWS-report.pdf>.

plastic waste in the environment, their fibers may also contain harmful chemicals that can be hard on the environment.⁷⁶

Popular retailer Patagonia conducted preliminary research that concluded synthetic microfibers can get caught in a washing machine and contribute to ocean pollution.⁷⁷ To capitalize on this social inertia, the fur industry ran advertising campaigns in popular fashion magazines like *Vogue* that marketed fur as “sustainable” and “responsible.”⁷⁸ This has led many people, especially young adults, to believe that genuine fur is a superior product because it is “better for the environment” than the synthetic alternative.⁷⁹ However, faux fur actually produces far less pollution than genuine fur, as mink farmers rely on a host of chemicals like formaldehyde and chromium to keep the raw fur from rotting.⁸⁰ The fur farming process was even ranked in the top five worst industries for toxic-metal pollution by the World Bank, because chemicals and feces can leak into local waterways.⁸¹ With access to conflicting information on both sides, the American consumer is at a crossroads between socially conscious causes.

Despite these concerns, faux fur poses much less of an environmental threat than genuine fur. There are more safeguards in place to prevent pollution from faux fur than genuine fur. In addition to preventing the needless suffering of mink, faux furs last longer and can be placed in washing machine friendly linen bags to prevent pollution.⁸² Faux fur solutions are available and are improving to the point where real and fake fur are indistinguishable to the consumer. From a market standpoint, the faux market is sustainable enough to accommodate the needs of the fashion industry as it continues to become more marketable. From a legal standpoint, having a tangible and viable alternative to real fur enables legislation that would incur stricter scrutiny of the fur industry knowing that constituents are in favor of those policies.

⁷⁶ Ray A. Smith, *Real Fur vs. Fake Fur: The Latest Dilemma for Socially Conscious Consumers*, THE WALL STREET J. (Dec. 8, 2018, 9:30 AM), <https://www.wsj.com/articles/real-fur-vs-fake-fur-the-latest-dilemma-for-socially-conscious-consumers-1544279400>.

⁷⁷ *An Update on Microfiber Pollution*, PATAGONIA OUTDOOR CLOTHING GEAR (Feb. 3, 2017), <https://www.patagonia.com/blog/2017/02/an-update-on-microfiber-pollution/>.

⁷⁸ Smith, *supra* note 76.

⁷⁹ Suzanne Kapner, *Bans on Fur Threaten an Industry's Rebirth*, THE WALL STREET J. (Apr. 14, 2019, 11:00 AM), <https://www.wsj.com/articles/bans-on-fur-threaten-an-industrys-rebirth-11555254000?mod=searchresults&page=1&pos=6>.

⁸⁰ Tansy Hoskins, *Is the Fur Trade Sustainable?*, THE GUARDIAN (Oct. 29, 2013, 8:42 ET), <https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/is-fur-trade-sustainable>.

⁸¹ *Id.*

⁸² PATAGONIA OUTDOOR CLOTHING GEAR, *supra* note 77.

d. Will of the American People

Subjecting animals to cruel treatment and euthanizing them for their fur has gradually become less popular amongst American consumers. According to a recent Gallup poll on the issue of wearing fur, in May 2018 thirty seven percent of Americans said that they consider buying and wearing fur to be morally wrong.⁸³ One year later in May 2019, the same poll reflected an eight percent jump to forty five percent of Americans believing that buying and wearing fur was morally wrong.⁸⁴ To reflect the shift in the consumer outlook towards fur, California and New York are already beginning to experiment with legislation outlawing fur and mink farming completely.⁸⁵ Public supporters of the legislation outlawing fur hope that a ban would cause serious damage to the fur industry by striking a blow to its demand.⁸⁶ As recently as September 2018, Los Angeles became the largest city to set the wheels in motion on a potential fur ban.⁸⁷ Los Angeles City Council, following suit with the inertia created by major retailers who are located in Los Angeles that were turning away from furs themselves, banned genuine fur within the city limits.⁸⁸ Councilmember Bob Blumenfield encapsulated the spirit of the vote by stating “[t]his is L.A. taking a stand and saying we will no longer be complicit in the inhumane and vile fur trade that’s been going on for years.”⁸⁹

A little more than a year later, the entire state of California followed their star-powered city when Governor Gavin Newsom signed AB44 into law in October 2019.⁹⁰ AB44 bans the sale of new clothing and accessories made of fur, but carves out an exception for cowhide, deerskin, sheepskin, and goatskin.⁹¹ Fur that is already in circulation may remain in circulation and will not be criminally prosecuted.⁹² According to the New York Times, the focus of AB44 is on the sale of

⁸³ Natasha Daly, *States Across U.S. are Taking Bold Steps Toward Protecting Animals*, NAT’L GEOGRAPHIC (Jul. 10, 2019), <https://www.nationalgeographic.com/animals/2019/07/first-time-animal-welfare-laws-in-us-states/>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Jonah Engel Brownmich, *Los Angeles Will Ban the Sale of Fur*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/style/fur-ban-los-angeles.html?module=inline>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Vanessa Friedman, *The California Fur Ban and What It Means for You*, THE NEW YORK TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/style/fur-ban-california.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁹¹ *Id.*

⁹² *Id.*

fur and not the wearing of it.⁹³ The legislation aims to serve as a means of enforcement that has the force of law. If a retailer or manufacturer sells fur unlawfully, they will incur civil penalties that take the form of a fine up to \$500 for the first offense and \$1,000 for multiple offenses.⁹⁴ The actions of these states and cities are the first step in closing a gap in the protection of fur animals. Threat of punishment that carries the force of law is a great start in holding mink farmers accountable to treating their mink better.

The strongest argument against the ban of fur seems to be an argument of freedom of personal choice. For most people, the greatest concern is not the mink fur itself, but what the legislation may ultimately lead to. Keith Kaplan of the Fur Information Council of American said after the news of California's enactment of AB44 broke that "this issue is about much more than animal welfare in the fur industry. It is about the end of animal use of any kind. Fur today, leather tomorrow, your wool blankets and silk sheets—and meat after that."⁹⁵ Although this sentiment seems justified, it is misleading. The argument that banning fur will eventually lead to a ban of all animal by-products avoids engaging with the issue at hand. It shifts attention to an extreme hypothetical in an attempt to provoke emotion. The fact of the matter is that minks are being cruelly treated in mink farms, and with the advancement in information technology many consumers are realizing that wearing fur is not worth the cost to these animals. It is paramount to recognize that the proposed remedies to fill the gap in legislation for fur farmed animals are to stop unnecessary suffering and promote respectful use of these animals. Arguments that suggest anything else are unsubstantiated and do not reflect the prevailing outlook towards mink farming.

IV. LEGISLATIVE REMEDIES

a. Federal Statute

The lack of protections for mink and animals farmed for fur begins at the federal level. While there are federal criminal codes, animal cruelty statutes, and agriculture laws, mink farmed for fur do not fall within any of them, thus creating the gap in legal protection. Below is the language of the federal statute that acknowledges animals farmed for fur. The statute reads as follows:

For the purposes of all classification and administration of Acts of Congress, Executive orders, administrative orders, and regulations pertaining to—

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

- a. Fox, **mink**, chinchilla, marten, fisher, muskrat, karakul and all other fur-bearing animals, raised in captivity for breeding or other useful purposes shall be deemed **domestic animals**;
- b. Such animals and the products thereof shall be deemed agricultural products; and
- c. The breeding, raising, producing, or marketing of such animals or their products by the producer shall be deemed an **agricultural pursuit**.

Title 7, Chapter 15, §399, United States Code.⁹⁶

The federal statute has several severe weaknesses that implicate animal welfare. The first is that the statute is antiquated. The statute has an effective date of April 30th, 1946.⁹⁷ For seventy-three years, this federal law has remained unchanged, but the views of the American public and the information available to them about the conditions of mink in fur farms have changed drastically. Second, because the statute is outdated, the language surrounding mink and fur farmed animals is inaccurate. The statute classifies the mink as a “domestic animal” meaning that it has been evolutionary bred away from its natural instincts to be more suitable for human consumption. Unfortunately, this is a dangerous misnomer because even mink raised in captivity still feel the need to satisfy their natural instincts. The mink’s inability to manifest instinctive tendencies causes them to suffer, and classifying them as domestic animals, legally authorizes their suffering.

Removing the “domestic animal” title from mink and fox and extending wild animal protections to them would be a tremendous start to legislative reform. Although they have been held in captivity regularly for longer than ninety years, mink have failed to express traits that are consistent with other domesticated animals.⁹⁸ Captive mink display a strong motivation to perform natural behaviors in spite of the fact that they have spent their entire lives in captivity.⁹⁹ Furthermore, minks exhibit a fearful-aggressive response to human beings, which is uncharacteristic of other domesticated animals.¹⁰⁰ The minks continued urge to act with natural instinct even after years of confinement, legitimizes the argument that legally classifying them as domestic animals is a misnomer. Their behavior is incongruous with more traditionally domesticated agricultural animals. Although they

⁹⁶ 7 U.S.C. § 399 (1946).

⁹⁷ *Id.*

⁹⁸ Cooper, *supra* note 31.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

are animals that have been domesticated in the sense of being held in captivity for a prolonged period of time, the question remains as to whether or not they are truly domesticated animals in the biological sense of evolving away from their natural tendencies.

Representatives of the fur industry assert that “farmed” mink behave substantially milder than those that are still in the wild.¹⁰¹ They contend that although mink travel long distances in nature, it is only to satiate their appetite.¹⁰² They further hypothesize that their need to travel is provoked only by their need to eat. If that need is satisfied, like it is in captivity, then the minks natural urge to travel is quelled.¹⁰³ This argument is presented without any scientific data or evidence, but instead based on anecdotal observations made by mink farmers.

The most scientifically valid element of the argument for domestication of mink is based on the fact that captive mink are “selectively-bred” to produce different fur combinations more suitable for human enjoyment than would naturally appear on wild mink.¹⁰⁴ However, this argument fails to acknowledge the behavioral traits and natural instincts that mink possess even if they are entirely born and raised in captivity.¹⁰⁵ Although the fur may be selectively bred in captivity, there is no support offered for the selective breeding of instinctive traits and tendencies.

On the other hand, scientific data has been offered to support the argument that captive mink still desire to act on their instinctive urges. In a study conducted for *Nature Research*, researchers concluded that

[F]ur-farmed mink are still motivated to perform the same activities as their wild counterparts, despite being bred in captivity for 70 generations, being raised from birth in farm conditions, and being provided with food. The high level of stress experienced by mink denied access to the pool, rated as the most valuable resource, is evidenced by an increase in cortisol production indistinguishable from that caused by food deprivation. These results suggest that caging mink on fur farms does cause the animals frustration, mainly because they are prevented from swimming.¹⁰⁶

¹⁰¹ *Fur Farming is Humane*, *supra* note 38.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Melissa A. Smith, *Domesticated Minks as Pets*, PETHELPPFUL (May 29, 2019), <https://pethelpful.com/exotic-pets/domesticated-mink>.

¹⁰⁵ Cooper, *supra* note 31, at 34.

¹⁰⁶ *Id.* at 34-35.

These research findings help clarify the argument that labeling fur-farmed mink as “domestic animals” is hardly an accurate depiction of the behavior mink are exhibiting whether or not they were raised in captivity or not. Reclassifying mink as wild animals instead of “domestic animals” would afford them the protections that wild animals have that are governed by state wildlife and conservation groups.

b. State Laws

Although changes in the federal law would create a uniform system of standards that every state would know and adhere to, animal welfare oversight and agricultural law is almost always delegated to the states.¹⁰⁷ While principles of federalism can be effective in some areas, the inherent problem with state control over agricultural pursuits is that there are no standardized rules across the states. Some states are better than others at regulating the fur trade, but there is a variation among them as to what kind of laws they have adopted toward fur farming. For example, Wisconsin and Utah are the biggest producers of mink farms and pelts.¹⁰⁸ Not coincidentally, those states also have the most relaxed laws toward fur farming; both of these states categorize mink farming as an “agricultural pursuit” meaning that farmers are free to conduct their farms in whichever way they please.¹⁰⁹ That means mink farming in these states is completely unchecked and unregulated, leaving mink vulnerable to poor conditions and abuse. These statutes are not doing enough to ensure the welfare of mink and do not impose any kind of sanction or penalty if inhumane conditions are found on a mink farm.

One recommendation that would keep the power of agricultural oversight in the hands of the states while promoting increased protections for mink would be for the states to delegate the authority of mink farm oversight to local state departments of agriculture. This would broaden the scope of the department of agriculture, who already perform the function of overseeing and inspecting farms with conventional livestock, to also routinely inspect and provide licenses for mink farms. This would ensure that mink are being treated humanely without burdening the federal government or eliminating the industry all together. This delegation of authority would create a system of accountability where mink farmers would be motivated to comply with state standards of care at the risk of losing their license or being fined. If this delegation to the state agencies were to be carried out , it would create an unprecedented

¹⁰⁷ Peterson, L. *Brief Summary of Fur Laws and Fur Production*, ANIMAL LEGAL & HISTORICAL CENTER (2010), <https://www.animallaw.info/intro/fur-production-and-fur-laws> (last visited May 14, 2020).

¹⁰⁸ BORN FREE USA, *supra* note 4, at 24.

¹⁰⁹ *Id.*

enforcement mechanism that would promote the welfare of mink and other animals farmed for fur.

Potential humane use recommendations that could potentially be implemented in state statute modification include a standardized euthanasia process and cage-free mink farming. The greatest animal welfare risk to mink reside in their treatment on the farm, and state statutes could reduce the unnecessary suffering of mink by instituting practices similar to those gaining popularity with free range chickens and pigs. States could also mandate for a more accommodating cage-size standard or eliminate cages altogether. If mink fur advocates truly believe mink are domesticated, then there should be little resistance to adopting free-range mink farming policies. In addition, the states could institute minimum standards for euthanasia requiring nothing less than one hundred percent Carbon Dioxide to ensure a humane death. These are certainly recommendations bred out of political compromise, but they would be a good start in ensuring mink can live a better quality of life while minimizing suffering.

c. Five-year Phase Out

In a modern political system filled with compromises, tension, and adversarial relationships, there are certain realities that cannot be ignored when recommending legislative solutions to legal problems. In a world without political limitations it would be most beneficial for animal welfare to impose a federal five-year phase out of all fur production and farming. Although it seems like a distant dream for animal welfare advocates, the argument for a federal phase-out is not as far-fetched as it appears at first glance.

As mentioned earlier, public sentiment has changed dramatically even over the last five years. More consumers, manufacturers, and legislators than ever before are not only acknowledging the inhumane price of fur, but are willing to go on record via polls, policies, and legislation to advocate for the defenseless fur farmed animals like the mink.¹¹⁰ The political momentum created by major retailers abandoning fur and major cities like New York and Los Angeles drafting legislation to outlaw fur is a strong first step to creating momentum for a federal five-year phase out.¹¹¹

European countries have already outlawed fur farming altogether, with the United Kingdom doing so in 2000.¹¹² Other European countries

¹¹⁰ Daly, *supra* note 83.

¹¹¹ Brownmich, *supra* note 87.

¹¹² *Croatian Citizens Show Support of Fur Farming Ban*, FUR FREE ALLIANCE (Feb. 25, 2015), <https://www.furfreealliance.com/croatian-citizens-show-support-of-fur-farming-ban/>; Paul Brown, *Last Mink Farms Must Close by 2003*, THE GUARDIAN (Dec. 27, 2001).

like Northern Ireland, the Netherlands, Slovenia, Bosnia, Serbia, and Austria have also followed suit with fur farming bans of their own.¹¹³ In 2007, Croatia instituted its own ten-year phase-out of chinchilla fur farming which was the only fur farming left in the country.¹¹⁴ The Croatian Animal Protection Act recognized the fur industry as “an extremely cruel practice” and hoped that a ten-year phase-out plan would be enough time for people who work in the industry to find another line of work and halt production.¹¹⁵ However, the ten-year period functioned only as a political compromise, as many chinchilla fur farms still operated in Croatia just a year before the ten year window closed.¹¹⁶

Although it would prove to be a much more difficult process, a five-year fur phase-out could work in the United States. With enough continued public support, especially in the wake of a newly-passed bipartisan animal cruelty bill, it is apparent that animal welfare issues are gradually receiving more visibility. In the modern age of social media and interconnectedness, it has never been easier to shed light on issues like mink farming that have historically been ignored. In addition, a five-year phase out is enough time to give those in the industry enough time to transition away from fur while also maintaining a sense of urgency that a ten-year ban would not carry. It would also give time for the faux fur industry to conduct more research into the growing environmental concerns that synthetic fibers can pose. In an ideal world, a five-year fur phase out would be the optimal recommendation to solve animal welfare issues for mink and it may be close to coming to fruition.

V. CONCLUSION

As long as the tenacious and resourceful mink continues to show off its robust fur as it prances from riverbank to riverbank, its most lethal enemy, the human being, will continue to find ways to commercialize and exploit it. The problem is that wild mink are being held captive in a farming system that does not accommodate their needs and instinctive habits. As a result, mink suffer and even cause themselves physical harm as a manifestation of their confinement anxiety. To make matters worse, many of the mink spend a lifetime in panic and anxiousness, only to be put out of their misery by an inhumane and prolonged death from asphyxiation. Scientific research has confirmed that mink are not meant for domestication, and preventing them from acting on their natural instincts is inhumane. As it stands, these animals have no legal protections and both state and federal statutes have deemed this practice

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

a lawful agricultural pursuit. Mink farmers are free to mistreat and confine these animals to their liking, with their only regulation being authored by an organization that profits from the mink's killing. These practices are a serious animal welfare violation, all of which are taking place in the name of vanity.

Wearing mink fur was a symbol of wealth sixty years ago, but times have changed. Major fashion retailers, consumers, legislators, and even the Queen of England have turned away from fur because of its inhumane practices, and it is time for the law to reflect the will of the people. With the growing accessibility and quality of faux fur alternatives, there is no utilitarian need to continue the barbaric practice of slaughtering mink for fashion.

The solution to the animal welfare crisis affecting mink resides in action. While a complete five-year phase-out of the industry completely is the most ideal solution, a more politically realistic solution is for states to delegate the oversight of mink farming to their respective departments of agriculture so that for the first time in history there can be an effective enforcement mechanism against cruel acts committed toward innocent mink. One of the core principles of the law is advocating for those who cannot advocate for themselves. Affording legal protections to mink is an easy way to promote a harmonious relationship between living beings on earth.

FEDERALISM AND ANIMAL LAW IN CANADA: A CASE FOR FEDERAL ANIMAL WELFARE LEGISLATION

SAMANTHA SKINNER, BA(HONS), JD, LL.M. CANDIDATE 2021

I. INTRODUCTION

Public pressures for the Canadian government to provide increased legal protections to animals in Canada are at an all-time high. In recent years, animal welfare has become a topic of interest in social justice advocacy groups, litigation, as well as both federal and provincial legislative bodies. Difficulties arise when enacting animal welfare laws because animals do not expressly fall within the subject matter of either legislative head of power under the *Constitution Act, 1867*.¹ Rather, animal welfare crosses over several areas of the subject matter contained within the exclusive legislative powers of both the federal government and the provincial governments. In attempting to address animal welfare concerns, both legislative bodies have enacted laws that seek to increase legal protections for animals. Despite these efforts, the results are deficient and merely create patchwork protections for animals in Canada.

This paper argues that the federal government can and must enact a comprehensive piece of animal welfare legislation to address the current deficiencies in Canadian animal welfare laws. Supreme Court jurisprudence is discussed and provides guidance on drafting valid federal law using the criminal law powers. Existing animal welfare legislative proposals are critiqued using the legal analysis from the Supreme Court, and direction and framework for future drafts of animal welfare legislation are offered.

PART I: ANIMAL LAW AND FEDERALISM

The following section explores the legislative division of powers as well as existing federal and provincial legislation, which establishes legal protections for animals. Unfortunately, deficiencies in all legislation leave animals vulnerable to abuse by humans. In order to address the deficiencies, the federal government must enact one piece of animal welfare legislation, which provides nationwide uniform protections to animals.

¹ Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app II, no. 5 (Can.).

a. The Constitution Act, 1867: Creation of A Multi-Tiered System

During Canada's confederation, animals were not a major concern for the politicians involved. The only protections for animals were adopted from English law but were placed in the Canadian Criminal Code under offenses against property.² During the time of confederation, non-human animals mainly shared two roles, either being raised for human consumption or working for humans (either on farms, for transportation, or entertainment). The designation of animals as property allowed for humans to own, buy, sell, confine, surgically alter, drug, impregnate, milk, and kill animals within the limits of the law.³

Sections 91 and 92 of the *Constitution Act, 1867* list the legislative division of powers.⁴ The division of powers gives the federal government the exclusive authority to legislate over certain areas, and the provinces' exclusive authority to legislate over other areas. The result is clear jurisdictional division, meaning that neither head of power can legislate over the subject matter of which the other has exclusive authority. If a head of power were to do so, the resulting law would likely not be constitutionally valid.

The subject of animals does not appear within the explicit subject matter areas contained in Sections 91 and 92.⁵ The subject of animals has been legislated by both heads of power and is considered to cross over many different subject areas contained in Sections 91 and 92.⁶ As a result, both the federal government and provincial governments have enacted legislation that affects animals. Described below are some of the animal laws which have been enacted by the federal and provincial governments.

i. Federal Legislation

Major areas of federal jurisdiction, which impact the lives of animals, are criminal law, interprovincial trade, international trade, slaughter standards, fisheries, and food and health safety.⁷ All of these areas affect the lives of at least some animals in some way, even though the purpose of the legislation does not always consider the welfare of the animals affected. Two pieces of federal legislation, which do consider

² Criminal Code, R.S.C., 1985, c. C-46 (Can.).

³ See Kate M. Natrass, ". . . Und Die Tiere" *Constitutional Protection for Germany's Animals*, 10 ANIMALS L. 283, 292 (2004).

⁴ Constitution Act, 1867, 30 & 31 Vict., c. 3, ss. 91 - 92 (Can.).

⁵ *Id.*

⁶ *Id.*

⁷ See Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91 (Can.).

animal welfare, are the Criminal Code and the Health of Animals Safety Act.

Part XI of the Criminal Code is Willful and Forbidden Act in Respect of Certain Property.⁸ Prohibitions concerning animals are found under this heading.⁹ Section 444 prohibits the unlawful killing of lawfully kept animals.¹⁰ The remaining three sections of the Criminal Code, which concern animals, address the prohibition of cruelty to animals.¹¹ Section 445 prohibits the unnecessary suffering of animals, which includes unnecessary pain, suffering, or injury to an animal.¹² Section 446 prohibits causing damage or injury to an animal, including neglecting animals while they are being transported or held in captivity.¹³ Section 447 prohibits cock-fighting.¹⁴ All prohibitions are hybrid offenses and can be pursued by either indictment or summary convictions.¹⁵ Punishments for Sections 445 and 447 are such that an offender may be punished by indictment with no more than five years of imprisonment.¹⁶ When pursued by a summary conviction, an offender may be punished by a \$10,000 fine and imprisonment for no more than eighteen months.¹⁷ The punishments are halved for Section 446 violations.¹⁸ These Criminal Code provisions provide prohibitions against animal cruelty and punishments for human offenders.

In February 2019, the Canadian Food Inspection Agency (hereinafter “CFIA”) released amendments to the Health of Animals Act, which regulates the transportation of animals.¹⁹ With regard to animal transport, animal activists are concerned with the transport times and conditions for livestock in Canada.²⁰ In Canada, cattle, sheep, and goats can be legally transported for thirty-six hours without food, water, or rest.²¹ The rationale for bringing the transport limit down from the

⁸ Criminal Code, *supra* note 2, at Part XI.

⁹ *Id.* § 445 - 447.

¹⁰ *Id.* § 444(1).

¹¹ *Id.* § 445 - 447.

¹² *Id.* § 445.

¹³ *Id.* § 446.

¹⁴ *Id.* § 447.

¹⁵ *Id.* § 445 - 447.

¹⁶ *Id.* § 445(2) and 447(2).

¹⁷ *Id.*

¹⁸ *Id.* § 446(2).

¹⁹ *Regulations Amending the Health of Animals Regulations: SOR/2019-38*, Canada Gazette, Part II, Volume 153, part 4, <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-02-20/html/sor-dors38-eng.html>.

²⁰ Animal Justice Media Release: “New Animal Transport Regulations Condemn Animals to Suffer and Die.” Retrieved from: <https://www.animaljustice.ca/media-releases/new-animal-transport-regulations-condemn-animals-to-suffer-and-die>.

²¹ *Regulations Amending the Health of Animals Regulations*, *supra* note 19.

previous forty-eight-hour limit to thirty-six hours is based on animal welfare.²² The CFIA stated that “[t]here is clear scientific evidence that shows that improved animal welfare results in improved animal health, and indirectly, contributes to reducing food safety risks.”²³ In this way, the CFIA acknowledges that animal welfare is important to the agriculture industry, but still allows animals to travel without rest, food, or water for a harmfully long time.

The Criminal Code and the Health of Animals Act are two pieces of federal legislation that affect certain animals. Although both statutes address valid concerns of animal welfare, they still allow for the abuse of animals. This occurs when the Criminal Code is not enforced and when animal transport laws continue to permit harmful practices. Since the federal government has failed to sufficiently protect animal welfare, the burden then falls to the provinces to address the deficiencies in protection.

ii. Provincial Legislation

Major areas of provincial power over animal welfare includes property (ownership of an animal), trade within the province, and enforcement agencies.²⁴ In the provinces, animal welfare enforcement agencies are enacted through statutes, such as Societies for the Prevention of Cruelty to Animals Acts (SPCAs) and other animal protection acts.²⁵ Major issues arise when these small agencies are tasked with enforcing animal protection laws and regulations to an entire province of animals. In addition, these enforcement agencies are tasked with animal rescue, adoption, shelter, health, and public education. Humane Societies and SPCAs from Alberta and Ontario reflect the difficulties that accompany these small enforcement agencies having such large mandates.

In Edmonton, the lack of resources has resulted in the Edmonton Humane Society announcing in early 2019 that it would no longer enforce the *Animal Protection Act*.²⁶ In response, the Alberta SPCA stated that it also had no obligation to enforce animal protection laws in Edmonton or Calgary.²⁷ This leaves the police in these cities as the only

²² *Id.*

²³ *Id.*

²⁴ See Constitution Act, 1867, *supra* note 1, at § 92.

²⁵ See, e.g. Animal Protection Act, R.S.A. 2000 Chapter A-41 Prevention of Cruelty to Animals Act, RSBC 1996 Chapter 372; The Animal Care Act, C.C.S.M. c. A84.

²⁶ Karen Bartko & Emily Mertz, *Edmonton Humane Society to Stop Enforcing Animal Protection Act*, GLOBAL NEWS (Jan. 25, 2019), <https://globalnews.ca/news/4878158/edmonton-humane-society-animal-protection-act-enforcement/>.

²⁷ Ian Kucerak *Alberta SPCA Reacts to End of Animal Protection Act Enforcement by Humane Society* Edmonton Journal (January 23, 2019), <https://>

law enforcement agency for animals. This is a responsibility that the police have not had for a long time and for which they do not have the resources to add to their current enforcement practices.²⁸ Thankfully, the City of Edmonton has created a new system of animal law enforcement, which is funded by the city.²⁹

The failure of dissociated animal protection agencies is worse in Ontario. In a recent Superior Court decision, *Bogaerts v. Attorney General of Ontario*, Justice Minnema found that the Ontario Society for the Prevention of Cruelty to Animals (OSPCA) Act was unconstitutional.³⁰ In the trial, many aspects of the OSPCA Act were questioned.³¹ Justice Minnema took issue with the fact that the OSPCA Act created a private charity that operated as a public law enforcement agency.³² Justice Minnema established a principle of fundamental justice that public agencies must be subject to accountability and transparency measures.³³ The OSPCA was not subject to these measures and was, therefore, unconstitutional.³⁴ As a result of this decision, the OSPCA made a public announcement that it will stop enforcing the OSPCA Act as of May 31, 2019, but will provide transitional help until June 2019.³⁵ Although this decision was overturned in November 2019, the OSPCA has been silent since the decision's release.³⁶ As with Edmonton, this means that the burden will shift to the police or new enforcement agencies to enforce animal protection laws.³⁷

Aside from the hardships incurred by agencies that enforce federal laws, certain provinces have enacted unique animal protection legislation. Two examples include Prince Edward Island's 2017 Circus Regulations and Nova Scotia's 2018 veterinary practice reforms. On April 13, 2017, Prince Edward Island (hereinafter "P.E.I.") amended its Animal Welfare Act and introduced the Circus Animals Regulations.³⁸ In effect,

edmontonjournal.com/news/local-news/watch-alberta-spca-reacts-to-end-of-animal-protection-act-enforcement-by-humane-society.

²⁸ *Id.*

²⁹ See Animal Care & Control Centre at https://www.edmonton.ca/residential_neighbourhoods/pets_wildlife/animal-care-control-centre.aspx.

³⁰ *Bogaerts v. Attorney Gen. of Ontario*, 2019 ONSC 41 (Can.).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ OSPCA, *Ontario SPCA and Humane Society Recommends A New Model to Provide Maximum Protection to Animals*, Ontario SPCA and Humane Society, (March, 2019), <http://ontariospca.ca/media-centre/media-releases/1571-ontario-spca-and-humane-society-recommends-a-new-model-to-provide-maximum-protection-to-animals-ontario-spca-initiates-transfer-of-enforcement-services.html>.

³⁶ *Ontario (Attorney General) v Bogaerts*, 2019 ONCA 876.

³⁷ *See id.*

³⁸ Animal Welfare Act, Chapter A-11.2.

P.E.I. banned circuses from including exotic animals.³⁹ Additionally, the Regulations set specific prohibitions on harmful training and handling practices, establish licensing and record-keeping procedures, and demand regular veterinary care for all animals authorized to be a part of a circus.⁴⁰ This unique legislation serves to prohibit harmful circus practices while establishing licensing procedures for public records.⁴¹ The Animal Welfare Act also describes penalties for contravention of any provision as up to twelve months imprisonment and a \$10,000 fine for offenders.⁴²

On October 11, 2018, Nova Scotia's Bill No. 27, amending the Animal Protection Act received royal assent.⁴³ This Act included provisions that prohibit elective cosmetic surgeries on animals.⁴⁴ For clarity, the Act describes cosmetic surgeries as surgeries performed "without a medical benefit" and "solely for the purpose of altering the appearance of an animal."⁴⁵ Cosmetic surgeries include tail docking, ear cropping, devocalizing, and declawing.⁴⁶ The Act also establishes that breaches of the provisions therein are punishable by up to two years imprisonment and \$75,000 in fines.⁴⁷ Like P.E.I.'s Circus Regulations, this legislation is unique in Canada. It establishes important prohibitions and punishments for unnecessary and harmful animal abuse.

These unique provincial statutes and lack of uniformity in law enforcement create weak, patchwork-like protections for animals in Canada. For example, traveling circuses that employ exotic animals or harmful training techniques need only skip P.E.I., a relatively small province, on their travels across Canada. Additionally, if a resident of Nova Scotia wanted to clip their dog's ears or tail, they would only need to cross the provincial border to find a veterinary clinic that still performs the surgery. Therefore, areas of Canada where enforcement is weak and additional provincial protections are not provided, animals are at a higher risk of being harmed and abused by humans. Further, the responsibility should not be left to the provinces to establish animal welfare protections and punishments for animal abusers. Offenders who victimize vulnerable animals should be subjected to federal criminal punishments. The patchwork protections fail animals who continue to suffer in Canada.

³⁹ *Id.* § 6(2).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Animal Protection Act, Bill No. 27, 2nd Session, 63rd General Assembly, Nova Scotia, 67 Elizabeth II, 2018.

⁴⁴ *Id.*

⁴⁵ *Id.* § 27(2).

⁴⁶ *Id.* § 27(2)(a, c-e).

⁴⁷ *Id.* § 42(1)(c).

Ideally, all public law enforcement agencies in Canada should enforce animal protection laws. Additionally, it is idea to ensure that all animals in Canada have the benefit of protection against harmful circus practices and unnecessary cosmetic surgeries. However, these ideals can only be achievable by a federally-enacted animal welfare bill, which would protect animals in Canada in a uniform way. As exemplified by P.E.I. and Nova Scotia's recent animal welfare legislation and the litigation of animal welfare in Alberta⁴⁸ and Ontario, animal welfare is a growing concern in Canada.

c. Legislation Recently Passed in Parliament

The recent Parliament passed historic legislation relating to animals in 2019. Three pieces of legislation addressed (1) whales and dolphins in captivity,⁴⁹ (2) Canada's role in the shark finning industry,⁵⁰ and (3) the sexual assault of animals.⁵¹ All three of these pieces of legislation received royal assent on June 21, 2019.⁵²

i. Ending the Captivity of Whales and Dolphins Act

This Act ends the purchase and import of orcas into Canada.⁵³ Unfortunately, the Act will not help orcas already in captivity (aside from preventing captive breeding), but it will prevent the needless suffering of orcas in the future.⁵⁴

ii. Act to Amend the Fisheries Act

In a large piece of legislation that amended the Fisheries Act, a small section of this Act prohibits people in Canada from removing fins from a shark and discarding the remainder of the animal while at

⁴⁸ See *Zoocheck Canada Inc v Alberta (Agriculture and Forestry)*, 2017 ABQB 764; *Reece v Edmonton (City)*, 2011 ABCA 238 [hereinafter *Zoocheck*].

⁴⁹ *Ending the Captivity of Whales and Dolphins Act*, S-203 2019, c. 1; Received Royal Assent June 21st, 2019 [hereinafter *Ending the Captivity of Whales*].

⁵⁰ *An Act to Amend the Fisheries Act and other Acts in Consequence*. Bill C-68 2019, c. 14; Received Royal Assent June 21st, 2019B [hereinafter *An Act to Amend the Fisheries Act*].

⁵¹ *An Act to Amend the Criminal Code (bestiality and fighting)*. Bill C-84 2019, c. 17; Received Royal Assent June 21st, 2019.

⁵² *Id.*; *Zoocheck*, *supra* note 48; *Ending the Captivity of Whales*, *supra* note 49.

⁵³ *Ending the Captivity of Whales and Dolphins Act*, S-203 2019, c. 1; Received Royal Assent June 21st, 2019.

⁵⁴ *Id.*

sea.⁵⁵ The Act also prohibits the import and export of detached shark fins.⁵⁶ This Act essentially ends Canada's involvement in the cruel shark finning industry.⁵⁷

iii. Act to Amend the *Criminal Code* (Bestiality and Animal Fighting)

This Act⁵⁸ addresses loopholes in the Criminal Code law surrounding bestiality and animal fighting.⁵⁹ In the 2016 decision *R. v. DLW*, the Supreme Court, in a 6:1 ruling, held that the definition of bestiality referred to acts of penetration only, thus declaring that non-penetrative forms of sexual relations with animals were not illegal.⁶⁰ This Act closes the gap in bestiality laws, making any contact with an animal for a sexual purpose illegal.⁶¹ Additionally, the Act makes certain conduct surrounding animal fighting illegal.⁶²

Because these recent pieces of legislation were proposed and approved so close in time, other proposed bills may continue to follow. Other issues in animal law, which have gained significant public attraction in Canada, include the continued operation of puppy mills,⁶³ cosmetics testing on animals,⁶⁴ and the use of inhumane traps for fur hunting.⁶⁵ This is in addition to the P.E.I. Circus Regulations and the prohibition of cosmetic surgeries in Nova Scotia. With the current momentum, more animal protection bills will be introduced to address the current unnecessarily cruel practices.

Nonetheless, proposing several small bills unnecessarily slows Parliament. Although incremental protections may result in effectively advancing animal welfare laws in Canada, expediency in the lawmaking process favors an all-encompassing bill that addresses all relevant areas of animal law.

⁵⁵ *An Act to Amend the Fisheries Act and other Acts in Consequence*. Bill C-68 2019, c. 14; Received Royal Assent June 21st, 2019.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *An Act to Amend the Criminal Code (bestiality and fighting)*. Bill C-84 2019, c. 17; Received Royal Assent June 21st, 2019.

⁵⁹ Criminal Code, *supra* note 2, at § 160.

⁶⁰ *R. v. DLW*, [2016] 1 SCR 402 (Can.). 2016 SCC 22.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Karen Gormley & Jim Berry "Animal Welfare Position Papers, Puppy Mills, and You" 2009 *Can Vet J* 55(11), 1166- 1168.

⁶⁴ See Giorgia Pallocca & Marcel Leist "Cruelty Free International: Ending Animal Experiments Worldwide" 2018 *ALTEX: Alternative to Animal Experimentation*, 35(4).

⁶⁵ See Andrea Fogelsinger "International Trapping: The need for International Humane Trapping Standards" 2017 *Animal & Nat. Resource L.*, 67.

d. *Necessity of a Uniform Approach to Animal Welfare*

In order to combat the current patchwork protections and bypass the lengthy process of enacting small, separate bills, the federal government must enact animal welfare legislation that protects all animals in Canada. Aside from federal and provincial legislative support, the Canadian public has shown a growing concern about the lack of animal protection in Canada.⁶⁶

The Canadian public was shocked in 2018 by the sad story of Molly, a pot-bellied pig from British Columbia (hereinafter “B.C.”).⁶⁷ Molly was rescued from an abusive situation and nursed back to health for six months by the British Columbia SPCA before she was adopted.⁶⁸ A local couple in B.C. adopted Molly and promised to care for her.⁶⁹ Less than a month after the adoption, the couple slaughtered and ate Molly.⁷⁰ Many Canadians were outraged and called for the criminal prosecution of the people who clearly violated the trust and promise with the B.C. SPCA.⁷¹ In response, the B.C. SPCA explained that it is not illegal in Canada to kill and eat one’s pets, as it is a legal use of property rights to dispose of one’s property as one wishes.⁷² However, if they had made Molly unnecessarily suffer during her slaughter (which the SPCA claims they did not), the couple may have broken the Criminal Code provisions against causing unnecessary suffering.⁷³ Canadians were confused by the lack of protection for Molly and the intersection between federal criminal law and provincial property law.⁷⁴ Many were left wondering how Molly’s slaughter could have possibly been legal.⁷⁵

A federal animal welfare bill is essential to address (a) the deficiencies in animal law enforcement; (b) the current patchwork

⁶⁶ See Canadian Centre for Food Integrity Public Trust Research “Connecting with Canadians” 2019 Retrieved from www.foodintegrity.ca; Camille Labchuk “Our Animal Cruelty Laws Need to Catch Up in 2018” *The Globe and Mail* February 25th 2018; Jeffrey M. Spooner, Catherine A. Schuppli, & David Fraser “Attitudes of Canadian Citizens Toward Farm Animal Welfare: A Qualitative Study” 2014 *Livestock Science* 163, 150—158.

⁶⁷ Amy Judd, *Pet Pig Adopted from BC SPCA Killed and Eaten by New Owners*, GLOBAL NEWS (Feb. 22, 2018, 9:22 PM), <https://globalnews.ca/news/4042125/pig-adopted-bc-sPCA-killed-eaten-owners/>; Malone Mullin, ‘Shock’ and ‘Heartbreak’ After Adopted Pig Ends Up on Dinner Table, CBC (Feb. 23, 2018, 7:44 PM), <https://www.cbc.ca/news/canada/british-columbia/molly-the-pig-1.455000010>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

of provincial protections; and (c) the growing public concern for the treatment of animals in Canada. The question then remains whether the federal government has the jurisdictional legislative power to create an animal welfare statute.

PART II: LEGALITY OF FEDERAL LEGISLATION PROHIBITING ANIMAL CRUELTY

This section explores the history of jurisdictional challenges to federal legislation and applies the legal analyses to previously proposed animal welfare legislation. Until the *Bogaerts* case in 2019, the issue of federalism and animal law had not been addressed since the 1960s.⁷⁶ In *Bogaerts*, Justice Minnema found animal law to be a double aspect; as such, if federal and provincial provisions do not contradict each other, then both governments may issue legislating concerning animal welfare issues.⁷⁷ The decision was overturned by the Court of Appeal on other grounds, and jurisdiction was not discussed during the appeal.⁷⁸ Further, judgment from the Ontario Superior Court of Justice does not carry as much weight as a judgment from the higher courts.⁷⁹ Therefore, it is prudent to look at the decisions of higher courts in respect to this matter.

The Supreme Court of Canada has addressed jurisdictional issues with other pieces of legislation. In *Bogaerts*, Justice Minnema found the OSPCA was legally enacted, meaning that there was no division of powers conflict in the province enacting legislation for animal protection. However, other Supreme Court jurisprudence—discussed below—provides helpful guidance to future legislative efforts.⁸⁰ The legal analyses provided within the judgments of the Supreme Court can be used to inform policymakers of how to draft federal legislation that can survive a constitutional challenge.

a. Issues with Federalism and Jurisdiction

When the heads of government enact animal protection laws, those laws are not immune to jurisdiction-based challenges before the

⁷⁶ See Canadian Counsel on Animal Care, “Guide to the Care and Use of Experimental Animals” (1993) Vol. 1, at I.A.1. Retrieved from: https://www.aaalac.org/accreditation/RefResources/CCAC_Experimental_Animals_Vol1.pdf.

⁷⁷ *Bogaerts*, 2019 ONSC, at para. 28.

⁷⁸ Ontario (Attorney General), 2019 ONCA 876.

⁷⁹ For an explanation of the structure of Canadian Courts, see “The Canadian Judicial System” Retrieved from: <https://www.scc-csc.ca/court-cour/sys-eng.aspx>

⁸⁰ See Zoocheck, *supra* note 48; and see Ending the Captivity of Whales, *supra* note 49; and see An Act to Amend the Fisheries Act *supra* note 50.

courts.⁸¹ Indeed, the multi-tiered system of animal protection legislation engenders constitutional challenges to the head of power's legislative authority to enact such laws. Therefore, if the government were to attempt to enact animal welfare legislation, the law must be created *intra vires*, or within their legislating power, it must not impede upon the legislative powers of the provinces. If the law were found to be *ultra vires*, or beyond the federal legislative powers, it would be found unconstitutional because the federal government would not have the authority to enact the law.⁸²

An example of the confusion surrounding federalism and animal law was exemplified in the 1960s when the federal government sought to address animal abuses in testing and scientific research.⁸³ In 1963, the Medical Research Council (United Kingdom) proposed that the Canadian National Research Council (hereinafter "NRC") establish a committee to study the conditions of animals used for experiments and provide recommendations for legislation.⁸⁴ The NRC Report of 1966 revealed that legislating regulations on the care of animals in laboratories was *ultra vires* the federal government and needed to be done at the provincial level.⁸⁵ Rather than lobbying for provincial legislation, the NRC established the Canadian Council on Animal Care (hereinafter "CCAC") in 1968 and made NRC funding for research contingent on approval of the CCAC.⁸⁶ Although researchers could conduct research without the funding, those who sought federal grants needed to be approved by the new council.

This example illustrates the regulation of animal testing as *ultra vires* the legislative authority of the federal government. However, in the decades that followed, the Supreme Court explained the legal analysis of the division of powers. The legal analysis articulated by the Supreme Court lends itself to explain when a federally-enacted law is valid (*intra vires*) or unconstitutional (*ultra vires*).⁸⁷

b. Federal Criminal Law Powers

The jurisdiction of Parliament to enact laws that impede upon provincial powers has long been the subject of litigation. Throughout the history of the jurisdictional division of powers, the Supreme Court

⁸¹ Federal Courts Act 18.1(4).

⁸² See Constitution Act, *supra* note 1, at § 52.

⁸³ Canadian Council on Animal Care, History: Evolution of the CCAC, <https://www.ccac.ca/en/about-the-ccac/history.html> (last visited Oct. 11, 2019).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *infra* notes 88, 89, 90.

has solidified a test to determine when a federally enacted law is a valid law, or whether a law is *ultra vires* the federal powers, and, therefore, unconstitutional.⁸⁸ Discussed below are three Supreme Court decisions that address the issue of federal jurisdiction. These cases concern environmental law,⁸⁹ firearms regulation,⁹⁰ and assisted human reproduction.⁹¹ Although none discuss animal welfare, the legal principles they contain, which establish jurisdiction and federal criminal law powers, will assist in guiding potential future federal animal welfare legislation.

In 1997, the Supreme Court released its decision in *R v. Hydro-Quebec*, which addressed the dumping of harmful chemicals into the St. Lawrence River.⁹² In recognition of Canada's international obligations to combat environmental damage, Parliament enacted the Canadian Environmental Protection Act (hereinafter "CEPA").⁹³ When the Minister of the Environment made an interim order to stop the dumping, Hydro-Quebec brought an action to have certain parts of CEPA declared *ultra vires* the federal government's powers to legislate.⁹⁴ Hydro-Quebec claimed that because environmental protections did not fall under any of the subject-matters in Section 91 of the Constitution Act of 1867, the federal government did not have the power to enact such laws.⁹⁵

In writing for a majority of five to four, Justice LaForest found that although the environment is not the subject matter of any powers under the Constitution Act, it crosses over many different areas of constitutional responsibility.⁹⁶ The majority found CEPA to be valid law.⁹⁷ Justice LaForest reasoned that the dominant purpose—"pith and substance"—of the impugned provisions in CEPA was to criminalize the dumping of toxic chemicals.⁹⁸ As the dominant purpose of the CEPA was to establish criminal law, the law fell under the federal head of power, as stated in Section 91.⁹⁹ The law was *intra vires* the federal government's power to enact and was therefore constitutionally valid.¹⁰⁰

Hydro-Quebec was the first use of this division of powers test by

⁸⁸ *Id.*

⁸⁹ *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 (Can.).

⁹⁰ Reference re Firearms Act, 2000 SCC 31.

⁹¹ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61.

⁹² *Hydro-Quebec*, 3 S.C.R. at 224.

⁹³ Canadian Environmental Protection Act, S.C. 1999, c 33 (Can.).

⁹⁴ *Hydro-Quebec*, 3 S.C.R. at § 225.

⁹⁵ Constitution Act, 1837, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no. 5, § 91 (Can.).

⁹⁶ *Hydro-Quebec*, 3 S.C.R. at § 308.

⁹⁷ *Id.*

⁹⁸ See Constitution Act, *supra* note 1, at § 130.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

the Supreme Court, and the test was accepted by both the majority and the dissent.¹⁰¹ There are two steps to this test:

Identify the pith and substance (dominant purpose) of the law; and

Identify the head of power to which that dominant purpose is assigned.¹⁰²

The majority found that the dominant purpose of CEPA was criminal in nature and that the powers of criminal law fell under the federal head of power.¹⁰³ Therefore, enacting CEPA was within Parliament's power.¹⁰⁴

The issue of jurisdiction and heads of power was again addressed in the Firearms Reference of 2000.¹⁰⁵ The issue was brought from Alberta and addressed the federally-enacted Firearms Act.¹⁰⁶ The Firearms Act requires that all owners of firearms obtain licenses and register their firearms. Using the division of powers test, the Supreme Court unanimously found the impugned provisions to be constitutional and a valid exercise of federal criminal law powers.¹⁰⁷

Concerning the first step of the test, the Court found the dominant purpose of the law was directed at enhancing public safety by controlling access to firearms.¹⁰⁸ The Court also considered the fact that Parliament had been legislating gun control for over a hundred years, and therefore, it was not necessary for the courts to prevent Parliament from doing so again.¹⁰⁹

In the second step of the test, the Court provided an analysis of the components of criminal law and when a statute will constitute valid criminal law.¹¹⁰ The Court reiterated the components of criminal law as (1) a prohibition backed by a punishment, which is (2) enacted with a valid public purpose.¹¹¹ The Court provided examples of valid criminal law purposes in the Margarine Reference, including public peace, order,

¹⁰¹ *Id.* §§ 23 and 112.

¹⁰² *Hydro-Quebec*, 3 S.C.R. at 239-40 (Lamer, CJ., and Iacobucci, J., dissenting).

¹⁰³ *See* Constitution Act, *supra* note 1, at § 130.

¹⁰⁴ *Id.*

¹⁰⁵ Reference re Firearms Act, *supra* note 89.

¹⁰⁶ *See generally* Firearms Act, S.C. 1995, c. 39 (Can.).

¹⁰⁷ *See* Firearms Reference.

¹⁰⁸ Firearms Reference, *supra* note 89, at § 4.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 25-47.

¹¹¹ *Id.* at paras. 27-28; *see also* *RJR-MacDonald, Inc. v. Canada*, [1995] 3 S.C.R. 199, para. 204 (Can.); *see, e.g.,* Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1, 50 (Can.) [hereinafter Margarine Reference].

security, health, and morality.¹¹² Since gun control was found to be directed at public safety and contained punishments and prohibitions, jurisdiction clearly fell under the federal criminal powers.¹¹³

The Court also addressed the overlap between federal and provincial powers in enacting laws. The Court recognized that as a function of federalism, each level of government could expect to have some overlap in legislative jurisdiction.¹¹⁴ The fact that there is overlap does not invalidate a law.¹¹⁵ Specifically, the Court noted that “the intrusions of the law into provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.”¹¹⁶ Following this logic, the Court found that although some of the provisions in the Firearms Act were not present in the Criminal Code, there was no basis for the conclusion that these provisions were not “criminal in nature.”¹¹⁷ Those peripheral provisions in the Firearms Reference were necessary and valid extensions of the Criminal Code.¹¹⁸

The Court ended its decision by addressing some of the concerns from the provinces. In doing so, they affirmed that Parliament’s intention was not to regulate property,¹¹⁹ and that the provinces still maintained the power to regulate firearms in harmony with the Firearms Act.¹²⁰ Concerning morality, the provinces attempted to argue that owning a firearm was not immoral.¹²¹ The Court rejected this argument, explaining that the misuse of firearms is clearly grounded in immorality and that the control thereof is directed at a moral evil.¹²²

Where the previous cases had dealt with statutes as a whole, the Reference re Assisted Human Reproduction Act of 2010 deals with carving out certain provisions that were found to be *ultra vires* federal power.¹²³ In this case, the question centered on whether the

¹¹² *Margarine Reference*, *supra* note 111, at para. 50.

¹¹³ *Firearms Reference*, *supra* note 89, at para. 31.

¹¹⁴ *Id.* at para. 26.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at para. 4.

¹¹⁷ *Id.* at para. 29.

¹¹⁸ The province has expressed concern about the licensing regulations which were enacted by the Firearms Reference, claiming that licensing was a purely regulatory function and not criminal law (*Id.* at paras 54—55). The Supreme Court’s finding the licensing provisions were valid as a natural extension of the criminal provisions has important implication for animal law (*Id.* at para 43) Following the Supreme Court’s reasoning, a piece of federal legislation may validly require all dog breeders to obtain licenses in order to combat illegal puppy mill practices.

¹¹⁹ *Reference re Firearms Act*, 2000 SCC 31., at paras. 36 - 40.

¹²⁰ *Id.* at paras. 50-53.

¹²¹ *Id.* § 54-55.

¹²² *Id.* at para. 54.

¹²³ *See Reference re Assisted Human Reproduction Act*, 2010 S.C.C. 61.

pith and substance of the Assisted Human Reproduction Act¹²⁴ focused on prohibiting improper medical practices or sought to regulate the practices.¹²⁵ Prohibiting improper medical practices would clearly fall under federal criminal powers, whereas regulating assisted human reproduction would clearly fall under provincial regulatory powers over healthcare. This was the central question because the Assisted Human Reproduction Act included prohibitions and punishments for certain actions, but also included specific laws for regulating the novel medical practices.

In analyzing the law, the Supreme Court was divided. Four justices found that the impugned provisions constituted valid criminal law.¹²⁶ In particular, they noted that the provisions that seemed regulatory in nature fell under ancillary criminal law powers and were necessary for the implementation of the criminal provisions in furtherance of the valid public purpose of public health.¹²⁷ In contrast, four justices found the provisions *ultra vires* as the pith and substance of the provisions were directed toward hospitals, property, and civil rights.¹²⁸

In splitting the tie, Justice Cromwell rejected the analysis of the ‘dominant purpose.’¹²⁹ Instead, Justice Cromwell identified the effects of the provisions separately and ruled on the constitutionality of each group of provisions separately.¹³⁰ Overall, the Reference re Assisted Human Reproduction Act gives rise to the notion that, for analyses of certain statutes, provisions that impede greatly upon provincial powers may be carved out as unconstitutional.

The provisions Justice Cromwell found to be purely criminal were constitutional.¹³¹ These included the provisions that were clearly prohibitions backed by penalties, such as the prohibition and punishment for human cloning.¹³²

The provisions, which legislated specific regulatory functions, were found by Justice Cromwell to exceed parliamentary powers.¹³³

¹²⁴ See Assisted Human Reproduction Act, SC 2004, c. 2.

¹²⁵ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61, at para. 23.

¹²⁶ *Id.* Sections 8, 9, 12, and 19 found constitutionally valid by McLachlin C. J., and Binnie, Fish, Charron, and Cromwell JJ. Sections 10, 11, 40(2)-(5), and 44(2)-(3) found constitutionally invalid by LeBel, Deschamps, Abella, Rothstein, and Cromwell JJ. Section 40(1) and (6)-(7), 41—43, 44(1) and (4), and 45—53 found constitutional to the extent that they relate to the constitutionally valid provisions by Cromwell J.

¹²⁷ *Id.* at para 10.

¹²⁸ *Id.*

¹²⁹ *Id.* at para. 284.

¹³⁰ *Id.* at paras 282-93.

¹³¹ *Id.* at 282-83, and 291.

¹³² *Id.* at para. 289 and 293.

¹³³ *Id.* at para 285.

These provisions created an agency that would be tasked with managing the information of assisted human reproduction.¹³⁴ Such provisions were found to be regulatory and, therefore, not within the federal government's power to legislate.¹³⁵ Other provisions addressed inspections to ensure compliance with the legislation.¹³⁶ Justice Cromwell found these provisions to be constitutional only to the extent that the provisions are related to criminal prohibition, not to the controlled activities.¹³⁷

All these cases help inform federal policymakers of the types of policies that will be accepted as constitutionally valid criminal law. The test for establishing valid legislative jurisdiction is clear: if the dominant purpose of the legislation falls under the head of power, which established the law, the statute will be valid. Concerning federal criminal law powers, the legislation must be articulated as prohibitions backed by punishments, which are enacted for a valid criminal law purpose.¹³⁸

As exemplified by Reference re Assisted Human Reproduction Act, the federal government may impose an obligation on the provinces to create enforcement agencies for the legislation but should refrain from including specific instructions.¹³⁹ As was articulated in the Firearms Reference, the provinces can be left to create enforcement and regulatory bodies in harmony with new criminal legislation.¹⁴⁰ With this guidance from the Supreme Court, the constitutionality of any future legislation concerning animals may be improved by consideration of the above decision on constitutionality.

c. Existing Draft Animal Welfare Legislation

With the growing push toward increasing animal rights, animal rights groups have begun advocating for national legislation and drafting proposals for such legislation. Two pieces of legislation have been drafted with the intention to guide lawmakers in enshrining animal rights into

¹³⁴ Assisted Human Reproduction Act, SC 2004, c. 2, at ss. 40(2)-(5), and 44(2)-(3).

¹³⁵ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61, at para. 294.

¹³⁶ Assisted Human Reproduction Act, SC 2004, c. 2., at ss 40(1) and (6)-(7), 41—43, 44(1) and (4), and 45—53.

¹³⁷ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61, at para 283.

¹³⁸ See *R. v. Hydro-Quebec* [1997] R.C.S. 213, 248 (Can.); and Reference re Validity of Section 5(a) of the Dairy Industry Act, [1948] S.C.R. 1, 50 (Can.) (that valid purposes include, but are not limited to, public peace, order, security, health, morality, or environment).

¹³⁹ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61, at para 293.

¹⁴⁰ See Reference re Firearms Act, 2000 SCC 31, 813-15 (Can.).

law. Both proposals were drafted as highly aspirational, and not with the hopes of coming into force as currently written. However, there is value in analyzing the proposals within the relevant constitutional framework.

i. Animal Charter of Rights and Freedoms

Canada's foremost animal legal advocacy group, Animal Justice Canada has drafted the Animal Charter of Rights and Freedoms.¹⁴¹ The Animal Charter is brief, consisting of three phrases of a preamble, a definition of "animals," and eleven provisions. Like the human-centric Canadian Charter of Rights and Freedoms, the Animal Charter of Rights and Freedoms seeks to provide animals with fundamental freedoms and legal rights. The full text of the Animal Charter can be found in Appendix B.

The Animal Charter, in its present form, would not withstand a constitutional challenge due to the legal tests of jurisdiction and criminal law powers. Recall that there are two tests that must be satisfied. The first test establishes the legislative head of power and the second analyses whether the legislation is valid criminal law.

The dominant purpose of the Animal Charter is to establish legal personhood, fundamental freedoms, and legal rights for all sentient non-human animals.¹⁴² Although that dominant purpose does not clearly fall into either of the heads of power, there are valid arguments as to why either head of power could legislate animal law. In *Bogaerts*, Justice Minnema found animal welfare to be the valid subject of both federal and provincial legislation.¹⁴³ As was the subject of the Firearms Reference, although guns are property, the Court found that the immoral uses of guns fell under the Federal criminal power.¹⁴⁴ Similarly, for animals, although animals are considered property, the immoral treatment of animals clearly falls under Federal criminal powers. This is bolstered by the recognition that immoral acts toward animals are already present in the Criminal Code, as were various firearms offenses.¹⁴⁵

The Animal Charter would likely fail on the consideration of whether the Animal Charter is valid criminal law. In order to be valid criminal law, the law must have been created for a valid public purpose and must be a prohibition backed by a penalty. There is no issue with the valid public purpose. Aside from Justice Minnema's finding, animal welfare may be found to be a valid subject of federal legislation

¹⁴¹ Animal Charter of Rights and Freedoms, <https://www.animaljustice.ca/charter> (last visited Oct. 30, 2019) [hereinafter Animal Charter].

¹⁴² *Id.*

¹⁴³ *Bogaerts*, 2019 ONSC, at para. 28.

¹⁴⁴ Firearms Reference, *supra* note 89, at para. 54.

¹⁴⁵ Criminal Code, *supra* note 2 at §§ 444—47.

through other areas already articulated by the Supreme Court. From the *Margarine Reference*, valid public purposes include public peace, order, security, health, and morality.¹⁴⁶ The court in *Hydro-Quebec* found that protection of the environment in itself was a valid analogous criminal purpose.¹⁴⁷ Drawing from *Hydro-Quebec*, a court could possibly find that the protection of animals is a valid criminal law purpose. More easily, a court could find a valid federal purpose rooted in the immorality of harming animals. In either case, there is a valid public purpose for the legislation.

The Animal Charter would fail judicial scrutiny because it does not contain any prohibitions or penalties. For example, s. 4 of the Animal Charter states that “[a]nimals under human care have the right to be free from abuse and neglect.”¹⁴⁸ Although this statement is rooted in animal protection and morality, it does not place a legal prohibition on humans from abusing or neglecting animals. There are also no articulated punishments for depriving an animal of his or her fundamental freedoms or legal rights.

Animal Justice advocates that Parliament must enact federal animal welfare legislation. Unfortunately, the Animal Charter they propose would likely be found *ultra vires* Parliament’s power to enact. However, as previously stated, the Animal Charter was drafted as aspirational, not as a proposed piece of legislation.

ii. Model Animal Welfare Act

The Model Animal Welfare Act¹⁴⁹ (hereinafter Model Act) was drafted by the United States-based group World Animal Net. Within the Model Act, there is a 41 page-long “Proposal for the Wording of a New Animal Welfare Act.”¹⁵⁰ Of particular focus are Chapter 2 and § 43, which state the general provisions of the Model Act and the potential penalties for violations of the Model Act.¹⁵¹ The full wording of Chapter 2 and § 43 of the Model Act can be found in Appendix C.

Chapter 2 of the Model Act would have a greater chance of withstanding a constitutional challenge on the basis of jurisdiction. For the same reasons, as stated above, the Model Act would likely satisfy the test to determine the legislative head of power over animals as a valid moral or criminal law purpose. The Model Act establishes clear prohibitions. For example, §7(1) of the Model Act states:

¹⁴⁶ *Margarine Reference*, *supra* note 111, at para. 50.

¹⁴⁷ *Hydro-Quebec*, 3 S.C.R. at para. 43.

¹⁴⁸ Animal Charter, at § 4.

¹⁴⁹ Janice H Cox & Sabine Lannkh, *Model Animal Welfare Act: A Comprehensive Framework Law I*, (World Animal Net ed.) (2016).

¹⁵⁰ See Cox & Lannkh, *supra* note 149, at 41-86.

¹⁵¹ See Cox & Lannkh, *supra* note 149, at 50-53.

1. It is prohibited to inflict or cause pain, suffering or injury on any animal, or to expose them to fear or distress, or illness or disease, without sound justification (based on over-riding reasons of animal and/or human welfare). It is furthermore prohibited, being the owner or person responsible, to cause or permit any animal to be so treated; or for any person to fail to take reasonable steps to prevent such treatment.¹⁵²

Section 7(2)(1-23) goes on to state specific acts which violate § 7(1). Section 8 of the Model Act prohibits unlawful human intervention on animals, and § 9 prohibits the killing of animals without sound justification.¹⁵³ These three sections clearly state prohibitions.

Section 43 of the Model Act details the “Penal and Administrative Fine Provisions.”¹⁵⁴ Section 43(1) articulates the levels of offenses (four levels increasing in severity) and states that an individual who is found to have breached a provision in the Model Act is guilty of a criminal offense and liable to a term of imprisonment, with a fine to be determined by a competent authority, or both.¹⁵⁵ Although the penalties are not specific, their presence may nevertheless satisfy the requirement of a penalty. Overall, if Parliament were to enact sections 1-9 and section 43 of the Model Act, it would likely be upheld as valid criminal law *intra vires* the federal legislative authority.

Because of the different power dynamics between the federal and state governments in the United States, the Model Act also includes specific provisions that are highly regulatory in nature.¹⁵⁶ These provisions create bodies of administration and enforcement.¹⁵⁷ Although this is meant to guide both the federal and state governments in the United States, these provisions may not be similarly *intra vires* in Canada. Following the logic in the Firearms Reference, although the Model Act contains regulatory provisions, those provisions may be found to be valid because they address the legitimate criminal provisions.¹⁵⁸ Conversely, following the logic of Cromwell J in the Reference re Assisted Human Reproduction Act, because the provisions are highly regulatory in nature, they are either (a) *ultra vires* the federal government powers and should, therefore, be struck, or (b) are only valid to the extent that they

¹⁵² Cox & Lannkh, *supra* note 149, at 50.

¹⁵³ *Id.* §§ 8-9.

¹⁵⁴ See Cox & Lannkh, *supra* note 149, at 84.

¹⁵⁵ *Id.* at 84.

¹⁵⁶ *Id.* at 102-127.

¹⁵⁷ *Id.* at 131-132.

¹⁵⁸ See Reference Re Firearms Act, para. 24.

relate to the valid criminal provisions. In either event, the inclusion of some regulatory provisions does not detract from the provisions which are valid criminal law.¹⁵⁹

The Model Act illustrates a draft piece of criminal animal law that may withstand a constitutional challenge. Where the Animal Charter fails to prove as valid criminal law, the Model Act includes valid criminal law. If a piece of legislation were to succeed in Canada, the Model Act would provide a more jurisdictionally, reliable basis. However, a new piece of animal welfare legislation may be necessary to address the deficiencies of both the Animal Charter and the Model Act.

PART III: GUIDELINES AND FRAMEWORK FOR A NEW ANIMAL WELFARE BILL

By identifying the deficiencies of the Animal Charter and the Model Act, the new guidelines and a framework for valid animal protections through criminal law become clear. In this last section, three considerations guide the drafting of a brief framework for future proposed legislation.

a. Guidelines and Considerations

The first consideration is the purpose of the animal welfare legislation and whether the courts will consider animal welfare is in itself a valid concern which attracts the attention of the criminal law. In *Hydro Quebec*, the Supreme Court found that the protection of the environment is itself was a valid criminal law objective.¹⁶⁰ It is possible that a court would similarly find the protection of animal welfare as a valid criminal law objective. The fact that criminal provisions prohibiting cruelty to animals have existed since the adoption of the Criminal Code bolsters the argument that animal welfare and the protection thereof is a valid criminal concern under federal legislative jurisdiction.¹⁶¹

However, to articulate the purpose of the legislation as the protection of animal welfare is a risk because the court could find that animal welfare is a property concern, which falls under provincial legislative authority. In order to mitigate this risk, the purpose of the legislation should clearly articulate the criminal nature of the proposed laws. Rather than protecting animal welfare in Canada, the purpose of the legislation should be articulated as the prohibition of animal abuse

¹⁵⁹ Reference re Assisted Human Reproduction Act, 2010 S.C.C. 61, at paras. 285-93.

¹⁶⁰ *R v. Hydro-Quebec*, [1997] 3 S.C.R. 213, para. 43 (Can.).

¹⁶¹ See Criminal Code, *supra* note 2, at § 445.

and suffering in Canada. Such a purpose clearly falls within the federal criminal law powers.

The second consideration of any proposed legislation is the text of the body. The Animal Charter fails to present valid criminal law because the body of the document is not criminal in nature, meaning that the text does not contain prohibitions backed by penalties. The Firearms Reference is an example of a law that seeks to prohibit the misuse of firearms by containing express prohibitions and penalties for breaching those prohibitions.¹⁶² Therefore, for a greater chance of success, the draft prohibition of animal abuse must contain prohibitions and penalties that are clearly articulated.

The Model Act contains prohibitions at sections 7-9 and penalties in section 43.¹⁶³ The prohibitions provide a good example of articulable prohibitions of human actions onto animals.¹⁶⁴ The penalties in the Model Act are vague, as section 43 leaves the punishments for breaching any prohibition to a competent legislative authority.¹⁶⁵ The vagueness of this provision may be remedied in proposed Canadian legislation by articulating a clear punishment for the offenses contained within the proposed legislation. Of course, punishments in Canada are almost always subject to judicial discretion, meaning that a sentence in Canada for crimes committed may still vary, similarly to the “level of offenses” in section 43.¹⁶⁶

A third concern is the inclusion of administrative and enforcement provisions. When addressed in the Reference re Assisted Human Reproduction Act, the provisions related to administrative and enforcement were found to be a valid use of Parliament’s ancillary powers.¹⁶⁷ Justice Cromwell found the provisions to be valid only so far as they related to the valid criminal provisions and found that other administrative provisions were too specific and the impediment upon provincial powers, therefore, was unconstitutional.¹⁶⁸ Drawing from this case, any provisions which relate to administrative provisions and enforcement of proposed animal legislation should refrain from being too specific to prevent impeding upon provincial powers.

For example, the Implementation and Enforcement provisions contained in the Model Act are likely to be too specific to be found to further the valid criminal law purpose of the Model Act.¹⁶⁹ However, any

¹⁶² See Reference re Firearms Act, 1 R.C.S. 783, 784 (2000).

¹⁶³ Cox & Lannkh, *supra* note 149, at 96-98, 138.

¹⁶⁴ *Id.* at § 43.

¹⁶⁵ Cox & Lannkh, *supra* note 149, at 138.

¹⁶⁶ Cox & Lannkh, *supra* note 149, at 138.

¹⁶⁷ Reference re Assisted Human Reproduction Act, 3 R.C.S. 457, 523-24 (2010).

¹⁶⁸ *Id.* at para. 292.

¹⁶⁹ See Cox & Lannkh, *supra* note 149, at 128—137.

proposed legislation may still suggest the addition of administrative and enforcement bodies to the extent that they further the valid criminal law purposes of the legislation. In this way, and consistent with the Firearms Reference, the provinces would still have the legislative authority to enact regulations in harmony with the federal legislation.¹⁷⁰

In order to avoid the issues previously raised in constitutional challenges to federally-enacted laws, any proposed legislation should (1) clearly articulate a purpose grounded in valid criminal concerns, (2) contain clear prohibitions and penalties, and (3) create administrative and enforcement bodies without including overly specific provisions.

b. Legislative Framework: Example “Prohibition of Animal Abuse Act”

Following the above guidelines, the remainder of this paper proposes a guiding framework for a draft “Prohibition of Animal Abuse Act.” For brevity, the draft framework here includes only general remarks for provisions.

Title: An Act respecting the protection of animals from abusive human conduct. [Prohibition of Animal Abuse Act]. The title conveys a clear prohibitive intention: the prohibition of humans abusing animals.

Part I: Preliminary provisions. This section should include a description of the objective of the Act as it aims to prohibit humans from subjecting non-human animals to immoral and abusive conduct, which causes suffering. This section should also include the definition of “animal.” A conflict provision should state that were any laws conflict, the prevailing law is the law that affords greater protections to the animal(s).

Part II: Prohibitions. This section could contain various provisions, each of which would be paired with a punishment. Prohibitions may include (1) prohibition of cruelty to animals, (2) prohibition of causing animals to suffer, (3) prohibition of the unlawful killing of animals, and (4) prohibition of keeping animals contrary to a court order. Although these pose as general provisions, specific prohibition should be articulated for clarity, such as the existing prohibitions against (a) bestiality, (b) animal fighting, (c) orca captivity, (d) shark finning, (e) puppy mills, (f) the use of exotic animals in circuses, (g) cosmetic surgeries, (h) inhumane fur traps, and any other specific animal law issue an act seeks to address. In this way, morally reprehensible abuse would be generally prohibited, and without limiting the general reach of these provisions, specific offenses could be targeted.

Part III: Enforcement. This section would introduce an obligation on the provinces for creating a competent authority to

¹⁷⁰ See Reference re Firearms Reference, S.C.C. 200 at paras. 50-53.

enforce the Act. The competent authority would also be tasked with making certain authorizations regarding human conduct and action with animals. The competent authority which enforces the Act would not be additionally burdened with non-criminal animal welfare responsibilities, such as maintaining animal shelters or providing adoption services. Such non-criminal responsibilities may be carried out by other organizations. This section could also establish legal personhood for animals, and give animals the entitlement to legal representation in Canadian courts.

Although brief in this paper, a draft bill based on this framework has a significant chance of withstanding a constitutional challenge if the federal legislative powers are challenged. Future steps to be taken include the substantive drafting of a “Prohibition of Animal Abuse Act.”

II. CONCLUSION

This paper has illustrated how the division of powers creates jurisdictional issues for the development of animal protection laws in Canada. Despite jurisdictional frustrations, both the federal and provincial governments have introduced legislation that seeks to increase legal protections for certain—not all—animals. Unfortunately, the resulting patchwork protections, sparse enforcement, and slow enactment of federal bills demand greater action in order to protect animals. Despite recent advancements, when approached about the possibility of introducing universal animal protection legislation, Parliament has shown reluctance and has suggested that animal protection belongs to the provinces.

In examining the jurisprudence of the Supreme Court, which addresses the legislative division of powers, a guide to enacting valid federal criminal law was produced. Arguments were made that a piece of legislation that contains a clear purpose of preventing animal abuse, as well as clear offense provisions, fall under the federal criminal law powers. Such a piece of legislation may withstand a constitutional challenge for jurisdiction. Unfortunately, legislation would merely prohibit certain human actions (a negative right). This is contrasted to law which would seek to give animals positive rights to be treated well; however, such positive rights may not fall under the federal power to enact criminal laws.

In recognition of the guidelines and framework for legislation offered by this paper, a new Canadian draft animal welfare policy should be produced. Perhaps when presented with a policy that could be classified as valid federal criminal law, Parliament would enact the bill, and legal protections for animals will be truly and effectively established in Canada.

APPENDIX A

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APPENDIX B

Model—*Animal Charter of Rights and Freedoms*

Animal Charter of Rights and Freedoms

Whereas non-human animals experience both suffering and pleasure in the same way that humans do; Whereas discrimination on the basis of arbitrary characteristics, such as species, is a violation of equity, natural justice and the rule of law; Whereas our legal system must not exclude the most vulnerable members of society;

DEFINITIONS

“Animals” means sentient, non-human animals.

LEGAL STATUS

1. Animals have the right to have their interests represented in court.
2. Animals are persons under the law.

FUNDAMENTAL FREEDOMS

3. Animals under human care have the right to be free from pain, injury or disease.
4. Animals under human care have the right to be free from abuse and neglect.
5. Animals under human care have the right to be free from fear, and emotional and psychological distress.
6. Animals in the wild have the right to live free from human intervention or exploitation.

LEGAL RIGHTS

7. Animals under human care have the right to adequate, species-appropriate food and water.
8. Animals under human care have the right to safe, clean, and comfortable shelter.
9. Animals in the wild have the right to enjoy a clean and ecologically sound natural habitat.
10. All animals have the right to socialize with friends and family in a manner that is appropriate for their species.
11. All animals have the right to engage in normal and natural behaviours.

APPENDIX C
Model—*Animal Welfare Act*

Chapter 2: General Provisions, ss. 7 - 9

Section 7 Prohibition of Cruelty to Animals

(1) It is prohibited to inflict or cause pain, suffering or injury on any animal, or to expose them to fear or distress, or illness or disease, without sound justification (based on over-riding reasons of animal and/or human welfare). It is furthermore prohibited, being the owner or person responsible, to cause or permit any animal to be so treated; or for any person to fail to take reasonable steps to prevent such treatment.

(2) Without limiting sub-section (1), sub-section (1) is in particular violated if a person

1. Kills any animal using a method which is inhumane, or in a manner that involves pain, suffering, injury, fear or distress for the animal.
2. Severs a limb from a live animal. Wounds, beats, kicks, overrides, over-drives, over-loads, overworks, mutilates, torments, tortures or otherwise treats any animal in a way that subjects, or is likely to subject, it to pain, suffering, injury, fear or distress.
3. Demands from an animal any work, labour or performance which is beyond the animal's current natural strength or species-specific behaviour, or of which the animal is physically or health-wise not capable at that time or which involves, or is likely to involve, pain, suffering, injury, fear or distress for the animal.
4. Does or omits to do an act with the result that pain, suffering, injury, fear, distress, illness or disease, is caused, or is likely to be caused, to an animal. Fails to provide an animal he or she keeps or cares for with sufficient, appropriate and constantly accessible food and drink to maintain it in full health and vigor.
5. Offers an animal food or substances the ingestion or digestion of which causes, or is likely to cause, pain, suffering, injury, fear or distress for the animal; or forces the animal to ingest food and substances when this is not necessary due to reasons of the animal's health or on veterinary/medical grounds.
6. Fails to provide an animal he/she keeps or cares for with an appropriate environment including shelter, proper facilities, a comfortable resting area and the opportunity to carry out normal, non-harmful social behaviours, in a way that results, or is likely to result, in pain, suffering, injury, fear, distress, or illness for the animal involved. In the case of an animal being exhibited to the public, this would include a place where the animal has the opportunity to seek privacy from the viewing public at all times.
7. Exposes an animal to temperatures, weather conditions, wrong chemistry (for aquatic animals), lack of oxygen or restriction of free movement inflicting, or likely to inflict, pain, suffering, injury, fear, distress, illness or disease on the animal.

8. Keeps or confines any animal in any enclosure, cage or other receptacle which is not designed in such a way, or does not measure sufficient in height, length and breadth, to permit the animal appropriate opportunity for movement and performance of its species-specific needs and behaviours, or does not provide access to a natural substrate, (unless this is a temporary measure to safeguard the animal's welfare).
9. Keeps any animal chained or tethered in a way that does not permit the animal appropriate opportunity for movement and performance of its species-specific needs and behaviours (unless this is a temporary measure to safeguard the animal's welfare).
10. Breeds animals which will be, or are likely to be, inflicted with pain, suffering, injury, fear, distress, illness or disease; or where their descendants will be, or are likely to be, inflicted with pain, suffering, injury, fear, distress, illness or disease (inhumane breeding practices).
11. Raises an animal in a way that causes, or is likely to cause, them pain, suffering, injury, fear, distress, illness or disease, including subjecting the animal to premature maternal separation, based on the natural age of dispersion of the species.
12. Trains, promotes, stimulates or increases aggressiveness or fighting readiness of an animal through breeding selection or other breeding technologies or methods. Advertises, imports, exports, keeps, possesses, sells, offers for sale, or passes on an animal bred, raised or treated in the ways referred to in items 12, 13 or 14 of this sub-section.
13. Sets an animal on another animal; incites animal fighting or causes an animal to fight against another animal or human; organizes, assists or attends the fighting of any animal; owns, possesses, trains, transports, or sells any animal with the intent that such animal shall be engaged in fighting with another animal or human; keeps, uses, manages or assists in the management of any premises or place used for the purpose or partly for the purpose of fighting any animal, or permits any premises or place to be so kept, managed or used for the same; promotes or advertises any event involving animal fighting; or receives or causes or procures any person to receive any money or other valuable for the admission of any person to such premises or place or for the purpose of betting on or assisting at such fights; or possesses, whether for sale or self-use, video images of such fights.
14. Promotes, stimulates or increases aggressiveness/fighting readiness of an animal by training, 'negative reinforcement' or other similar methods.
15. Uses any measures, methods, aids or devices in training or during sports or competitions or similar events which are linked to pain, suffering, injury, fear or distress for an animal; or administers any unauthorized substance or drug in order to enhance an animal's performance.

16. This shall include the prohibition of ‘negative reinforcement’ methods of training; and a ban on the use of any cruel devices and implements such as bullhooks, electric prods, goads, pitchforks, baseball bats, whips, and any other cruel devices.
17. Causes, procures or assists at any shooting or hunting event, match or competition wherein an animal is released from captivity for the purpose of such event, match or competition; or receives or causes or procures any person to receive any money for such event, match or competition.
18. Uses any unauthorized devices or methods of capture or entrapment; or uses authorized traps and catching devices in such a way that does not result in capturing the animal unharmed or killing the animal instantly.
19. Uses a live animal for feed or bait, or breeds or keeps a live animal for this purpose. [In cases where the welfare of animals cannot be assured without feeding with live feed or bait, then such animals shall not be kept.]
20. Conveys or carries, whether in or upon any vehicle or not, any animal in such a manner or position which causes, or is likely to cause, pain, suffering, injury, fear, distress, illness or disease.
21. Abandons a domestic or companion animal; abandons or releases into the wild a non-indigenous wild animal; or abandons or releases into the wild an indigenous wild animal which has not been fully rehabilitated to adapt to a life in the wild or where there is any doubt that it will survive in the territory to which it is being released.
22. Gives an animal away as, or offers an animal as, a prize or award.
23. Uses an animal for film shots, advertising, exhibitions or similar purposes or events if this causes, or is likely to cause, pain, suffering, injury, fear, distress, illness or disease for the animal. Performs/carries out an action of a sexual nature on or with an animal.

Section 8 Prohibited Interventions Performed on Animals

- (1) Any intervention carried out on an animal other than for therapeutic or diagnostic purposes (in accordance with legal regulations applicable) is prohibited.
- (2) It is in particular prohibited
 1. To partly or completely amputate any body part;
 2. To partly or completely remove or destroy any organ or tissue of the animal; or
 3. To carry out any intervention to create a transgenic animal.
- (3) Exceptions to these prohibitions are only permitted
 1. To prevent reproduction;
 2. To indicate a neutered stray animal by the tipping of an ear; or When necessary for over-riding animal welfare reasons; and in such cases, only when there is no alternative solution and the most humane method available has been used.

- (4) If the intervention will cause, or is likely to cause, any pain for the animal and in the cases referred to in sub-sections (3) 1. and (3) 2. above, it must be carried out under effective anesthesia and by a veterinarian, who shall ensure that all available measures are taken to achieve a procedure and recovery free from pain, suffering, fear or distress, in particular including the administration of sedation, local anesthesia, non-steroidal anti-inflammatory drugs and analgesia.
- (5) It is prohibited to mark or identify an animal in such a way that causes, or is likely to cause, pain, suffering, injury, fear or distress.
- (6) In addition: Authorization of the Minister responsible, the Ministry or the Competent Authority to adopt any regulations [and establish, as appropriate, 'Welfare Codes', standards and guidance] in this context.

Section 9 Prohibition of Killing Animals

- (1) It is prohibited to kill an animal without any sound justification.
- (2) It is prohibited to kill a companion animal, such as a dog or cat, for the purpose of obtaining/manufacturing food, feed, fur or other products.
- (3) It is prohibited to kill any animal in order to provide entertainment or as part of a cultural ritual or celebration.
- (4) Where authorization is granted for the killing of vertebrate animals for any purpose covered in this Act (for example, humane euthanasia of companion animals and the expert/competent killing of farm or game animals), this must be carried out in a specified humane manner, in accordance with Section 20 below.
- (5) In addition: Authorization of the Minister responsible, the Ministry or the Competent Authority to adopt any regulations [and establish, as appropriate, 'Welfare Codes', standards and guidance] in this context.

Section 43 Penal and Administrative Fine Provisions

- (1) Liable of a criminal offence and on conviction to imprisonment for a period not exceeding a level 4 offence and to a fine according to a level 4 offence shall be who
 1. Kills any sentient animal without a sound justification;
 2. Inflicts on any sentient animal
 - a. Deliberately, intentionally or out of brutality pain or suffering; or
 - b. Prolonged or repeated pain or suffering;
 3. Sets any animal on another animal with the intent that a sentient animal experiences pain, suffering or injury;
 4. Performs an act of bestiality with a sentient animal; or
 5. Abandons any sentient animal that is unlikely to survive in freedom.

- (2) An administrative offence is committed by any person who deliberately or negligently violates against the provisions of Sections 7, 8, 10, 11 or any of the Sections listed under Chapter 3 (Keeping of Animals/Care of Animals) and Chapter 4 (Specific Categories of Animal Use).
1. In minor cases the punishment for such an administrative offence will be classified as a level 1 offence.
 2. In serious cases the punishment for such an administrative offence will be a fine according to a level 2 offence.
 3. For aggravated infringements as well as repeated offences the fine will be rated as a level 3 offence.

The separate banding list could then read as follows:

Level 1 offence—minor infringements.;

Level 2 offence—serious infringements;

Level 3 offence—aggravated infringements as well as repeated offences; and

Level 4 offences—imprisonment and/or fine for criminal offences

CORPORATE CRUELTY: HOLDING FACTORY FARMS ACCOUNTABLE FOR ANIMAL CRUELTY CRIMES TO ENCOURAGE SYSTEMIC REFORM

MARY MAERZ

Abstract: Animal cruelty within industrialized animal agriculture, or factory farms, is a major concern of the animal protection movement. Two types of animal cruelty exist in factory farms: systemic and egregious cruelty. Systemic cruelty refers to day-to-day operations of factory farms which expose farm animals to the most constant and prolonged suffering. Egregious cruelty refers to specific acts of violence to animals by farm workers. While systemic cruelty is the top priority of animal advocates, only criminal prosecution of egregious cruelty has gained traction. This Note proposes that animal advocates, through the criminal justice system, should seek to apply the doctrine of corporate criminal liability to egregious anti-cruelty cases. Doing so would address the factory farming system itself, deter the corporation from allowing similar conduct to continue, incentivize the corporation to make systemic reforms to avoid liability, and address controversial prosecutions of factory farm workers. Anti-cruelty violations of workers can satisfy the elements of the legal doctrine for corporate criminal liability. Due to the nature of their day-to-day work, factory farm workers, when they commit acts of egregious cruelty, are employees of the factory farm corporation, working within the scope of their employment, and to the benefit of the corporation. The *mens rea* element required for criminal corporate liability can be satisfied by imputing the workers' knowledge or intent to the corporation. Animal advocates can take advantage of the ability to prosecute egregious anti-cruelty cases arising from factory farms through corporate liability to better impact systemic cruelty reform.

I. INTRODUCTION

The industrialized animal agricultural system of the twentieth and twenty-first centuries¹ is fertile ground for criticism from animal protection and advocacy groups.² The industrial settings of factory

¹ See Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 *LAW & CONTEMP. PROB.* 325, 327-28 (2007), for a detailed discussion on the history and workings of factory farms and their implications on animal welfare.

² Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and its Enforcement*, 4 *J. ANIMAL L. & ETHICS* 63, 64-65 (2011) (“[a]nimals raised to be

farms³ create environments exhibiting extensive cruelty to the animals within the system's facilities. With the rise in popularity and use of undercover investigations into factory farms by animal advocates,⁴ the use of prosecutorial means of addressing cruelty against animals in industrial settings has emerged.⁵ While the prosecution of anti-cruelty law violations committed by factory farm workers is seen as an animal advocacy success,⁶ solely targeting short-term, isolated solutions to systemic problems inherent in industrial agriculture cannot effectively change the system. Rather than merely bringing criminal actions against factory farm workers who are documented violating anti-cruelty laws, prosecutorial action should be brought against the overarching corporations of these factory farms for anti-cruelty law crimes under a doctrine of corporate criminal liability.

Previous scholarship has examined the prosecutorial successes, failures, and the challenges of enforcing anti-cruelty laws against factory farm workers.⁷ Proposed legal reforms to better target animal

killed for food comprise over 98% [of the animals killed in the United States].... Over 10 billion land animals alone are killed in the U.S. each year for food.... Well over 90% of these are raised in intensively confined and industrialized factory farming conditions. From [a greater] animal advocacy perspective, this means that all of the animals killed in vivisection...., in hunting, trapping, and fur...., companion animals... in shelters...., in entertainment...., and all other types of animals killed by humans do not even comprise 2% of the overall number.”)

³ A factory farm is a large, industrial operation that raises large numbers of animals for food. The term “factory farm” is often used interchangeably with industrial farms or industrial agriculture. Matheny & Leahy, *supra* note 1, at n. 11.

⁴ Pamela Fiber-Ostrow & Jarret S. Lovell, *Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation*, 19 CONTEMP. JUST. REV. 230, 231 (2016).

⁵ See Leahy, *supra* note 2, at 80-125 (sketching cases in which undercover investigations led to criminal actions).

⁶ See *Our Powerful Progress*, Mercy for Animals, <https://mercyforanimals.org/legal> (last visited Mar. 4, 2019) (advertising on its website that, “[a]fter a 2017 MFA undercover exposé that revealed workers punting and throwing chickens and ripping the legs off conscious birds, 38 charges were brought against Elite Farm Services, Sofinia Foods, and a chairman of Elite Farm Services.”; see also Michelle Kretzer, *Meet Your ‘Happy’ Meat: 46 Cruelty Charges for Owner of ‘Happy’ Farm*, PETA (Sept. 4, 2018), <https://www.peta.org/blog/46-cruelty-charges-owner-of-happy-farm/>. Recently, PETA touts 46 cruelty charges against an owner of a small, family-operated poultry and egg farm. Seven workers at a Tyson factory farm in Virginia were convicted in 2017 of cruelty to animals after undercover investigation revealed egregious cruelty to chickens.

⁷ See Leahy, *supra* note 2. Leahy evaluated the use of applying existing law to target the ills of factory farming, namely the abuse and neglect of animals in industrialized agriculture. While Leahy notes significant strides in the ability to enforce anti-cruelty laws, she notes that the enforcement is generally limited to cases of egregious animal abuse, rather than systemic animal neglect.

cruelty in this realm include increased enforcement of anti-cruelty laws,⁸ greater prevalence of undercover investigations,⁹ increased pressure on public officials to prosecute anti-cruelty violations,¹⁰ education of law enforcement,¹¹ increased publicity,¹² increased access to information,¹³ private or civil enforcement mechanisms,¹⁴ and challenges to farming

⁸ *Id.* at 127. Leahy advocates for an increase in the use of existing anti-cruelty laws, although the proposed mechanism for this increase is unclear.

⁹ *Id.* at 128; see also Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. MARSHALL L. REV. 649, 652 (2017). Evidence obtained from undercover investigations has led to massive food recalls, lawsuits, stronger animal-protection laws, changes in corporate policy, as well as criminal convictions; see, e.g., Andrew Martin, *Largest Recall of Ground Beef is Ordered*, N.Y. TIMES (Feb. 18, 2008), www.nytimes.com/2008/02/18/business/18recall.html (reporting on largest beef recall in history--143 million pounds of beef produced by Hallmark/Westland Meat Company, following an undercover investigation by the Humane Society of the United States that revealed workers on forklifts forcing "downer" cows into slaughter, a severe violation of food safety laws); Matt Rice, *Progress: Walmart Announces Sweeping Animal Welfare Policy*, MFA Blog (May 22, 2015), (announcing Walmart's stated commitment to improving farmed animal welfare across its entire global supply chain following a string of undercover investigations revealing egregious abuse among its pork suppliers); Complaint at 22, *Animal Legal Defense Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013) (presenting litany of animal-cruelty convictions founded on evidence obtained during undercover investigations by animal-rights groups).

¹⁰ Animal cruelty laws also have an enforcement problem, with animal abuse cases often being "shuffled to the bottom of the pile," and enforcement agents lacking funding and resources to vigorously pursue suspected cases. See, e.g., Cynthia Scanlon, *Animal Abuse Targeted*, NAT'L L.J., 20, 20 (1997); Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 16 (1998).

¹¹ Leahy, *supra* note 2, at 128 ("[H]umane/SPCA officer, police, and sheriffs' departments should be educated on these issues to help them understand the extent of the problem and their powers and jurisdiction in enforcing cruelty laws, particularly against large-scale commercial farming operations.").

¹² *Id.* at 74-75 ("Veganism and vegetarianism are the most obvious and basic ways a person can elect not to support factory farming. This sort of boycott of animal products is key to effecting tangible change, as is providing educational and other resources to help encourage the growth of vegetarianism and veganism, and to encourage a reduction in the consumption of animal products generally. Additional tools, however, are also required to target a problem of such magnitude. Advocacy groups have used a variety of tools, including humane education, corporate campaigning, outreach to restaurants and other businesses, social network-building, the creation and maintenance of animal sanctuaries, investigations into factory farming practices, campaigns to get healthy plant-based items in schools, and a variety of other methods to combat factory farming.").

¹³ *Id.*

¹⁴ See, e.g., William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005) (evaluating the strengths and weaknesses of North Carolina law which allows citizen standing to sue for civil enforcement of animal cruelty laws).

exemptions in cruelty codes.¹⁵ One scholar asserts that criminal animal abuse protections should be applied to animals raised for food, and he suggests that such criminal liability would necessarily require criminal liability of the corporation itself.¹⁶ However, no scholar has attempted to analyze the law of corporate criminal liability, as it could apply to animal cruelty within industrialized animal agriculture, and none have focused on the question of whether corporate liability in this context is desirable in contrast to individual liability.

In this note, Part I will examine the problem of cruelty within industrialized animal agriculture before examining the animal protection movement's goals of advocacy in this area. Next, this note will analyze the extent to which the advocacy efforts employed have been successful and then discuss where these efforts fall short. With these matters in mind, the doctrine of corporate criminal liability will be presented as a solution to the shortcomings of current strategies to enforce and utilize anti-cruelty laws within factory farms. Part II of this note will examine why corporate criminal liability is a desirable method for industrialized animal agriculture reform, focusing on the strategy's abilities of deterrence, incentivizing systemic reform, targeting the party most culpable, and targeting the system itself. Part III will analyze the current legal doctrine of corporate criminal liability and apply egregious acts of cruelty to each element of the doctrine.

II. CRUELTY IN CONTEXT

Industrialized agriculture is notoriously at odds with the animal protection movement, based on the perceived severity of suffering of farm animals within the system, and the raw number of animals affected.¹⁷ To

¹⁵ See, e.g., Leahy, *supra* note 2, at 81-82 ("North Carolina's animal cruelty law is somewhat unusual in that it has a civil law that parallels its criminal law. Both versions of the North Carolina cruelty statutes include language in them apparently meant to exempt certain farming practices from coverage under the law. It is unclear by looking at these exemptions, however, what they cover specifically. The Belcross case, however, by using the criminal law successfully to obtain convictions, indicates that a prosecutor was confident that—at the very least—egregious cruelty to animals is not exempted from the law, and that industrial farming is held to the standards of the criminal cruelty statute.").

¹⁶ Joseph Vining, *Animal Cruelty Laws and Factory Farming*, 106 MICH. L. REV. FIRST IMPRESSIONS 123, 125-126 (2008) (recognizing the fact that farm animals are raised and confined within greater corporate and organizational structures and thus, in order to apply anti-cruelty laws to farm animals, corporations must be criminally liable for animal cruelty).

¹⁷ See Matheny & Leahy, *supra* note 1, at 325-26 (discussing that approximately ten billion land animals are raised and killed for food in the United States alone. Over ninety percent of these animals are killed in factory farm settings).

understand what animal protection organizations are seeking to improve in factory farms, it is necessary to distinguish between two different types of cruelty—systemic cruelty and egregious cruelty.¹⁸

First, to understand the use of anti-cruelty laws in the factory farming context, it is important to discuss the fundamental attributes of anti-cruelty laws. Every state has laws prohibiting cruelty to animals, but what constitutes animal cruelty varies from state to state.¹⁹ All state laws penalize two types of actions under cruelty provisions: intentional acts and the failure to act.²⁰ Intentional acts are those acts of cruelty where the actor knowingly tries to hurt an animal by striking, burning, or committing some other violent or cruel act against an animal.²¹ “These acts will often be classified the most severely under the applicable criminal law.”²² “The failure to provide food, water, necessary shelter, or in some states, reasonable veterinary care, may be considered animal neglect.”²³ Most state anti-cruelty laws are classified as misdemeanor offenses that carry penalties of a fine or imprisonment terms of less than

¹⁸ Leahy, *supra* note 2, at 80 (dividing criminal cases of animal cruelty within factory farms into egregious cruelty and “day-to-day” cruelty; the latter is hereinafter referred to as systemic cruelty.).

¹⁹ *Legal Protections for Animals on Farms*, ANIMAL WELFARE INST. (2018), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf> (discussing that there are no federal animal cruelty law exists in the United States, so all anti-cruelty laws stem from state criminal codes).

²⁰ Rebecca F. Wisch, *Brief Summary of State Cruelty Laws*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/intro/state-anti-cruelty-laws> (last updated 2010).

²¹ *Id.*; see also Tex. Penal Code Ann. § 42.09 (West 2007) (defining cruelty as Cruelty to Livestock Animals: (a) A person commits an offense if the person intentionally or knowingly: (1) tortures a livestock animal; (2) fails unreasonably to provide necessary food, water, or care for a livestock animal in the person’s custody; (3) abandons unreasonably a livestock animal in the person’s custody; (4) transports or confines a livestock animal in a cruel and unusual manner; (5) administers poison to a livestock animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner’s effective consent; (6) causes one livestock animal to fight with another livestock animal or with an animal as defined by Section 42.092; (7) uses a live livestock animal as a lure in dog race training or in dog coursing on a racetrack; (8) trips a horse; or (9) seriously overworks a livestock animal.).

²² Wisch, *supra* note 20. As of the publication of this article, all 50 states have felony provisions against animal cruelty, and the Preventing Animal Cruelty and Torture (PACT) Act provides federal anti-cruelty protections; see, e.g., *Extreme Animal Cruelty Can Now be Prosecuted as a Federal Crime*, The Humane Society of the United States (Nov. 25, 2019), <https://www.humanesociety.org/news/extreme-animal-cruelty-can-now-be-prosecuted-federal-crime>.

²³ *Id.*; see also MO. REV. STAT. §578.009 (2017) (“A person commits the offense of animal neglect if he or she: (1) had adequate custody of an animal and fails to provide adequate care; or (2) knowingly abandons an animal in any place without making provisions for its adequate care.”).

one year.²⁴ However, 46 states have felony provisions for aggravated acts of cruelty where the offender commits acts such as mutilation or intentional infliction of pain or death.²⁵ Parts (a) and (b) will examine, respectively, systemic and egregious cruelty by defining each, providing examples, and analyzing each as a target of animal advocacy.

a. Systemic Cruelty

Systemic cruelty against animals in factory farms generally refers to cruelty in day-to-day farming operations and focuses on the suffering of animals created by the nature of industrialized agriculture.²⁶ Thus, systemic cruelty generally does not implicate anti-cruelty laws,²⁷ but refers to the legally acceptable practices that afford low standards of care and well-being to animals within factory farms. Systemic cruelty is of particular importance to animal welfare and advocacy efforts because the conditions afforded to these animals cause some of the most acute suffering over extended periods of time and is inflicted on these animals as part of the fundamental nature of the industry.²⁸ The sheer volume of animals within the industrial animal agriculture system and the animal welfare costs of mass efficiency and production are at the center of animal protection groups' efforts to target factory farms. While conditions on factory farms vary from facility to facility, a survey of the treatment of farm animals within a typical factory farm is presented below for chickens, pigs, and cows. These examples are exhibited to provide an overview of the types of conditions and routine practices animal advocates seek to remedy.

Every year, more than nine billion chickens are raised and slaughtered in the U.S.,²⁹ which accounts for over ninety percent of the land animals killed for food each year.³⁰ Many broiler chickens are

²⁴ Wisch, *supra* note 20; *see also* Mo. Rev. Stat. §578.009(2) (2017) (mandating that the crime of animal neglect is a class C misdemeanor).

²⁵ *See, e.g.*, ARIZ. REV. STAT. ANN. §13-2910(G) (2019) (mandating that certain acts of cruelty are classified as felonies).

²⁶ Leahy, *supra* note 2, at 92 (explaining that “the hallmarks of industrialization—wealth maximization and efficiency—combine in the animal agriculture context to produce an environment in which the comfort, care, or concern for the well-being of an animal is of little to no importance to the system working to produce as many animal products as possible for the least amount of money).

²⁷ This type of cruelty tends not to implicate particular anti-cruelty law provisions, unless the cruelty is so extreme as to constitute neglect.

²⁸ Leahy, *supra* note 2, at 65.

²⁹ Poultry Production and Value 2008 Summary, USDA (May 29, 2009), <http://usda.mannlib.cornell.edu/usda/current/PoulProdVa/PoulProdVa-05-29-2009.txt>.

³⁰ Leahy, *supra* note 2 at 64.

raised in overcrowded conditions and are often allotted less than one square foot per chicken.³¹ These chickens raised for meat are bred to have drastically enhanced breasts and thighs; most broilers become so heavyset at only a few weeks of age that they can barely walk,³² and some break their legs or suffer heart attacks as a result.³³ Hens raised for egg production spend nearly all their lives without enough room to turn around, extend their wings, preen, or bathe.³⁴ There are typically eight or nine hens in a single battery cage, and cages are stacked on top of one another—meaning that feces and food spills onto the hens below. The metal wires of the cages causes injuries to the hens' skin and feet, and the combined stress of captivity and copious egg production results in a life span of two years or less.³⁵ Male non-broiler chicks are considered to have no value and are suffocated, electrocuted, gassed, or ground up almost immediately after hatching.³⁶ Furthermore, all poultry are subject to federally unregulated slaughter practices,³⁷ meaning there is no law in place requiring chickens to be rendered unconscious before slaughter.

The barren conditions in which some factory-farmed pigs are raised can lead to tail biting, and, consequently, farmers may cut off pigs' tails and teeth without painkillers.³⁸ Pigs may be forced to live amid their own feces and vomit and sometimes amid the corpses of other pigs.³⁹ At any given time, more than half of the pigs in factory farms suffer from mange and other diseases.⁴⁰ Sows may spend their reproductive lives confined to a gestation crate in which the sow cannot move or turn around.⁴¹ At seventeen to twenty days of age, piglets

³¹ Felicity Lawrence, *If Consumers Knew How Farmed Chickens Were Raised, They Might Never Eat Their Meat Again*, *The Guardian* (Apr. 24, 2016).

³² *Inside Chicken Factory Farms—The Awful Truth*, *The Grow Network* (Nov. 11, 2017), <https://thegrownetwork.com/raising-chickens-factory-farms>.

³³ A. A. Olkowski, *Pathophysiology of Heart Failure in Broiler Chickens: Structural, Biochemical, and Molecular Characteristics*, 86(5) *POULT. SCI.* 999, 999 (2007).

³⁴ *Inside Chicken Factory Farms*, *supra* note 32.

³⁵ *Chickens Used for Eggs*, *Farm Sanctuary*, <https://www.farmsanctuary.org/learn/factory-farming/chickens/> (last visited Nov. 15, 2019).

³⁶ *Id.*

³⁷ 7 U.S.C.A. §§ 1902 (West 1958). The Humane Methods of Slaughter Act (HMSA) does not include poultry.

³⁸ *A Closer Look at Animals on Factory Farms*, *American Society for the Prevention of Cruelty to Animals*, <https://www.aspc.org/animal-cruelty/farm-animal-welfare/animals-factory-farms> (last visited Nov. 15, 2019) [hereinafter *A Closer Look*].

³⁹ *The Pork Industry*, *People for the Ethical Treatment of Animals*, <https://www.peta.org/issues/animals-used-for-food/factory-farming/pigs/pork-industry/> (last visited Nov. 15, 2019).

⁴⁰ *Id.*

⁴¹ *Pork Production on Factory Farms*, *Farm Sanctuary*, <https://www.farmsanctuary.org/learn/factory-farming/pigs-used-for-pork/> (last visited Nov. 15,

are taken away from their mothers and typically undergo a series of mutilations—including castration—without any pain relief. The piglets then spend the next six months of their lives confined to pens until they reach “market weight” and are sent to slaughter.⁴²

Similarly, cattle raised for beef may be branded, castrated, and may have their horns removed without painkillers.⁴³ Between the ages of six months and one year, most beef cattle live the last months of their lives on crowded feedlots with hundreds or thousands of others.⁴⁴ On these feedlots, the cattle often must stand in mud, ice, and their own waste. Dairy cows are often tethered by chains or ropes in “tie stalls.”⁴⁵ Unnaturally high milk production—in part the result of nearly constant pregnancy induced by artificial insemination—leads to mastitis, a painful bacterial infection.⁴⁶ Dairy cattle are dehorned and have their tails removed without painkillers.⁴⁷ Calves may be taken from their mothers almost immediately after birth, which is traumatizing to both mother and calf.⁴⁸ Many calves are then kept in stalls so small they can barely move, and are given restricted diets to be raised for veal.⁴⁹ After two to five years of milk production, dairy cows are slaughtered for meat.⁵⁰

Livestock, in general, are subject to long and brutal transport conditions.⁵¹ They are also subject to a flawed slaughter system, which often results in animals being conscious while their throats are slit, when they are placed into the boiling water of defeathering or hair removal tanks, or while they are being skinned or cut apart.⁵²

2019); *but see State Legislation*, Farm Sanctuary, <https://www.farmsanctuary.org/get-involved/federal-legislation/state-legislation/> (last visited Nov. 15, 2019) (noting that nine states have enacted legislation which bans or phases out the use of gestation crates).

⁴² *Id.*

⁴³ *A Closer Look*, *supra* note 38.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *A Closer Look*, *supra* note 38; *but see State Legislation*, *supra* note 41 (noting that veal crates have been banned or restricted in eight states).

⁵⁰ *Id.*

⁵¹ *See generally COK Investigation Exposes Farmed Animal Suffering During Interstate Transport*, Compassion Over Killing, <http://cok.net/inv/farm-animal-transport/> (last visited Nov. 15, 2019) (discussing transport conditions); *see also During Transport*, Animal Welfare Institute, <https://awionline.org/content/during-transport> (last visited Mar. 21, 2019) (reporting that farm animals in transport are deprived of food, water, and bedding; and trucks may be so overcrowded that animals are unable to rest, and may trample or fight with one another in search of space).

⁵² *See* Gail A. Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect,*

i. Systemic Cruelty as a Target of Advocacy

Systemic cruelty involves the most common, chronic, and entrenched form of animal suffering within industrialized agriculture. Combined with the sheer number of animals experiencing this type of cruelty, systemic cruelty is, without a doubt, the main long-term target of animal advocacy efforts. Indeed, for this reason, “the next phase in factory farm anti-cruelty advocacy must be targeting the worst suffering experienced by the largest number of animals over prolonged periods of time.”⁵³ In other words, the change sought by animal advocates must, at least in part, be the change of the industrialized animal agriculture system as a whole.

While there are efforts to enforce anti-cruelty statutes with regards to systemic cruelty,⁵⁴ this type of cruelty is notoriously difficult to secure criminal charges for. Part of this is simply due to the fact that it may be difficult to isolate the criminal act if it is undertaken as part of a socially sanctioned system, but state animal cruelty laws provide even more barriers. For example, the definition of “animal” varies widely between state statutory codes.⁵⁵ A common definition found in several states is “every dumb creature.”⁵⁶ However, many states specifically exclude farm animals from the definition,⁵⁷ thus excluding farm animals from an animal cruelty offense. The majority of states also exempt “common” or “normal” farming practices from their definitions of

and *Inhumane Treatment Inside the U.S. Meat Industry* 20, 63 (2006); see also Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* 60, 186 (2013).

⁵³ Leahy, *supra* note 2, at 92-93 (after discussing various cases involving egregious acts of violence by factory farm workers, Leahy argues for a push toward prosecuting systemic acts of cruelty).

⁵⁴ Leahy sketches several legal attempts to enforce anti-cruelty laws for systemic animal abuse. See *id.* at 92. For example, in 2000, a Farm Sanctuary investigation in New Jersey documented two live hens that had been discarded by a farm employee on a pile of dead birds, left to die of starvation, dehydration, crushing, or other means. *Id.* at 95-96. While the employee was initially convicted of animal cruelty under New Jersey state law, the appellate court overruled this conviction by reasoning that the level of *mens rea* did not meet the requirement of the cruelty statute. *Id.* at 96-97.

⁵⁵ Animal Welfare Inst., *Legal Protections for Animals on Farms* (Oct. 2018), <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf>.

⁵⁶ Wisch, *supra* note 20; see also CAL. PENAL CODE § 599b (West, Westlaw through Ch. 860 of the 2019 Reg. Sess.).

⁵⁷ See, e.g., IOWA CODE ANN. § 717B.1(1) (West, Westlaw from 2019 Reg. Sess.) (defining “animal” as a nonhuman vertebrate, but immediately removing livestock from this umbrella definition).

cruelty.⁵⁸ Under this exemption, an animal could be subjected to extreme suffering, but as long as that which causes the suffering is a process or activity commonly practiced within the industry, anti-cruelty laws cannot apply.

So, while systemic cruelty is the ideal target of animal advocacy efforts, the legal barriers surrounding any attempted application of criminal liability to systemic acts in the industrial agriculture arena is particularly difficult. While some such prosecutions have been successful,⁵⁹ the liability for cruelty of this nature is not able to be used to effectively combat the wide array of systemic horrors that animal advocates wish to reform. While legislative reform and consumer action may wield more power in this instance to attack systemic cruelty, anti-cruelty measures should not be ruled out entirely. Successful prosecutions of factory farm cruelty are not foreign, in contrast, to cases involving acts of egregious cruelty.⁶⁰ On its face, egregious cruelty does not seem to reach the systemic cruelty concerns as presented. However, the ability that egregious cruelty has to reach within the walls of factory farms combined with the doctrine of corporate criminal liability may ultimately be able to commendably address systemic cruelty issues. First, this Note will explore egregious cruelty and how this type of cruelty fits into the broader context of enforcing anti-cruelty laws within factory farms.

b. Egregious Cruelty

Systemic cruelty focuses on the routine, day-to-day suffering that animals in factory farms are subjected to. Egregious cruelty, on the other hand, consists of episodic actions of individual factory farm

⁵⁸ Leahy, *supra* note 2, at 77. For example, Missouri animal cruelty law exempts with respect to farm animals, “normal or accepted practices of animal husbandry.”; MO. STAT. ANN. § 578.007 (West, Westlaw through 2019 First Reg. and First Extraordinary Sess. of 100th Gen. Assembly 2019); Kansas exempts “normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals for food or by-products and the careful or thrifty management of one’s herd or animals, including animal care practices common in the industry or region,” KAN. STAT. ANN. § 21-6412(c)(6) (West, Westlaw through 2019 Reg. Sess. 2019).

⁵⁹ The first conviction for factory farm neglect occurred in 2000 against an egg farmer in Washington State who closed down his battery egg operation and left approximately 1,500 hens to die from hunger, thirst, or disease. *See* Jim Haley, *Chicken Farmer Pleads Guilty to Cruelty*, HeraldNet (Dec. 8, 2000, 9:00 PM), <https://www.heraldnet.com/news/chicken-farmer-pleads-guilty-to-cruelty/>.

⁶⁰ *See* Leahy, *supra* note 2, at 80 (discussing several cases of attempted prosecutions of cruelty in day-to-day farming operations). There is often hesitation to charge workers for systematic cruelty, and egregious cruelty is more common than systematic cruelty. *See id.* at 80.

employees, which involve particular acts of cruelty against farm animals such as beating, kicking, bludgeoning with objects, dismembering, or the like.⁶¹ It follows, then, that egregious cruelty tends to implicate animal abuse laws more often, but specific parties can also commit animal neglect. Undercover investigations, conducted by animal protection organizations, have well documented countless incidents of specific, egregious animal cruelty.⁶² The instances presented below are examples of egregious acts of cruelty and are intended to express the interest that animal protection organizations have in addressing such acts, as well as to demonstrate the class of acts that is easier to bring criminal actions against.

An undercover investigation into Belcross Farms Pigs in North Carolina in 1999 discovered incidents of workers beating pregnant sows on a daily basis with a wrench or iron poles, skinning pigs alive, and sawing off the legs of conscious pigs.⁶³ An investigation of Seaboard Pigs in Oklahoma two years later, one of the largest pig factory farms in the country, showed repeated beating, kicking, bludgeoning with metal gate rods and hammers, and other violence toward pigs by workers.⁶⁴ Other pigs at Seaboard “were left to die agonizing deaths from severe injuries, illness, and lameness... without any veterinary care.”⁶⁵

Widespread abuse of chickens at a Kentucky Fried Chicken supplier in 2004 included workers “tearing beaks off, ripping a bird’s head off to write graffiti in blood, spitting tobacco juice into birds’ mouths, plucking feathers to ‘make it snow,’ suffocating a chicken by tying a latex glove over its head, and squeezing birds like water balloons to spray feces over other birds.”⁶⁶ A 2007 investigation of a Smithfield Foods supplier revealed horrific cruelty to pigs including “workers dragg[ing] injured pigs out of the facility by their snouts, ears and legs...

⁶¹ *Id.* at 80-81.

⁶² *Id.* at 80. Leahy discusses the legal actions taken and their successes or shortcomings regarding these documented cases of “egregious cruelty by workers.” *See id.* at 80-92.

⁶³ *Investigation of North Carolina Pig Farm Results in Historic Felony Cruelty Convictions*, People for the Ethical Treatment of Animals (Apr. 2000), <https://www.peta.org/about-peta/victories/investigation-north-carolina-pig-farm-results-historic-felony-cruelty-convictions>; *see also* atimeforchange, *Belcross Pig Farm Investigation: Narrated by James Cromwell*, YouTube (July 5, 2008), https://www.youtube.com/watch?v=JHgj0C94_Mc; *see also* Leahy, *supra* note 2, at 81.

⁶⁴ *See Pig Abusers Charged with Felony Cruelty to Animals at Seaboard Farms, Inc.*, PETA (July 2001), <https://www.peta.org/about-peta/victories/pig-abusers-charged-felony-cruelty-animals-seaboard-farms-inc.>; *see also* Leahy, *supra* note 2, at 82.

⁶⁵ *Pig Abusers Charged with Felony*, *supra* note 64.

⁶⁶ *See* Donald G. McNeil, Jr., *KFC Supplier Accused of Animal Cruelty*, N.Y. TIMES (July 20, 2004), <https://www.nytimes.com/2004/07/20/business/kfc-supplier-accused-of-animal-cruelty.html>; *see also* Leahy, *supra* note 2, at 82-83.

cut[ting] off piglets' tails and pull[ing] out piglet's testicles—without any pain relief. . . hit[ting] and jab[ing]" pigs in the face with metal gate rods; and a "worker goug[ing] out the eyes of four pigs with his fingers."⁶⁷

A 2010 investigation of Ohio's Conklin Dairy Farms documented sadistic abuse of cows and calves in the dairy industry.⁶⁸ Abuse included "routine stabbing with pitchforks in the face, legs, and stomach; punching udders, beating cows in the face with crowbars; twisting cows' tails until the bones snapped; and workers bragging about stabbing, dragging, shooting, breaking bones, and beating cows and calves to death."⁶⁹ A video taken at a dairy farm and Publix supplier in 2017 showed workers beating a cow in the head with a steel rod, as well as workers kicking, beating, and stabbing cows to force them into cramped pens.⁷⁰ Workers at a Tyson facility were documented striking and slamming chickens at a factory farm in 2017.⁷¹ Workers at a dairy farm in Florida were documented in 2017 stabbing cows with spears tipped with knives and using a blow torch on cows.⁷²

Reports such as those discussed above are abundant, and the overwhelming amount of evidence produced by investigations in factory farms "demonstrate [s] a widespread lack of regard for the well-being of factory-farmed animals."⁷³ This relative abundance suggests that these incidents of animal cruelty by factory farm workers are "the rule and not the exception."⁷⁴ The widespread mistreatment of animals is unsurprising; given that efficiency is the top priority of the livestock industry.

These animal cruelty cases are, in some instances, enforceable under state law. For example, twenty-two counts of animal cruelty charges were brought against employees of a Hormel supplier in 2008. The Employees of Hormel were documented beating pigs with metal

⁶⁷ *Charges Filed After Investigation Reveals Torture of Pigs*, PETA, <https://www.peta.org/action/action-alerts/charges-filed-investigation-reveals-torture-pigs> (last visited Nov. 15, 2019); see also Leahy, *supra* note 2, at 83-84.

⁶⁸ See *Ohio Dairy Farm Investigation*, Mercy for Animals, <http://ohdairy.mercyforanimals.org> (last visited Nov. 15, 2019); see also Leahy, *supra* note 2, at 87.

⁶⁹ *Ohio Dairy Farm Investigation*, *supra* note 68.

⁷⁰ See David Fleshler & Adam Sacasa, *Criminal Investigation Opened into Abuse of Cows at Dairy Farm*, South Florida Sun Sentinel (Nov. 9, 2017), <http://www.sun-sentinel.com/news/florida/fl-reg-dairy-farm-video-20171109-story.html>.

⁷¹ See Lissette Nunez, *Undercover Investigation Reveals Animal Cruelty in Tyson Farm*, 47 ABC (Dec. 14, 2017), <http://www.wmdt.com/news/virginia/undercover-investigation-reveals-animal-cruelty-in-tyson-farm/672463736>.

⁷² See Howard Cohen, *Video Shows Dairy Cows Beaten and Burned at McArthur Farm*, Miami Herald (Dec. 15, 2017), <https://www.miamiherald.com/news/state/florida/article189935934.html>.

⁷³ Leahy, *supra* note 2, at 125.

⁷⁴ *Id.*

rods and sticking clothespins into pigs' eyes and faces.⁷⁵ Five of the six employees charged pled guilty to the charges.⁷⁶ Seven Virginia workers at Tyson factory facilities were convicted and sentenced⁷⁷ in 2017 under Virginia's animal cruelty statutes,⁷⁸ after an undercover investigator documented the employees throwing, punching, and kicking chickens.⁷⁹ The owner of a small, family-operated poultry and egg farm in Maryland was shut down and charged with forty-six counts of animal cruelty in 2018, after horrendous facility conditions were documented.⁸⁰

i. Egregious Cruelty as a Target of Advocacy

Because egregious acts of animal cruelty more easily fall under existing anti-cruelty laws, they are a popular avenue of animal protection legal advocacy. As previously noted, criminal charges and convictions are celebrated by animal advocacy organizations⁸¹ as legal victories on behalf of factory-farmed animals. While there are ways in which these individual criminal actions help the animal protection movement, it cannot be ignored that individual workers, if convicted, will simply be replaced by another worker who exists within the same confines of an industry of systemic animal abuse.⁸² Furthermore, egregious cruelty

⁷⁵ *Id.* at 84-85 (discussing that fourteen of these twenty-two charges were aggravated misdemeanors, which were the highest possible charges for animal cruelty in Iowa.).

⁷⁶ *Id.*

⁷⁷ Justin Moyer, *Seven Sentenced After Animal Rights Activists Film Abuse at Chicken Farms*, *The Washington Post* (Aug. 31, 2017), https://www.washingtonpost.com/local/public-safety/seven-sentenced-after-animal-rights-activists-film-abuse-at-chicken-farms/2017/08/31/9c3656f4-8e6a-11e7-8111-e841db675815_story.html?utm_term=.987858d980ce.

⁷⁸ VA. CODE ANN. §3.2-6570 (2019).

⁷⁹ *Tyson Exposed: New COK Video Uncovers Rampant Violence & Cruelty to Birds Compassion Over Killing*, COK, <http://cok.net/inv/tyson/> (last visited Jan. 17, 2020).

⁸⁰ Michelle Kretzer, *Meet Your 'Happy' Meat: 46 Cruelty Charges for Owner of 'Happy' Farm*, PETA (Sept. 4, 2018), <https://www.peta.org/blog/46-cruelty-charges-owner-of-happy-farm> (reporting the investigation at issue found, among other things, birds eating chicken carcasses, ducks in a slaughter room with blood on the floor and intestines in a bucket, and chickens suffering from contagious avian diseases causing birds' eyes to be swollen shut, among other ailments.).

⁸¹ *See id.*; *see also Our Powerful Progress*, Mercy for Animals, <https://mercyforanimals.org/legal> (last visited Mar. 4, 2019) (Farm animal advocacy organization Mercy for Animals advertises on its website that, “[a]fter a 2017 MFA undercover exposé that revealed workers punting and throwing chickens and ripping the legs off conscious birds, 38 charges were brought against Elite Farm Services, Sofinia Foods, and a chairman of Elite Farm Services.”).

⁸² *See Pachirat*, *supra* note 52, at 255 (“[T]here is a] need for a context-sensitive politics of sight that recognizes both the possibilities and pitfalls of organized,

prosecutions directly address specific animal abuse incidents, but cannot reach animal abuse on a larger scale. Nor can egregious cases, on their own, address wide-scale animal neglect in these facilities. Focusing solely on egregious cruelty in factory farms may be a rewarding endeavor in its narrow focus, but this narrowness limits its ability to enact greater systemic reform in industrialized animal agriculture.

c. The Limitations of Current Legal Efforts and Corporate Criminal Liability as a Step Forward

Despite the dichotomy between egregious and systemic cruelty, both types of cruelty are targets for factory farm reform by the animal protection movement. However, both types of cruelty have distinct legal positions with respect to existing anti-cruelty laws. While addressing systemic cruelty is the ultimate goal of reform, egregious acts of cruelty are currently those that have a higher likelihood of obtaining legal redress through criminal prosecution. Egregious cruelty cases are generally easier to enforce under animal cruelty statutes; if farm animals have any cruelty protections under their respective state laws, these are generally protections against conduct that “no responsible...farmer would defend,”⁸³ and the egregious cruelty identified above generally falls into this penumbra of prohibited conduct.

Such prosecutions have become major symbols of farm animal victories for animal advocacy organizations. Their victories—aside from punishing actors who cause extreme harm to some animals—include increasing public awareness of how farm animals are raised and treated in industrial agriculture,⁸⁴ as well as helping to frame⁸⁵ an ethical narrative within the broader animal protection social movement development.

concerted attempts to make visible what is hidden and to breach, literally or figuratively, zones of confinement in order to bring about social and political transformation.”)

⁸³ Pamela D. Frasch et. al, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 75-76 (1999).

⁸⁴ See, e.g., *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare*, ASPCA (July 7, 2016), <https://www.aspc.org/about-us/press-releases/new-research-finds-vast-majority-americans-concerned-%20about-farm-animal> (noting a survey conducted for the ASPCA where three quarters of consumers said that they are concerned about the welfare of animals raised for food). Criminal prosecutions raise awareness of the treatment of animals in industrialized agriculture. Consumer action, then, plays an enormous role in animal protection reform.

⁸⁵ Carol McClurg Mueller, *Building Social Movement Theory*, in *Frontiers in Social Movement Theory* 3, 14 (Aldon D. Morris & Carol McClurg Mueller eds., 1992). Framing consists of a process in which “enterprising agents within social movements draw from existing mentalities and political culture to manipulate the symbols necessary for creating action-oriented frames of meaning that will mobilize others on behalf of movement goals.”

While the efforts and successes of bringing criminal actions against cases of egregious cruelty within factory farms should be commended, the efforts clearly do not address the greater concern of systemic cruelty within the industry. In order to better promote the change that animal advocates wish to see, such as punishing the individual, replaceable factory farm workers cannot be the only avenue for anti-cruelty legal action. Furthermore, the use of criminal sanctions against factory farm workers, who are members of minority populations and of low socioeconomic status, is problematic and increasingly criticized.⁸⁶

So, while egregious cruelty prosecutions have been relatively successful, they fail to address the systemic cruelty within factory farming, and furthermore raise concerns over the ethics of prosecuting factory farm workers. As a solution to these problems, animal advocates—through public prosecutors—should focus efforts on pursuing anti-cruelty charges and convictions against the overarching corporation responsible for any particular factory farm facility.

Through the doctrine of corporate criminal liability, criminal sanctions for violation of anti-cruelty laws could be enforced against the corporations rather than individual workers. Furthermore, holding the corporation responsible for anti-cruelty offenses committed by employees would serve as a corporate deterrent against future animal abuse, helping to address systemic cruelty as well. Simply stated, in order to address the system itself—and systemic cruelty—the system as a whole must be targeted. Using the pre-existing legal leverage of egregious cruelty crimes, punishing the corporation for such crimes will be able to bridge the gap between egregious and systemic cruelty reform efforts.

Part II will first discuss why corporate criminal liability is desirable for animal cruelty cases within industrialized animal agriculture. Specifically, the ability of corporate liability to effectuate corporate deterrence through incentivizing systemic reform, placing liability on the party most culpable, and targeting the system as a whole. Part III will subsequently examine the doctrine of corporate criminal liability. Each element of this doctrine will be summarized and analyzed in terms of how acts of egregious cruelty can effectively impute liability to the overarching farming corporation.

⁸⁶ Professor Justin Marceau of Denver University describes the problems with “carceral” animal law, including the targeting of populations where culpability is questionable. Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment*, passim (Cambridge Univ. Press 2019).

III. WHY CORPORATE CRIMINAL LIABILITY SHOULD BE PURSUED

Prosecuting individual factory farm workers for egregious anti-cruelty violations may be victories for animal advocates, but at best they are short-term, one-off solutions, and at worst they punish the wrong entity. Animal protection organizations—through criminal prosecutors—should instead take the advantages of being able to enforce anti-cruelty laws in factory farms for egregious cruelty, situate them within corporate liability doctrine, and, consequently, use these advantages to address the ultimate goal of systemic cruelty reform. Part II will map corporate criminal liability and how it relates to direct liability. It will then analyze the deterrent effect imputed liability would confer onto the corporation and how this incentivizes systemic reform, as well as discuss how corporate criminal liability may alleviate concerns of holding the wrong entity liable for egregious cruelty. Finally, the importance of targeting the factory farming system as a whole will be emphasized.

Direct liability holds the individual corporate agent accountable for criminal behavior by imposing penalties on these agents whenever they commit a crime. For example, a manager of Seaboard Farms was charged with four felony counts of cruelty to animals for bludgeoning pigs with an iron rod.⁸⁷ This case applied criminal animal cruelty directly to a specific individual that was documented committing the cruelty. Corporate liability, on the other hand, follows the doctrine of *respondeat superior* and determines that the employing corporation is responsible for the employee's criminal action.⁸⁸ As an example, ISE Farms, a large-scale egg farm, was charged with animal neglect for discarding two live hens and leaving them to die.⁸⁹

Most of the early cases of corporate criminal liability involved incidents of “public harms, such as nuisance, for which private enforcement was unlikely.”⁹⁰ Consequently, public enforcement through

⁸⁷ *Pig Abusers Charged with Felony Cruelty*, *supra* note 64; *see also* Leahy, *supra* note 2, at 82 (discussing two other pig farms in which workers were criminally charged with animal cruelty).

⁸⁸ Brice Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 S.W. L.J. 908, 908 (1975) (“Individual agents of a corporation can engage in a wide variety of actions which can result in corporate criminal liability.”).

⁸⁹ Sonia S.Waisman et al., *Animal Law Cases and Materials* 335 (Carolina Acad. Press, 3d ed. 2006).

⁹⁰ *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1485-86 (1996); *see, e.g.*, A. Mitchell Polinsky, *An Introduction to Law and Economics* 75-86 (Little, Brown, & Co. 2d ed. 1989) (analyzing public and private enforcement); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 *passim* (1975); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 *passim* (1980).

criminal proceedings was necessary to ensure that corporations and their actors properly internalized the costs of their activities to society.⁹¹

Public enforcement was undoubtedly necessary to address public harms committed by corporations.⁹² While holding individual agents liable through public enforcement was always an option, judgment-proof or unidentifiable individuals within a corporation made imposing liability on the corporation itself necessary to maintain optimal deterrence.⁹³ Farm animal welfare is consistently recognized as a public interest,⁹⁴ and thus prosecuting corporate malfeasance is consistent with the original aims of corporate criminal liability. Pursuing corporate liability for animal cruelty offense is the most effective method for deterring animal cruelty on factory farms. Solely prosecuting the individual employee provides little to no incentive for the corporation to change its policies or practices.

Deterrence is widely accepted as a primary goal of criminal liability,⁹⁵ and the main goal of corporate criminal liability,⁹⁶ therefore, should be of major concern to those wishing to challenge and address cruelty within factory farms. The Supreme Court “has made it clear that the purpose to be served by imposing liability on corporations is to deter criminal conduct in the name of the corporation by denying

⁹¹ Khanna, *supra* note 90, at 1486; *but see* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1246 (1984). If agents cannot be cheaply monitored, this efficiency-enhancing aspect of corporate liability is reduced, but not eliminated. In these cases, whether corporate liability is preferable to direct liability is debatable. For a more thorough discussion of the complications of expensive or imperfect observability, see *id.* at 1247-56.

⁹² See Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 *VAND. L. REV.* 573, 587 (1994).

⁹³ Khanna, *supra* note 90, at 1486.

⁹⁴ See, e.g., Danielle R. Deemer & Linda M. Lobao, *Public Concern with Farm-Animal Welfare: Religion, Politics, and Human Disadvantage in the Food Sector*, 76 *RURAL SOCIOLOGY* 167 *passim* (2011); Amelia Cornish et. al, *What We Know About the Public’s Level of Concern for Farm Animal Welfare in Food Production in Developed Countries*, 6 *ANIMALS* 74 *passim* (2016).

⁹⁵ Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *AM. CRIM. L. REV.* 1313, 1313 (2000).

⁹⁶ *Id.* at 1494. See also, Herbert L. Packer, *The Limits of the Criminal Sanction*, 356 (1968) (arguing that deterrence, rather than retribution, is the aim of corporate criminal liability); Sanford H. Kadish, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 *HARV. L. REV.* 1227, 1235 & n.16 [hereinafter *Developments*] (citing numerous sources that suggest that deterrence is the “primary rationale” for corporate criminal liability); Coleman, *supra* note 79, at 911 (suggesting that society has moved away from using punishment generally strictly for retribution and that deterrence should be the main reason that corporations are held criminally liable and punished).

the owners the benefits of the prohibited conduct, thereby providing a direct incentive to the owners to assure compliance with the law.”⁹⁷ Importantly, prohibiting corporations from profiting from their failure to follow animal cruelty laws⁹⁸ is necessary to address both egregious and systemic cruelty.

Punishment through criminal liability may deter criminal behavior in several ways. Some will not engage in prohibited conduct for fear of being punished. Others are not deterred by this possibility, so punishment serves to remove them from society in order to prevent them from committing further crimes. Others may not be deterred by the threat of punishment but are deterred when they witness the actual imposition of punishment on other offenders.⁹⁹ Finally, some will not engage in prohibited conduct because of their desire to conform their behavior to societal norms—they are, in essence, deterred by the fear of incurring the disapproval of their community.¹⁰⁰ It must be kept in mind that punishment alone is not the purpose of criminal law—the “purpose of criminal law is to define socially intolerable conduct, and to hold conduct within limits which are reasonably acceptable from the social point of view.”¹⁰¹

As to the latter method of deterrence, conformity to advancing social perceptions regarding animal welfare is significant for factory farm corporations. “To consumers who have seen these videos again and again—there are no bad apples anymore. The bad apple, to the consumers now, is the industry.”¹⁰² While holding individuals accountable for criminal animal cruelty is often already a challenging feat for prosecutors, only holding individuals responsible perpetuates

⁹⁷ H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents*, 41 LOY. L. REV. 279, 284 (1995).

⁹⁸ See Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1327 (2005) (there is pressure from animal protection organizations to utilize unfair competition laws in order to target farms which do not adhere to anti-cruelty or other regulatory laws, as opposed to more “humane” farms).

⁹⁹ Coleman, *supra* note 88, at 919; see also, W. Clark & W. Marshall, *A Treatise on the Law of Crimes* 56 (6th ed. 1958).

¹⁰⁰ Coleman, *supra* note 88, at 919; see also Khanna, *supra* note 90, at 1499 (“The most powerful sanction that society can impose on a corporation is lost reputation or stigma.”).

¹⁰¹ R. Perkins, *Criminal Law* 4 (1957) (Perkins notes that if the criminal law were one hundred percent effective, there would be no need for punishment because nobody would step outside the boundaries of socially acceptable conduct prescribed by the criminal law).

¹⁰² *Abused Calves at Vermont Slaughter Plant*, Humane Soc’y U.S. (Nov. 2, 2009), <https://www.humanesociety.org/news/abused-calves-vermont-slaughter-plant>http://www.humanesociety.org/news/news/2009/11/veal_investigation_110209.html.

the myth that animal cruelty is committed by “bad apples” rather than the industry itself. Bringing cruelty charges against corporations, then, could work to increase industry transparency and consumer awareness of the conditions endured by animals on factory farms. Indeed, numerous studies have demonstrated that animal welfare is a major concern for consumers.¹⁰³

Imposing sanctions on a corporation for the criminal conduct of its agents presumably decreases the corporation’s net worth.¹⁰⁴ Shareholders thus have incentives to discourage its employees from committing undesirable acts.¹⁰⁵ Shareholders can influence the conduct of corporation agents in several ways, such as by modifying employment contracts to discourage certain types of activities.¹⁰⁶ The influence of shareholders on employees’ incentives, then, can be similar to the influence of direct liability. However, without significant corporate liability or even shared liability, individual incentives would be seen as too weak to ensure a corporation-wide commitment to law abidance.¹⁰⁷ Corporate liability deters crime by moving the risk of loss away from risk averse agents toward the corporation, and it effectively distributes liability risk between the corporation and employees.¹⁰⁸

An objection to corporate liability is that it can punish innocent people, particularly shareholders of the corporation, while avoiding punishing the obvious actors.¹⁰⁹ One scholar argues that the question of where to place liability is not answered by determining who has the guilty mind, but rather by who should be held criminally responsible in order to best serve the deterrent purpose.¹¹⁰ The Model Penal Code

¹⁰³ See, e.g., *Natural Food Labels Survey*, Consumer Reports National Research Center (Jan. 2016) (Consumer Reports’ 2015 Natural Food Labels Survey found that better living conditions for farm animals is viewed as “very important” to 52% of consumers and “important” to an additions 32%).

¹⁰⁴ *Id.* at 1495. See also John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 586-87 (1982).

¹⁰⁵ Khanna, *supra* note 90, at 1495. (explaining ability of shareholders to set up effective incentives is tempered by the difficulty of monitoring the activities of the corporation’s managers and employees).

¹⁰⁶ *Id.*

¹⁰⁷ William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1364 (1999); see also Brown, *supra* note 97, at 280-308.

¹⁰⁸ See Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 433 (1963) (“The case for corporate criminality rests presumably upon the inadequacy of the threat of personal conviction upon the individual actors.”). *United States v. Sun-Diamond Growers*, 138 F.3d 961, 971 (D.C. Cir. 1998) (referring to the importance of incentives in vicarious liability).

¹⁰⁹ Coleman, *supra* note 88, at 920.

¹¹⁰ *Id.*; see also Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J.

states that a primary purpose of holding a corporation criminally liable is to encourage supervising managers to supervise corporate agents closely.¹¹¹ This conforms with the idea that corporate criminal liability is necessary to address systemic, rampant crime within a corporation. By directing legal action toward the recognized guilty party—the industry—the animal welfare movement would better be able to target the root of the problem. By closely supervising employees or increasing protective policies for animal welfare within their facilities, corporations should decrease their instances of egregious cruelty. However, once the corporation is recognized as the entity to be held accountable for egregious acts of cruelty to animals, the corporation would subsume liability for criminally cruel conditions including systemic cruelty, within their facility. Hence, corporations, acting in accordance with perceived liability for animal cruelty, will begin to address the systemic cruelty they perpetrate in order to mitigate criminal liability.

While there is interest in holding the appropriately culpable actor criminally liable for an act, an individual worker could still be held responsible for egregious cruelty. In certain cases, it may be desirable to hold both the employee and the corporation liable for the same harm.¹¹² Commentators even argue that corporate responsibility on top of criminal liability of the agent may best serve the deterrent purpose of corporate criminal liability.¹¹³ A criminal proceeding against an agent does not preempt a criminal proceeding against the corporation, and vice versa.¹¹⁴ In fact, in instances where both the corporation and the corporate agent have been charged with a crime committed by the agent, courts have not been troubled by inconsistent verdicts.¹¹⁵ Juries frequently convict the corporation while acquitting the individual, and the courts have generally held that acquittal of the individual provides no defense to the corporation.¹¹⁶ Acquittal of the corporation will not absolve the individual of liability.¹¹⁷

827, 833 (1927). The argument that corporate responsibility added to the criminal liability of the corporation's representatives will best serve this purpose.

¹¹¹ Model Penal Code § 2.07, cmt. at 154 (Tent. Draft No. 4 1955).

¹¹² See, e.g., A. Mitchell Polinsky, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993) (discussing how it is socially desirable to punish employees when corporations themselves face liability.).

¹¹³ Coleman, *supra* note 88, at 920; see also Edgerton, *supra* note 109, at 833. Otherwise the corporate agent may risk his own liability for the sake of the corporation.

¹¹⁴ Coleman, *supra* note 88, at 911.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959); *United States v. Austin-Bagley Corp.*, 31 F.2d 229 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929).

¹¹⁷ See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943); *United*

The culpability of individual factory farm workers is questionable. The multiple sites of violence condoned and called for in slaughterhouses and factory farms may fit into a “progression theory” of extra-institutional violence.¹¹⁸ There is, first, the abrupt, unnatural, and often painful death of billions of animals in the slaughterhouse as well as the systemic cruelty witnessed and participated in within the factory farm. Less acknowledged within the animal protection movement is the extreme physical and psychological toll on these workers who, among all private sector U.S. industries, suffer the highest annual rate of nonfatal injuries and illnesses and repeated-trauma disorders.¹¹⁹ Such claims also parallel the “brutalization hypothesis”;¹²⁰ in this context, ethnographic accounts¹²¹ emphasize the contradiction faced by slaughterhouse workers between the rules that regulate the slaughter and the necessity of carrying out the killing in an efficient and routinized way.¹²² Corporate criminal liability could thus allow prosecutors discretion in determining the appropriately culpable actor(s).

Another, practical advantage to holding corporations criminally liable for the acts of their agents is that it is often difficult to identify and convict a specific individual, due to complexities in the structures of large organizations¹²³ or the nature of the documentation of cruelty on factory farms. Most documentation of cruelty in factory farms is obtained from videos taken by undercover investigators. It would be a safe assumption to assert, that in many instances, cruelty is documented

States v. American Socialist Soc’y, 260 F. 885 (S.D.N.Y. 1919), *aff’d*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637 (1920).

¹¹⁸ Piers Beirne, *From Animal Abuse to Interhuman Violence? A Critical Review of the Progression Thesis*, 12(1) SOC’Y AND ANIMALS 39, 54 (2004).

¹¹⁹ *Occupational Injuries and Illnesses: Counts, Rates, and Characteristics, 1997*, U.S. Department of Labor (1999).

¹²⁰ The brutalization hypothesis argues that, instead of having a deterrent effect on homicides, the use of the death penalty (as a clear example of state-sanctioned violence) increases homicide rates due to the legitimization of lethal violence. Amy J. Fitzgerald et al., *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover from “The Jungle” Into the Surrounding Community* 6, <https://doi.org/10.1177/1086026609338164> (2009). See also David R. King, *The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683-87 (1978); John K. Cochran & Mitchell B. Chamlin, *Deterrence and Brutalization: The Dual Effects of Executions*, 17 JUST. Q. 685-706 (2000); Bijou Lang & David Lester, *The Deterrent Effect of Executions: A Meta-Analysis Thirty Years After Ehrlich*, 36 J. OF CRIM. JUST., 453-460 (2008).

¹²¹ See, e.g., Gail A. Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect, and Inhumane Treatment Inside the U.S. Meat Industry* (1997); Deborah Fink, *Cutting into the Meatpacking Line: Workers and Change in the Rural Midwest* (1998); Catherine Rémy, *Une Mise à Mort Industrielle “Humaine”? L’abattoir ou L’impossible Objectivation des Animaux* 16 Politix 51-73 (2003).

¹²² Fitzgerald, *supra* note 119, at 6.

¹²³ Coleman, *supra* note 88, at 922.

without clear evidence of the identification of parties involved. Often the only identifiable participants are menial employees who were acting on the instructions of unidentifiable higher officials of the corporation,¹²⁴ and it may be difficult to establish who among the corporate hierarchy gave orders or otherwise tolerated cruelty within the production process.¹²⁵

The most pressing justification for corporate criminal liability in the context of animal cruelty on factory farms is that holding the corporation liable for cruelty comes closer to holding the system itself accountable. As discussed above, cruelty on factory farms is neither a small nor an isolated phenomenon. In an inherently cruel system, which may reward or encourage cruelty, these employees that commit cruel acts could be seen as the products of the nature of the system. Merely holding an individual accountable instead of the corporation at large would effectuate the perception that animal cruelty offenses in factory farms are episodic acts of egregious cruelty perpetrated and contributed to only by the individual. This would allow the industry to maintain that animal cruelty is committed by “bad apples” rather than a byproduct of a factory farm that commits extreme systemic cruelty and thus creates a breeding ground for particularized, egregious cruelty. Targeting only the products of a system would arguably fail to adhere to the purpose of cruelty laws in the first place—to deter cruelty to animals and hold those responsible accountable for such cruelty.

Taking systemic reform of factory farms as the goal, placing liability for egregious criminal acts of animal cruelty by farm employees on the overarching corporation may be able to target systemic cruelty in a way that existing law cannot. While direct liability for egregious cruelty will punish the actor who committed the cruelty, the legal advancement will be limited to the, albeit increasing, ability to prosecute animal abusers within the confines of factory farm walls. Through the criminal justice system, animal advocates can take advantage of the ability to prosecute violations of anti-cruelty laws by using criminal corporate liability to place liability for such crimes on the factory farm, either in conjunction with or instead of the individual.

¹²⁴ *Id.*; see also Edgerton, *supra* note 109, at 834; *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The court justified conviction of the corporation for an antitrust violation on the grounds that high management officials most likely participated in the violation or were at least aware of the violation. Also, it was the corporation, rather than the corporate agents, which benefited from the violation. 467 F. 2d at 1006.

¹²⁵ See, e.g., *Update: Pennsylvania Court Finds that Animal Abuse on Egg Factory Farm is Legal, Compassion Over Killing*, COK, <http://cok.net/inv/esbenshade-farms/> (last viewed Nov. 15, 2019) (referencing a Pennsylvania case in which charges of animal cruelty were brought against a manager and owner of Esbenshade Farms).

Understanding the problem of animal cruelty within factory farms, the current legal enforcement of anti-cruelty laws for egregious animal abuse crimes, and now the rationale and desirability of pursuing corporate liability for these same crimes, Part III will next sketch the doctrine of criminal corporate liability. The ambition of pursuing corporate liability in this context would mean little if the legal avenue was not available for these types of crimes. The doctrine of criminal corporate liability, however, is readily accessible in cases of egregious acts of animal cruelty committed within factory farms.

IV. APPLICATION OF CORPORATE CRIMINAL LIABILITY TO FACTORY FARM ANIMAL CRUELTY

The scope of criminal liability for corporations in the United States is broad; a corporation may be criminally liable for almost any crime.¹²⁶ Corporate liability is based on the imputation of agents' conduct to a corporation, usually through the application of the Doctrine of *Respondeat Superior* [hereinafter the Doctrine of Corporate Liability].¹²⁷ "There are three elements of this doctrine: the offense must be "(a) committed by the corporation's officers, employees, or agents; (b) within the scope of employment; and (c) at least in part for the benefit of the corporation."¹²⁸ Criminal corporate liability in addition requires

¹²⁶ "[T]he standards that courts use to attribute liability to a corporation are easily satisfied." Khanna, *supra* note 90, at 1488-89. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder. See Richard S. Gruner, *CORPORATE CRIME AND SENTENCING* §3.02(2)(d), at 177-78 (Michie, 1st ed. 1994).

¹²⁷ See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979). Although *respondeat superior* is the most common basis of liability, corporations can be found criminally liable under a number of related theories. See *id.* at 1246-47, 1251-53. Some states have embraced alternative standards, such as the Model Penal Code (MPC), and these standards are usually narrower than *respondeat superior*; see *id.* at 1251-53. Many states have adopted the MPC. Its provisions on criminal corporate liability provide that corporations are liable for minor, regulatory offenses where a clear legislative purpose to impose liability is present and the agent's actions were on behalf of the corporation and within the scope of his authority. Notably, the MPC allows a corporation to escape conviction if it can establish that a responsible supervisory officer used due diligence to prevent the offense. Additionally, a corporation is liable where the offense is based on a failure to discharge a specific duty of performance imposed by law. Finally, corporations are liable for all penal violations where the offense was authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment. MPC § 2.07 (2019).

¹²⁸ Charles Doyle, Cong. Research Serv., R43293, *Corporate Criminal*

(d) a *mens rea* elements of the underlying crime to be satisfied.¹²⁹ Each element will be examined as a legal doctrine before being applied to egregious animal cruelty.

a. Committed by the Corporation's Officers, Employees, or Agents

The first element necessary to impute criminal liability onto a corporation is that the offense must be committed by the corporation's officers, employees, or agents.¹³⁰ Virtually any person who is authorized to act on the corporation's behalf can subject the corporation to criminal liability.¹³¹ It is common that the acts of senior management will be attributed to the corporation for purposes of criminal prosecution. However, vicarious liability is not confined to acts committed by this "inner circle"; rather, they can extend to actions taken by mid-level managers and "menial" employees as well.¹³² *United States v. George F. Fish, Inc.*¹³³ further clarifies that corporations are in more danger of liability if the criminal action in question is typically performed by the specific type of employee at issue.¹³⁴ It should be noted, furthermore,

Liability: An Overview of Federal Law 3 (2013).

¹²⁹ See *United States v. Union Supply Co.*, 215 U.S. 50 (1909) (holding that a corporation was capable of willful failure to maintain the books and records required of wholesale dealers in oleomargarine). It is still controversial among commentators whether a corporation can formulate criminal intent. See Brown, *supra* note 97, at 298.

¹³⁰ DOYLE, *supra* note 127, at 3. See, e.g., *United States v. Singh*, 518 F.3d 236, 249-50 (4th Cir. 2008) (holding a corporation accused as liable for the criminal acts of its employees and agents acting within the scope of their employment for the benefit of the corporation and such liability arises if the employee or agent acted for his own benefit as well as that of his employer.).

¹³¹ Brown, *supra* note 97, at 285; see *United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918); Harvey L. Pitt & Karl A. Groskaufmanis, *Comment, Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. REV. 447, 448 (1991) ("The last decade has seen a renewed interest in criminally prosecuting corporations. One survey found that criminal prosecutions of corporations tripled from 1970 to 1984.").

¹³² Corporate liability has been established for lower-level employees in a variety of contexts. Brown, *supra* note 97, at 285-87; see also *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (finding corporations have been held vicariously liable for the acts of their non-managerial employees in numerous instances); *United States v. Bank of New England, N.A.*, 821 F. 2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) (a bank's "head tellers" failed to report currency transactions); *United States v. Automated Medical Labs.*, 770 F.2d 399 (4th Cir. 1985) (medical lab employees falsified log books to conceal violations of FDA regulations).

¹³³ *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

¹³⁴ *Id.* at 801 ("No distinctions are made...between officers and agents, or between persons holding positions involving varying degrees of responsibility. And

that corporate liability has been extended to the acts of independent contractors; therefore a corporation cannot necessarily avoid liability by arguing that the workers are not actual employees of the corporation because they are independent contractors.¹³⁵

In addressing animal cruelty offenses committed by factory farm workers, this element should be relatively easy to establish. Animal abuse or neglect is typically committed by employees tasked with managing or caring for the animals. In factory farms, the workers who manage, care for, or otherwise work directly with the farm animals are also the employees tasked with performing any legal duties owed to the animals. However, their duties do not include violating animal cruelty laws through their employment with the corporation. As such, they are inherently the specific type of agents or employees of the factory farm corporations whose abusive or neglectful actions factory farm corporations should be held liable for.

Furthermore, a factory farm corporation could likely not avoid liability for its lack of compliance with animal cruelty laws merely because it hired independent contractors to handle the farm animals. This concept was tested in an animal cruelty case in Missouri.¹³⁶ While the case ultimately settled, charges were brought against a corporate entity for animal neglect committed by workers of an independent contractor.¹³⁷ It should be noted, however, that the legal rules surrounding whether a corporation can be held liable for the actions of an independent contractor vary from state to state.¹³⁸

this seems the only practical conclusion in any case, but particularly here, where the sales proscribed by the [law] will almost invariably be performed by subordinate salesmen, rather than by corporate chiefs, and where the corporate hierarchy does not contemplate separate layers of official dignity, each with separate degrees of responsibility. The purpose of the [law] is a deterrent one; and to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion.”)

¹³⁵ Brown, *supra* note 97, at 287; *see also* United States v. Parfait Powder Puff Co., 163 F. 2d 1008 (7th Cir. 1947) (holding the defendant had a legal duty to ensure compliance with the law to which it would not be immune by entrusting compliance to the other entity, despite the lack of an employer-employee relationship).

¹³⁶ *Moark Must Pay \$100,000 and Overhaul its Spent Hen Procedures to Settle Animal Cruelty Charges*, Humane Society of the United States (Oct. 25, 2005) http://www.hsus.org/farm/news/ournews/moark_settles_case.html.

¹³⁷ *Id.*

¹³⁸ For example, in Kentucky, an employer is usually not liable for the tortious acts of an independent contractor but rather the employer is bound by the terms of the written contract with the contractor. *Penix v. DeLong*, 473 S.W. 3d 609, 612 (Ky. 2015).

b. Within the Scope of Employment

The doctrine of corporate liability requires that a corporation's officer, employee, or agent acted within the scope of his or her employment when the crime was committed.¹³⁹ The court in *United States v. Cincotta*¹⁴⁰ made clear that, in the criminal context, "an employee is considered to be acting within the scope of his or her employment if the employee has either actual or apparent authority to engage in a particular act."¹⁴¹ "An employee is considered to have apparent authority if the employee engages in conduct which a third party reasonably believes the employee has authority to perform."¹⁴² "Actual authority...is authority that a corporation intentionally and knowingly gives to an employee."¹⁴³

The determination of an employee's actual authority focuses on the functions delegated to the employee and whether or not the conduct at issue falls within those general functions:¹⁴⁴ "acts committed by a servant are considered within the scope of employment when they 'are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.'"¹⁴⁵ Thus, if an employee's criminal conduct is reasonably related to his or her duties as an employee, the corporation can most likely be held criminally liable for such conduct.¹⁴⁶ Courts and commentators¹⁴⁷ have suggested that the basis of corporate liability

¹³⁹ Brown, *supra* note 97, at 290. ("The term 'scope of employment' has been broadly defined to include acts on the corporation's behalf in performance of the agent's general line of work."). *United States v. Automated Medical Lab., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985); *see also* Kathleen F. Brickey, *Corporate Criminal Liability, A Primer for Corporate Counsel*, 40 BUS. LAW. 129, 133 (1984); Kadish, *supra* note 96, at 1250.

¹⁴⁰ *United States v. Cincotta*, 689 F.2d 2 38 (1st Cir. 1982).

¹⁴¹ *Id.* at 241-42. ("A corporation may be convicted for the criminal acts of its agents, under a theory of *respondeat superior*. But criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn requires that the agent be performing acts of the kind which he is authorized to perform.").

¹⁴² Joel M. Androphy et. al, *General Corporate Criminal Liability*, 60 TEX. B.J. 121, 121 (1997). *See also* *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984).

¹⁴³ *Id.* at 122.

¹⁴⁴ *Id.*

¹⁴⁵ *Domar Ocean Transp., Ltd., Div. of Lee-Vac, Ltd. v. Independent Refining Co.*, 783 F.2d 1185, 1190 (5th Cir. 1986) (quoting Prosser & Keeton, *The Law of Torts* 502 (5th ed. 1984)); *see also* Brickey, *supra* note 139.

¹⁴⁶ Androphy, *supra* note 142, at 122.

¹⁴⁷ *See, e.g.*, *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972) ("it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of

for statutory offenses is not grounded on culpability or guilt, but rather is based in the deterrence goal of corporate criminal liability¹⁴⁸ and is intended to “bring the full weight of societal pressure to bear on the corporation to ensure that its employees and agents act responsibly.”¹⁴⁹

A corporation generally cannot preempt the establishment of an employee’s actual authority by asserting that the criminal actions taken by the employee violated corporate policy or instructions;¹⁵⁰ however, a few authorities have sustained such a defense.¹⁵¹ While corporate policies and rules may deter employee misconduct and reduce the punishment received in the sentencing phase of a criminal trial, the fact that an employee violates express instructions of supervisors or other guidelines does not make the corporation immune from criminal responsibility.¹⁵²

If factory farm employees were expressly instructed to manage the farm animals in a way that would violate animal cruelty laws, this would be a clear case of actual authority. However, absent clear records or similar testimony by other employees that such actions were authorized, such direct authorization would likely be difficult to establish. The key to successfully satisfying the scope of employment element of corporate liability would be to emphasize that animal cruelty is inherently a product of, and thus within, employment within a particular factory farm. “One can imagine that if a job involves repeated killing, institutionalized infliction of suffering en masse...and/or required ‘care’ of 100,000 animals or more, a factory farm employee may become desensitized to the violence and suffering inherent in his or her job.”¹⁵³

The job requirements of a such a worker require handling and managing countless animals as efficiently as possible.¹⁵⁴ Included actions would involve moving the animals to and from holding facilities, providing food and water, taking animals to slaughter, and—depending on the facility—slaughtering. Physical abuse when handling these animals as well as neglect in their care are undoubtedly “closely connected with what the [worker] is employed to do” and should fall

their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.”), cert. denied, 409 U.S. 1125 (1973).

¹⁴⁸ Brown, *supra* note 97, at 292.

¹⁴⁹ *Id.*

¹⁵⁰ Androphy et. al, *supra* note 142, at 122.

¹⁵¹ *Id.*; see, e.g., *Holland Furnace Co. v. United States*, 158 F.2d 2, 8 (6th Cir. 1946); *Model Penal Code* § 2.07(5) (2017); *John Gund Brewing Co. v. United States*, 204 F. 17, 23 (8th Cir. 1913).

¹⁵² *Id.* Androphy et. al, *supra* note 142, at 122.

¹⁵³ Leahy, *supra* note 2, at 91.

¹⁵⁴ William Reppy, Jr. & Jeff Welty, *Farm-Animal Welfare, Legislation, and Trade*, 70-WTR Law & Contemp. Probs. 325 (2007).

under the scope of employment element.¹⁵⁵ Following from above, a factory farm corporation cannot necessarily escape liability merely because it has an official policy that forbids animal cruelty, or if it specifically instructed employees not to engage in such conduct.¹⁵⁶

The argument against recognizing an animal cruelty offense as being within the scope of employment would arise in a situation where a worker who commits an egregious act of cruelty performs such act completely divorced from his or her job requirements or responsibilities (i.e., a corporation could frame an incident of cruelty as a worker deciding to beat a pig “for fun” or with otherwise purely personal intentions). And in theory, certain egregious abuses may have far less connection with what the worker is employed to do. This does not weigh strongly against pursuing corporate liability for such cases. A conclusion that an act of animal cruelty is so egregious that the factory farm carries no culpability or responsibility is almost certainly an incredibly rare incident, for the reasons discussed above. Furthermore, prosecutors may choose to bring charges against the corporation, the individual, or both. The nature of the crime itself fits into this scheme without issue.

c. For the Benefit of the Corporation

The third element comprising the basic scheme of corporate criminal liability is established if the employee committed the criminal conduct “for the benefit of the corporation.”¹⁵⁷ This element is satisfied if the employee engaged in the conduct with the intent to benefit the corporation.¹⁵⁸ Importantly, the corporation does not have to receive an actual benefit.¹⁵⁹ However, an intent to benefit the corporation does not

¹⁵⁵ See Pachirat, *supra* note 52, at 239 (“The zones of confinement that characterize contemporary practices of industrialized killing replicate one another, beginning with the division between the slaughterhouse and society at large, followed by the divisions of labor and space between different departments within the slaughterhouse, and reproduced yet again in minute intradepartmental divisions. These zones segregate the work of killing not only from the ordinary members of society but also at what might be expected to be the most explicitly violent site of all: the kill floor.”).

¹⁵⁶ See, e.g., *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989) (explaining that a corporation’s “compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law.”), *cert. denied*, 493 U.S. 2021 (1990).

¹⁵⁷ *Androphy et al.*, *supra* note 142, at 123; see *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

¹⁵⁸ See *United States v. Beush*, 596 F.2d 871, 877 (9th Cir. 1979) (“The acts of an agent may be imputed to the principal...but only if it is the agent’s purpose to benefit the principal, thus bringing his acts within the scope of his employment.”).

¹⁵⁹ *Androphy et al.*, *supra* note 142, at 123. It is clear that there is no

have to be the sole or primary motivation for the employee's conduct.¹⁶⁰ This element is also an important consideration for determining if the employee was acting within the scope of his or her employment, and both elements revolve around similar questions regarding the employee's conduct.¹⁶¹

The motivation underlying the benefit element of corporate liability is suggested to be the protection of the corporation from liability for the acts of a "rogue" employee who is motivated only to benefit himself or a third party.¹⁶² It seems "that there is an attempt to focus liability on the entity which will benefit or which was intended to benefit from the illegality, thus providing the entity with a motivation to assure adherence to the law by those who act on its behalf."¹⁶³ A corporation, then, can only escape criminal liability when the employee in question is motivated solely to benefit himself or herself.¹⁶⁴

A factory farm employee who commits acts of animal cruelty in the course of his or her employment is acting with the intent to benefit the corporation considering the systemically cruel nature of factory farms. The intensive confinement and mass production inherent in factory farming systems on their own may implicate a poor level of care for animals therein. When workers perform their jobs with the intent to support the function of such a system, cruel conduct towards animals may, at the least, promote "efficiency" in moving, confining, controlling, or slaughtering animals. For example, workers in Virginia who are paid per chicken slaughtered were documented crushing

requirement that the corporation benefit in fact from the employee's illegal actions; *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978) ("While it may be that the anti-competitive conduct in this case did not in fact bring monetary gain to Cadillac, this fact does not militate against our conclusion that the actions of the Florida agents were taken for the purpose of benefiting the corporation.").

¹⁶⁰ *Androphy et al.*, *supra* note 142, at 123; see *United States v. Automated Med. Lab.*, 770 F.2d 399, 407 (4th Cir. 1985) ("It would seem entirely possible, therefore, for an agent to have acted for his own benefit while also acting for the benefit of the corporation"); *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984) ("To the extent that [defendant's] requested instructions implied that an agent had to be acting for the exclusive benefit of the corporation for corporate liability to exist... they clearly misstate the law."); see *Cadillac*, 568 F.2d at 1098.

¹⁶¹ *Brown*, *supra* note 97, at 294.

¹⁶² See *Automated Med. Lab.*, 770 F.2d at 407 (4th Cir. 1985) ("The basic purpose of requiring that an agent have acted with the intent to benefit the corporation... is to insulate the corporation from criminal liability for actions of its agents which [may] be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation."); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir.), cert. denied, 459 U.S. 991 (1982).

¹⁶³ *Brown*, *supra* note 97, at 294-95.

¹⁶⁴ *Id.* at 295.

chickens with industrial machinery in order to kill as many chickens as quickly as possible.¹⁶⁵ It is not difficult to imagine that supervisory or managerial employees have awareness of such practices yet take no action. Animal cruelty should surely be considered as offenses of employees acting with intent to benefit the corporation by effectuating efficient production outcomes or acting in accordance with actual or implied policies regarding animal handling or slaughter methods. The close proximity between a farm worker's duty to "care" for an animal and the animal's subjection to extensive systemic cruelty in the same facility exhibits the reality that workers are not "rogue agents" when they commit acts of cruelty on the job.

d. Culpability

With the three legal elements of the doctrine of corporate liability satisfied, the final requirement in order to impute criminal liability to a corporation is the culpability, or *mens rea*, requirement.¹⁶⁶ Courts have been willing to impute to a corporation the knowledge and "careless disregard" of its employees on a theory much like *respondeat superior*.¹⁶⁷ Courts have consistently held that the knowledge gained by corporate employees acting within the scope of their employment, as well as the employees' intent when acting within the scope of employment, will be imputed to the corporation for purposes of ascribing to the corporation the requisite criminal culpability.¹⁶⁸

While a few courts have refused to hold corporations liable for crimes requiring *mens rea* unless directors or corporate officers authorized the criminal acts or participated or acquiesced in the acts, thus supplying a "corporate intent,"¹⁶⁹ many cases exist holding a corporation

¹⁶⁵ Michelle Welch, Senior Assistant Attorney Gen. & Dir. of Va. Attorney Gen.'s Animal Law Unit, Va. Attorney General's Office, Presentation on Successful Prosecution of Chicken Abuse Cases Tied to a Commercial Operation at the Lewis and Clark Law School's Animal Law Conference: Law and the Farmed Animal: Policy, Advocacy and Culture (Oct. 13, 2018) (describing evidence of factory farm employees crushing chickens to death with machinery).

¹⁶⁶ See Brown, *supra* note 97, at 283. While there is debate on whether a corporation can truly have criminal intent, the Supreme Court has concluded that a corporation can be criminally liable for an offense that requires a *mens rea*. While it is still controversial among commentators whether a corporation can formulate criminal intent, *see id.* at 298, the Court has stated that corporations "are as much within the mischief aimed at as private persons, and as capable of a 'willful' breach of the law.;" *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).

¹⁶⁷ See *Standard Oil Co.*, 307 F.2d at 127-28.

¹⁶⁸ Brown, *supra* note 97, at 298.

¹⁶⁹ *Id.*; *see also, e.g., Grant Bros. Constr. Co. v. United States*, 13 Ariz. 388, 114 p. 955 (1911), *aff'd*, 232 U.S. 647, 34 S. Ct. 452, 58 L.Ed. 776 (1914).

responsible for criminal acts committed by low-level employees.¹⁷⁰

A corporation can be held criminally liable for knowingly breaking the law based on the knowledge of its employees, even subordinate employees.¹⁷¹ Federal courts have also developed the doctrine of “collective knowledge,” which imputes to the corporation the aggregated knowledge of all employees.¹⁷² Furthermore, the doctrine of “willful blindness” cannot shield a corporation from criminal liability.¹⁷³ If “circumstances occur which would lead a reasonable person in a supervisory position to inquire into the legality of certain suspect conduct, the corporation will be deemed to have knowledge of the resulting criminal violations.”¹⁷⁴ Like knowledge, the intent of the employee in committing a criminal act will generally be imputed to the corporation.¹⁷⁵ Such cases are fairly straight-forward in their application.¹⁷⁶ If an employee satisfies the *mens rea* requirement for a crime requiring willfulness, then willfulness will generally be imputed to the corporation.

Those wishing to hold factory farm corporations criminally liable for animal cruelty committed by their employees will have the greatest chance of success in courts that extend liability to the corporation for the tasks of non-officer or non-supervisory employees, and may also have the ability to succeed in other courts by demonstrating that the

¹⁷⁰ Brown, *supra* note 97, at 298. A third group of courts take a somewhat intermediate position, holding that where there “is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal’s business...so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have ‘authorized’ the criminal act.” *Id.*; see also *Continental Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960).

¹⁷¹ Brown, *supra* note 97, at 299; see also *Apex Oil Co. v. United States*, 530 F. 2d 1291 (8th Cir. 1976) (holding that while “no officer or director of the corporation had knowledge of [the crime]...the knowledge of the employees is the knowledge of the corporation).

¹⁷² See, e.g., *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) (“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller component. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.”).

¹⁷³ Androphy et al., *supra* note 142, at 124.

¹⁷⁴ *Id.*; see also *United States v. Bank of New England*, 821 F.2d at 855.

¹⁷⁵ Brown, *supra* note 97, at 302-03.

¹⁷⁶ *Id.* at 303 n. 90; see also *United States v. Empire Packing Co.*, 174 F. 2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949) (holding that a corporate employee’s “guilty intent” was imputable to the corporation for the purpose of proving the guilt of the corporation).

inherently and prolifically cruel system of factory farming can result in the effective authorization or acquiescence of animal cruelty by corporate officers or supervisory employees.

Because animal cruelty laws vary state-by-state, the specific conduct and the *mens rea* requirements that establish criminal animal cruelty vary as well. While some criminal animal statutes do not specify a particular culpability requirement,¹⁷⁷ the *mens rea* elements for state animal cruelty laws generally require knowledge or willfulness in order for a person or entity to be criminally culpable.¹⁷⁸ A common distinction among states is requiring knowledge for animal neglect offense and willfulness for animal abuse offenses. In Missouri, for example, the crime of animal neglect is committed if one “[k]nowingly abandons an animal in any place without making provisions for its adequate care.”¹⁷⁹ Animal abuse, on the other hand, can be committed if a person “[p]urposefully or intentionally causes injury or suffering to an animal.”¹⁸⁰

The doctrines of imputing criminal knowledge to the corporation suggest that a corporation could readily be established to have knowledge with respect to animal cruelty (of which knowledge is a statutory element) committed by employees. Employees that commit animal cruelty certainly have knowledge of such cruelty. Even if acts of cruelty were apportioned among several employees or groups within a corporation, the collective knowledge doctrine would compile the knowledge of the separate employees or groups to impute on the corporation. Moreover, a corporation cannot limit its own liability by purposefully keeping supervisory employees in the dark regarding criminal acts of lower-level employees. In the alternative, if a factory farm employee satisfies a willful or purposeful *mens rea* requirement of an animal cruelty statute, this can be imputed to the corporation. In sum, the *mens rea* requirements necessary to hold corporations criminally liable for animal cruelty in factory farms could be readily established.

The egregious anti-cruelty violations committed by factory farm employees can satisfy the three elements of the doctrine of corporate liability as well as *mens rea* requirements for imputing criminal liability. Under the first element, which requires that the crime be committed by the corporation’s employee or agent, factory farm employees undoubtedly have this relationship to the farm they work for, even if

¹⁷⁷ See, e.g., MO. REV. STAT. § 578.009(1) (a person commits the offense of animal neglect if he or she “[h]as custody or ownership of an animal and fails to provide adequate care”). Here, knowledge or willfulness is not required to commit animal neglect.

¹⁷⁸ See, e.g., VA. CODE § 3.2-6750. (Providing that “any person who... willfully inflicts inhumane injury or pain...” on an animal commits a crime).

¹⁷⁹ MO. REV. STAT. § 578.009(2).

¹⁸⁰ MO. REV. STAT. § 578.012(2).

they are independent contractors. The second element requires that the employee's act be committed within the scope of his or her employment. The close relationship between cruelty to animals committed by the industrialized system and cruelty committed by workers defeats any argument that these egregious acts of cruelty—committed within the very same facilities—are outside of a worker's scope of employment. Third, a similar analysis indicates that egregious cruelty is committed for the benefit of the corporation. The nature of a factory farm worker's day-to-day job requires maximizing efficiency and working within an already systemically cruel process, and acts of cruelty toward animals surely work toward an aim of aiding the farm's operations. Lastly, *mens rea* requirements are simple in application. Knowledge and willfulness requirements—as codified in state animal cruelty laws—are easily imputed from the individual worker to the corporation.

V. CONCLUSION

Systemic cruelty to animals within industrialized animal agriculture is one of the top priorities for animal rights, welfare, and protection organizations and movements. While this type of cruelty is well documented and widespread, it cannot be addressed through existing law. Recent developments have seen the success of criminal prosecutions of egregious acts of animal cruelty by factory farm workers. This success is narrow, however, in scope.

This Note argues for utilizing this prosecutorial advantage with egregious cruelty—for the benefit of targeting systemic cruelty—by pursuing criminal corporate liability in such cases. Imputing criminal liability for animal cruelty case to corporations is desirable because it provides a deterrence mechanism for corporations causing them to address cruelty within their facilities; it alleviates the problematic nature of targeting prosecution toward factory farm workers; it incentivizes corporations to improve systemic conditions for animals to avoid liability; and it does what animal advocates always wish to do—target the system itself.

After determining the desirability of criminal corporate liability for animal cruelty, the doctrine was explored, element by element, and analyzed with respect to egregious acts of animal cruelty. Due to the nature of factory farm workers' employment with the corporation and the nature of the day-to-day operations and jobs within a factory farm setting strongly weighing in favor of these acts being committed by an employee of the corporation, within the scope of employment, and for the benefit of the corporation, the doctrine of corporate liability is satisfied. Lastly, the *mens rea* requirements for criminal liability are

simple in application. The knowledge and willfulness requirements found in most animal cruelty laws can, in most case, be directly imputed to the corporation.

Animal protection and advocacy organizations have made significant strides in advancing animal welfare in industrialized animal agriculture, with systemic reform as the ultimate target. The development of the ability to prosecute factory farm workers for anti-cruelty offenses involving egregious acts of cruelty toward farm animals is notable, however the scope and effectiveness of such a strategy is limited. The next step in utilizing existing law to expand the scope of animal welfare reform is to use corporate criminal liability to place the liability for anti-cruelty offenses by workers on the factory farm itself, thus directly holding the industry responsible for cruelty toward animals within their facilities. This strategy, in comparison, would serve as a cruelty deterrent for factory farm corporations and incentivize them to make systemic cruelty improvements and reform in order to avoid further liability for cruelty to animals.

EMERGENCE OF GLOBAL ANIMAL LAW AS A SEPARATE BRANCH OF INTERNATIONAL LAW

SABA PIPIA*

I. INTRODUCTION

Contemporary scientists share the view that non-human animals are sentient beings¹ and thus able to feel and perceive things, such as pain, emotional or physical suffering, and loneliness. Concurrently, attitudes towards animals have changed and humans have begun to think about protecting animals from extinction, extermination and unnecessary suffering.² Ethical issues have been raised in relation to industrial farming, where billions of animals, each with complex sensations and emotions, live and die on a production line.³ Whether or not the law recognizes animals as being sentient, those animals still feel fear and stress and fail to cope with and suffer from pain during transport, slaughter, or any other situations where animals' well-being are at stake. As time passes and humankind steps forward, human-animal interaction is becoming more and more intense and the need to regulate this interaction is gathering momentum. That is precisely where animal law steps in.

The law of animal welfare, commonly referred to as animal law, is any legal issue that involves animals. More specifically, it is a combination of statutory and case law in which the nature of non-human animals, whether legal, social or biological, is an important factor.⁴ Animal law includes all animals: companion animals, animals raised for food, animals used in research, education, and entertainment, and

* Saba Pipia holds a PhD degree in Law from Tbilisi State University (Tbilisi, Georgia). He teaches international law in several universities in Tbilisi, Georgia. The Author wishes to thank Prof. David Favre (Michigan State University) for giving the opportunity to publish this article; also Editor-in-Chief and entire editorial board for their insightful comments on previous version of this article; Prof. Anne Peters (Max Planck Institute for Comparative Public Law and International Law); late Prof. Levan Alexidze, and Prof. Ketevan Khutsishvili (Tbilisi State University); and Mathias Greiner for their continuous support while working on this research project.

¹ Welne Scholts (Ed.) *Animal Welfare and International Environmental Law: From Conservation to Compassion*, 233 (2019).

² Guillaume Futhazar, *Biodiversity, Species Protection, and Animal Welfare under International Law in Studies in Global Law* 101-2 (Peters A. ed., 2020).

³ See *Animal Welfare: Ethical Eye*, Council of Europe Publishing, 42-55 (2006).

⁴ Joan E. Schaffner, *An Introduction to Animals and the Law*, 4-5 (2011).

wildlife.⁵ *Brels* defines animal welfare as a positive state of well-being for non-human animals, resulting from both the absence of suffering and the satisfaction of fundamental needs.⁶ This formula is also known as the “five freedoms” of animal welfare, which were initially developed and introduced by the UK Animal Welfare Council⁷ and later endorsed by the International Organization of Animal Health.⁸ These “five freedoms” include animals’ freedom from: (1) hunger and thirst; (2) discomfort; (3) pain, injury, or disease; (4) fear and distress, and (5) freedom to express normal behaviour.⁹ It has been argued that the “protection of animals from suffering and cruelty is a universal issue” one that should be addressed in international agreements.¹⁰

Development of animal welfare norms may be observed both in national and international law, albeit with much fewer animal-related rules in international law.¹¹ However, it is considered that legal scholarship should cover both domestic and global areas, which would involve ‘horizontal’ comparisons, among different national legal regimes, and ‘vertical’ legal comparisons, among national, European and international legal regimes.¹² Indeed, in order to study the evolution of animal law on a global level, scholarship cannot avoid a thorough examination of domestic legislations and all relevant norms related to the animal welfare that exist in the realm or discipline of international law.

⁵ *Id.*

⁶ Sabine Brels, *The Evolution of International Animal Law: From Wildlife Conservation to Animal Welfare in What Can Animal Law Learn from Environmental Law?* 378 (Randall S. Abate ed., 2015).

⁷ See, *Farm Animal Welfare Council, Farm Animal Welfare in Great Britain: Past, Present and Future* 1- 2 (2009).

⁸ Terrestrial Animal Health Code, art. 7.1.2 (2), https://www.oie.int/en/standard-setting/terrestrial-code/access-online/?htmfile=chapitre_aw_introduction.htm (last visited April 8, 2020).

⁹ However, it should be underlined that animal welfare encompasses sparing animals from artificially created suffering. As *Futhazar* observes, “[i]ndeed, an animal in its natural and undisturbed conditions may very well be subjected to events that violate its ‘freedoms’, such as predation or starvation. The concept of animal welfare does not suggest that such situations should be prevented but rather dictates that humans should not create conditions that negate the aforementioned freedoms.” See Guillaume Futhazar, *Biodiversity, Species Protection, and Animal Welfare under International Law* 2 (MPIIL Research Paper No. 2018-22, 2018) (September 13, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248916.

¹⁰ Amy B. Draeger, *More than Property: An Argument for Adoption of Universal Declaration on Animal Welfare*, 12 *Drake J. of Agric. L.*, 277, 297 (2007).

¹¹ States increasingly regulate animals unilaterally (see Anne Peters *Introduction in Studies in Global Law* 2-3 (Peters A. ed., 2020), while international community has provided scarce norms in terms of animal law, which is further explained in Chapter 2 of this Article.

¹² See Anne Peters, *Animals Matter in International Law and International Law Matters for Animals*, 111 *Am. J. of Int’l L. Unbound* 252, 255 (2017).

There are old and new ways of thinking about animals in international law: “The old way conceives of them as living natural resources.¹³ The new way sees them as sentient beings deserving of protection from unnecessary suffering, or even as inherently valuable lives that it would be wrong to destroy.¹⁴ There is “an emerging recognition in international law that animals have some significance in and of themselves and as individual beings, not merely as a means to human ends and not just as members of their species.”¹⁵

This research paper seeks to study the formation of animal law as it is manifested on a global level, as a separate branch of international law. To that end, this paper analyses why animal law has become transnational, thus global, and how the process of the evolution of a new branch of international law unfolds. This study further examines the possible options for the finalization of the process of law formation and provides some practical options in that direction.

The first part of the paper reviews the opinions of different scholars on the ‘globalization’ of animal law and the trans-boundary features it bears. The second part looks at all international instruments, be they hard or soft law, judicial decisions, or general principles of law, that are currently in place for promoting animal well-being. Part three investigates whether the existing international regime related to animal welfare is indicative of a consensus within the international community on the formation of global animal law as an autonomous field of international law. Finally, the paper discusses different practical tools of international law-making, which may be employed for the purposes of completing the formation process of global animal law. The conclusion further addresses the development of global animal law in light of codification and progressive development, and presupposes the risk of possible fragmentation, which is embedded in the future expansion of animal law.

II. TRANSNATIONAL DIMENSION OF ANIMAL WELFARE ISSUES

Globalization of international law rests on the notion that “activities which were previously treated as local—are now internationalized.”¹⁶ Indeed, as noted by *Tomuschat*, as far as the

¹³ Katie Sykes, Joanna Langille and Robert Howse, *Whales and Seals and Bears, Oh My! The Evolution of Global Animal Law and Canada’s Ambiguous Stance in Canadian Perspectives on Animals and the Law* 212 (Peter Saknoff, Vaughan Black and Katie Sykes eds., 2015) [hereinafter *Oh My!*].

¹⁴ *Id.*

¹⁵ Katie Sykes, “*Nations Like Unto Yourselves*”: *An Inquiry into the Status of a General Principle of International Law on Animal Welfare*, 49 *Canadian Y.B. of Int’l L.*, 3, 10 (2011) [hereinafter *Nations*].

¹⁶ Philippe Sands, *Turtles and Torturers: The Transformation of International*

density of international regulation is concerned, it is trivial to state that international law has conquered wide spaces that were thought to be unfit for international regulations a century ago.¹⁷ The qualitative difference that existed between domestic and international law in the classical time of international law has almost vanished, and new branches have emerged from domestic legal systems, such as, human rights and environmental law.¹⁸

Animals appear in legal relations of all sorts; ranging from freedom of religion¹⁹ to the degree of protection they are afforded in the event of armed conflict.²⁰ However, while on one hand the interaction between humans and animals in the sphere of food, research, and agriculture has been globalized, there is, on the other hand, basically no global regulation that deals with these issues.²¹ Protection of animal welfare is a global concern, and it needs to be addressed globally in international law.²² Currently there is a marked “absence in international law of the mechanisms for the protection of animals from cruelty and mistreatment.”²³ *Peters* highlights the analytical and practical tension present in the acknowledgement of a continuum between humans and animals, and the extant legal gap between the wealth of international law serving human needs and rights and the glaring international regulatory deficit concerning animal welfare.²⁴ *Sykes* further suggests that the “standards of behaviour of civilized nations [towards animals] and the entanglement of animals with transnational issues, such as trade or environmental protection, indeed indicate that human-animal interaction calls for international regulations.”²⁵

Law, 33 N.Y.U. J. Int'l L. & Pol. 527, 538 (2001).

¹⁷ Christian Tomuschat, *International Law as a Coherent System: Unity or Fragmentation?*, Looking to the Future. Essays on International Law in Honor of W. Michael Reisman 335 (Mahnoush A. Arsanjani et al. eds., 2011).

¹⁸ *Id.*

¹⁹ See Marc Trabsky *Law in the Marketplace in Law and the Question of Animal: A Critical Jurisprudence* 135-44 (Otomo Y., Mussawir E. eds. 2013); See also *Animal Welfare: Ethical Eye*, Council of Europe Publishing, 137-170 (2006); See also Anne Peters, (2019). Religious slaughter and animal welfare revisited. *Canadian Journal of Comparative and Contemporary Law*, 5, 269–297.

²⁰ See Marco Roschini *Animals and the Law of Armed Conflict*, Israeli Yearbook of Human Rights vol.47, 35-68 (2017).

²¹ Currently, there is no international binding instrument, which would universally cover all aspects of animal uses. On this topic see David Favre, *An International Treaty for Animal Welfare*, 18 *Animal L.* 237, 237 (2012).

²² Brels, *supra* note 4, at 366, 376.

²³ Basic Legal Documents on International Animal Welfare and Wildlife Conservation 1 (Mark Austen & Tamara Richards eds., 2000).

²⁴ Anne Peters, *Liberté, Égalité, Animalité: Human- Animal Comparisons in Law*, 5 *Transnat'l Env't'l L.* 25, 29 (2016).

²⁵ Katie Sykes, “Nations Like Unto Yourselves”: An Inquiry into the Status

Animal cruelty laws have been adopted in ever increasing countries, which, according to *Peters*, “is an adequate response to the current post-national constellation in which virtually all aspects of human-animal interactions possess a trans-boundary dimension.”²⁶ Moreover, animal law-making on a global level comprises all the elements that are characteristic of the transnational legal process.²⁷

III. FORMATION OF ANIMAL LAW ON A GLOBAL LEVEL

Amid the sparse binding legal norms related to animal welfare on a global stage, significant progress can be traced in soft law, regional arrangements, and the decisions of international judicial institutions, as well as in the movements of various international non-governmental organizations. This section provides an overview of these developments for the purpose of demonstrating that animal law has already been sufficiently formed on a global level.

a. Hard Law Instruments

To the best of this author’s knowledge, the only applicable hard law instrument that contains provisions related to animal welfare is the Convention on International Trade in Endangered Species of Flora and Fauna (CITES).²⁸ Although the scope of its regulation is not necessarily related to animal welfare, instead dealing primarily with conservation, it nevertheless includes several clauses primarily aimed at ameliorating or diminishing animal suffering. In particular, the preamble of the Convention cites the prevention of species’ overexploitation through trade as one of its objectives,²⁹ and the provisions dealing with the handling and transportation of species in certain conditions envisage that any living specimen will be handled, transported, and cared for so as to minimize the risk of injury, damage to health, or cruel treatment.³⁰ Notwithstanding that CITES applies only to wild animals and the above referred clauses are the only set of provisions aimed at protecting animal

of a General Principle of International Law on Animal Welfare, 47 Canadian Y.B. of Int’l L., 4 (2011).

²⁶ See ‘Introduction to Symposium on Global Animal Law (Part I)’, Anne Peters, *Animals Matter in International Law and International Law Matters for Animals*, 111 Am. J. of Int’l L. Unbound 252, 253 (2017).

²⁷ See Janet Koven Levit, *A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 180-82 (2005) (citing the elements of transnational legal process).

²⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, TIAS No. 8249.

²⁹ *Id.*, at preamble.

³⁰ *Id.*, at arts. 3(2)(c), 3(4)(b), 4(2)(c), 4(5)(b), 4(6)(b), 5(2)(b), 7(7)(c), 8(3).

welfare, for some authors, “CITES constitutes a talisman directing attention to the global nature of issues relating to the treatment of animals, and is a beacon lighting the way for animal lawyers to appreciate that animal abuse and protection cannot be adequately addressed locally or even nationally; these issues must be addressed on a global basis.”³¹ Indeed, CITES pioneered on a global level to echo, in limited terms, the idea that animals should be spared from suffering and cruel treatment, and that issues relating to animals are truly global issues. Although CITES specifically regulates welfare issues only in connection to the international transportation and handling of animals, it “constitutes the recognition of the global nature of issues relating to trade in endangered animals by a large number of countries.”³²

b. General Principle of Law

Sykes, Langille and *Howse* outline three basic developments, which point to the emergence of animal law, previously perceived as part of domestic legal domain, on a global level. Namely, they suggest that (1) “the proliferation of international instruments manifesting commitments to minimum standards for treatment of animals;” (2) “the growth of international civil society movements focusing on animal issues;” and (3) “rulings of international judicial bodies,” the World Trade Organization and International Court of Justice, dealing with animal protective norms make it difficult to deny that the protection and welfare of animals is indeed a sufficient cause for concern in international law.³³ *Sykes* went even further by stating that animal welfare norms attained the status of general principle of law as long as “commitment to animal welfare is a principle that can be credibly claimed to count among the shared values of humankind.”³⁴

Following the logic developed by Judge Weeramantry in the *Gabcikovo-Nagymaros* case while discussing the status of the concept of sustainable development, general principles as a source of law should be understood to embrace not only those principles common to all the major legal systems today, but also certain “pristine and universal values which command international recognition,” as evidenced by their acceptance by all the principal cultures and civilizations throughout history.³⁵ Based

³¹ Thomas G. Kelch, *CITES, Globalization, and the Future of Animal Law*, in *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?* 269, 285 (Randall S. Abate ed., 2015).

³² *Id.* at 284.

³³ *Oh My!*, *supra* note 13.

³⁴ *Nations*, *supra* note 15, at 57.

³⁵ *Gabčikovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, 108-09 (Sept. 25) (separate opinion by Weeramantry, J.).

on this consideration, *Bowman, Davis and Redgwell* conclude that a comprehensive review of national legislation may not be necessary for determining whether a certain concept constitutes a general principle of law or not.³⁶ They thoroughly examined the domestic legislations of several countries that incorporate animal welfare provisions into their constitutions or other legal acts. Afterwards, they analyzed animal welfare in cultural and religious traditions, and came to the conclusion that there are ample grounds for recognizing concern for animal welfare both as a principle widely reflected in national legal systems and as a universal value, in the broader sense. Additionally, the study of international legal norms, although scarce, led them to assume that “given the pervasiveness of international concern for animal welfare, and the wealth of recent formal expressions of commitment to that objective, it may indeed now be plausible to discern a convergence upon a general principle of law to that effect in the sense conveyed by Article 38 of the ICJ Statute.”³⁷

c. Case Law

In addition, significant developments with respect to animal welfare have taken place during international litigation, namely the reports of World Trade Organization (“WTO”) Dispute Settlement Panel on the European Community’s (“EC”) ban on seal products³⁸ and the judgment of the International Court of Justice (“ICJ”) on whaling in the Antarctic.³⁹

The *EU Seal Products* case⁴⁰ was brought before the WTO Panel by Canada and Norway, who alleged that the seal regime enacted by the European Community, which imposed a ban on all products made of, or containing, seal, coupled with exemptions for certain categories of products, discriminated against them.⁴¹ The most important exception under the European Union (“EU”) legislation concerned the seals hunted by indigenous communities in traditional hunts carried out primarily for subsistence.⁴² The applicants argued that such an exception allowed

³⁶ MICHAEL BOWMAN, PETER DAVIES & CATHERINE REDGWELL, *LYSTER’S INTERNATIONAL WILDLIFE LAW* 675 (2d ed., 2010).

³⁷ *Id.* 680.

³⁸ Panel Reports, European Communities—Measures Prohibiting the Importance and Marketing of Seal Products, WTO Docs. WT/DS400/R and WT/DS401/R (adopted Nov. 25, 2013) [hereinafter Panel Reports].

³⁹ Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

⁴⁰ Panel Reports, *supra* note 38.

⁴¹ *Id.*

⁴² REGULATION (EC) No 1007/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 on trade in seal products, art. 3(1).

for the import of considerably more products from Greenland, whose seal industry is almost entirely carried out by local indigenous sealers.⁴³ Almost all seal products hunted in Greenland could potentially enter the EU market under the indigenous community exception, whereas a fairly small proportion of products from Norway and Canada would fit under the same exception clause.⁴⁴ Although the WTO Panel ruled that the EU failed to comply with the requirement that measures not be applied in a manner that constitutes arbitrary or unjustifiable discrimination under the General Agreement on Tariffs and Trade (“GATT”), it nevertheless upheld that the seal regime was provisionally justifiable as necessary to protect public morals as prescribed under the exception set out in Article XX(a) of the GATT.⁴⁵ The Panel held that:

[...] We are persuaded that the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union. International doctrines and measures of a similar nature in other WTO Members, [...] illustrate that animal welfare is a matter of ethical responsibility for human beings in general.⁴⁶

[...] various actions concerning animal welfare at the international as well as national levels suggest in our view that animal welfare is a globally recognized issue.⁴⁷

The ICJ came upon the opportunity to discuss the issue of animal welfare, namely the welfare and protection of whales, in its landmark case, *Whaling in the Antarctic*. Australia challenged the legality of Japan’s whaling program based on alleged commercial interests, which run contrary to the purpose and objective of the International Convention for the Regulation of Whaling (“ICRW”).⁴⁸ Australia claimed that Japan’s whaling program, JAPRA II, shielded an alleged commercial purpose behind its research objectives, and that the program did not in fact aim to provide any scientific breakthrough, but was merely motivated by commercial interests.⁴⁹ Indeed, the JAPRA II program envisaged killing

⁴³ Panel Reports, *supra* note 38, annex B-1 and B-2.

⁴⁴ Panel Reports, European Communities—Measures Prohibiting the Importance and Marketing of Seal Products, annexes B-1—B3, WTO Docs. WT/DS400/R/Add.1 and WT/DS401/R/Add.1 (adopted Nov. 25, 2013).

⁴⁵ *Id.* at 122.

⁴⁶ *Id.*

⁴⁷ *Id.* at 125.

⁴⁸ *Whaling in the Antarctic*, *supra* note 39, at 249-50.

⁴⁹ *Id.*; Memorial of Australia, vol. I, 9 May, 2011, chapter 5, section II.

certain species of whales to ensure that the research objectives of the program had been achieved, and then selling the meat in order to fund further research.⁵⁰

The Court, while admitting that there are divergent views among members of the international community on the appropriateness of whaling,⁵¹ still adopted a more animal-centric approach while declaring the inadmissibility of lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the program's stated objectives.⁵² In light of this reasoning, the Court thoroughly examined Japan's whaling activities and found that by granting special permits to kill, take, and treat whales in pursuance of JARPA II, it violated the ICRW.⁵³ The Court ordered Japan to revoke any extant authorization, permits, or license granted in relation to JARPA II, and to refrain from granting any future permits in pursuance of that program.⁵⁴

Veritably, this decision is a great achievement for international law on animal welfare because, with this move, the Court transformed a once environmentally-motivated Convention, which was primarily focused on sustainable usage of whale stocks,⁵⁵ into an animal-centric instrument, guaranteeing the well-being of whales. Indeed, the particular species killed by Japan under the JAPRA II program were not endangered and the killings would not have threatened their existence, at least at that time, under the conditions of whaling activities in the Antarctic.⁵⁶ Yet, the Court decided to limit states' right to use lethal samplings, which went beyond the necessity of strictly defined research objectives.⁵⁷ As rightly held by Judge *Trindade* in his separate opinion, ICRW is a living instrument capable of continuing to respond to the needs of the international community and new challenges it faces in the present domain.⁵⁸

Speaking of these two rulings, *Sykes* notes that the fact that prominent international tribunals discussed issues related to animal protection and welfare indicates that global animal law, a body of transnational norms concerning the treatment of animals, is indeed in the process of establishing itself in positive international law.⁵⁹

⁵⁰ Whaling in the Antarctic, *supra* note 39, at 261-63.

⁵¹ *Id.* at 252-53.

⁵² *Id.* at 259-60.

⁵³ *Id.* at 293.

⁵⁴ *Id.* at 298-300.

⁵⁵ International Convention for the Regulation of Whaling (ICRW) 2 December, 1946, 161 U.N.T.S. 172 at 3.

⁵⁶ Whaling in the Antarctic, *supra* note 39, at 263.

⁵⁷ *Id.* at 259.

⁵⁸ *Id.* at 358 (separate Opinion of Judge Trindade).

⁵⁹ Katie Sykes, *The Appeal to Science and the Formation of Global Animal Law* 27(2) E.J.I.L 497, 498 (2016).

On a regional level, the European Court of Human Rights (“ECtHR”) touched upon the issue of animal welfare on numerous occasions. In most cases, the Court, which is primarily designed to find human rights violations and provide effective remedies, has included animal welfare issues under the realm of natural environment and considered claims in this respect in conjunction to the right to privacy, protected under Article 8 of the European Convention on Human Rights (“ECHR”).⁶⁰ However, as *Sparks* rightly remarks, what is protected under the ECHR is the interest that humans may feel in the welfare and suffering of animals and not the welfare of animals as an end itself.⁶¹ Moreover, ECtHR tends to consider harm to animal life under Article 8 only in situations where the harm, and the harm to the wider environment, will produce substantially negative impacts on human individuals.⁶² Therefore, case law provided by the ECtHR related to animal welfare does not support the idea of “internationalization” of animal welfare issues via incorporating them into the human rights domain.

d. Regional Developments

Of all the regions of the world, Europe led the way in creating a regional system of animal protection. It started at the Council of Europe level,⁶³ followed by developments within the European Union.⁶⁴ The Council of Europe (“CoE”), whose membership consists of nearly all the countries of Europe,⁶⁵ has been one of the leading actors in the promotion of animal welfare since the 1960’s. “Seeking to recognize the importance of animal welfare and the contributions animals make to human health and quality of life, the CoE adopted framework conventions on animal welfare.”⁶⁶ Although nearly all of them lack the all-European approval, the number of parties to these conventions vary between fifteen and thirty-four, the principles set out in these instruments have not met disapproval either; some have been incorporated into

⁶⁰ See Tom Sparks, *Protection of Animals Through Human Rights. The Case Law of the European Court of Human Rights* in *Studies in Global Animal Law* 101-2 (Peters A. ed., 2020).

⁶¹ *Id.* at 162.

⁶² *Id.* at 166.

⁶³ See the official website of the Council of Europe Directorate General Human Rights and Legal Affairs https://www.coe.int/t/e/legal_affairs/legal_cooperation/biological_safety_and_use_of_animals/ [last visited: 07.06.2020].

⁶⁴ See the official website of the European Union https://ec.europa.eu/food/animals/welfare_en [last visited: 07.06.2020].

⁶⁵ See the list of member states of the Council of Europe <https://www.coe.int/en/web/about-us/our-member-states> [last visited: 07.06.2020].

⁶⁶ Jessica Vapnek and Megan Champan, *Legislative and Regulatory Options for Animal Welfare*, (FAO Legislative Study, no. 104, 2011), 19.

the national legislations of member states, even without ratifying the conventions.⁶⁷

The five framework conventions related to the animal welfare are:

1. The European Convention for the Protection of Animals During International Transport of 2003 lays down the general conditions for the international transport of animals from their preparation, to loading, and finally to unloading.⁶⁸ The Convention also provides the design of transport means, fitness for transport of the animals, veterinary controls, handling of animals, and certificates.⁶⁹ It sets out special conditions for the transport of animals by road, air, sea, and rail.⁷⁰
2. The European Convention for the Protection of Animals Kept for Farming Purposes of 1976 is a framework convention introducing principles for the housing and management of farm animals, particularly for animals in intensive breeding systems.⁷¹ In 1992, the scope of application was widened to include the breeding of animals produced as a result of genetic modifications or novel genetic combinations.⁷²
3. The European Convention for the Protection of Animals for Slaughter of 1979 applies to the movement, handling, restraint, stunning and slaughter of domestic animals in slaughterhouses and slaughter operations.⁷³
4. The European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes of 1986⁷⁴ concerns the use of animals in experiments and testing. The Convention

⁶⁷ GLOBAL ANIMAL LAW PROJECT, <https://www.globalanimallaw.org/database/national/index.html> (last visited Apr. 29, 2020).

⁶⁸ European Convention for the Protection of Animals during International Transport (Revised) ETS No.193.

⁶⁹ *Id.* arts. 9-10, 14.

⁷⁰ *Id.* arts. 26-30.

⁷¹ European Convention for the Protection of Animals kept for Farming Purposes, ETS No.087.

⁷² Protocol of Amendment to the European Convention for the Protection of Animals kept for Farming Purposes, ETS No.145.

⁷³ European Convention for the Protection of Animals for Slaughter, ETS No.102.

⁷⁴ European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, ETS No.123.

was primarily designed to reduce both the number of experiments and the number of animals used for such purposes.⁷⁵ It encouraged Parties not to experiment on animals except where there was no alternative.⁷⁶ All research into alternative methods was encouraged.⁷⁷ Animals to be experimented on were to be selected on the basis of clearly established quantitative criteria and must have been well cared for and spared avoidable suffering whenever possible.⁷⁸

5. The European Convention for the Protection of Pet Animals of 1987⁷⁹ aims to ensure the welfare of pet animals kept for private enjoyment and companionship. Provisions are included on breeding,⁸⁰ boarding,⁸¹ and keeping.⁸² The Convention also aimed to regulate trading in and breeding of pet animals,⁸³ to prohibit the modification of their natural appearance,⁸⁴ and to reduce the number of stray animals.⁸⁵

The CoE framework conventions are based on the idea that humans may, and sometimes must, make use of animals, but also bear the moral obligation of ensuring that the animals' welfare and health are not unnecessarily put at risk.⁸⁶

These conventions on the protection of animals promulgated by the Council of Europe were the first international legal instruments to establish ethical principles for the transport, farming, and slaughter of animals.⁸⁷ Additionally, to the knowledge of this author, they were the first legal frameworks to delineate the usage of animals for experimental purposes and as pets.⁸⁸ They have influenced all relevant European legislation. Animal welfare is an issue of increasing importance in

⁷⁵ *Id.* Preamble, para. 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* Part II.

⁷⁹ European Convention for the Protection of Pet Animals, ETS No.125.

⁸⁰ *Id.* art. 5.

⁸¹ *Id.* art. 8.

⁸² *Id.* art. 4.

⁸³ *Id.* art. 2,8.

⁸⁴ *Id.* art. 10.

⁸⁵ *Id.* art. 12.

⁸⁶ Vapnek, *supra* note 66, at 20 (referencing Council of Eur. Hum. Rts. & Legal Aff., Biological Safety Use of Animals by Humans, https://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/default.asp).

⁸⁷ *Id.*

⁸⁸ *Id.*

Europe; the work of the Council of Europe reflects this evolution.⁸⁹ It seems that these conventions were a reference in European countries for the elaboration of relevant national legislations, and were used as a basis for relevant EU legislation.

In terms of the EU, protection of animal welfare is enshrined primarily in the Treaty on the Functioning of the European Union (“TFEU”), which sees animals as sentient beings whose wellbeing should be regarded by member states in the formulation and implementation of the EU’s policies in different spheres.⁹⁰ Furthermore, provisions related to the common market and customs union allow restrictive measures on import and/or export if such measures are justified on grounds of, *inter alia*, protection of health and life of humans, animals.⁹¹ The clause declares that animals’ lives and their health are protected to the same extent as a human’s;⁹² this would allow the member states to impose restrictive measures on export/import in the same manner and with the same scale as they would do if human health or life had been endangered.

Apart from the TFEU, provisions ensuring animal well-being are widely enshrined in secondary legislation including regulations, directives, and decisions. This paper will not discuss all these documents in detail now, but the legislation related to animal welfare enacted within the European Union is quite comprehensive and sets out an inclusive regime of rules to ensure the well-being of animals and spares animals from unnecessary suffering.⁹³

e. Soft Law

From the law-making point of view, the term ‘soft law’ is a description for a variety of non-binding legal instruments used in contemporary international relations. It encompasses, *inter alia*, inter-state conference declarations, instruments adopted under the United Nations General Assembly, codes of conduct, guidelines and [interpretive guides or] recommendations.⁹⁴ Also, potentially included

⁸⁹ For detailed description of the work of the CoE for promotion of animal welfare see brief information on the web-site of the CoE Directorate General Human Rights and Legal Affairs https://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/Introduction.asp#TopOfPage (last visited June 7, 2020).

⁹⁰ Treaty of the Functioning of the European Union, No. 55/2012 of Oct. 2012, art. 13, 2012 O.J. (C 326) 1 [hereinafter TFEU].

⁹¹ *Id.* art. 36.

⁹² *Id.*

⁹³ See generally DAVID B. WILKINS, ANIMAL WELFARE IN EUROPE: EUROPEAN LEGISLATION AND CONCERNS (Stanley P. Johnson et al., ed., 1997).

⁹⁴ Dinah Shelton, *Soft Law in* Routledge Handbook of International Law 69-71 (Armstrong D. ed. 2008).

within the category of soft law are [the] common international standards adopted by transnational networks of national regulatory bodies, NGOs and professional and industrial associations.⁹⁵

Animal welfare has been on the agendas of various inter-governmental institutions, non-governmental organizations, and various activism movements.⁹⁶ The most significant progress in this regard can be seen in the course of actions of the World Organization for Animal Health (“OIE”). The organization, which was established mainly to prevent epidemic diseases by controlling animal health, has been transformed; its mandate has been expanded to encompass animal welfare issues.⁹⁷ The OIE instigated the development and domestic implementation of standards for animal welfare in trade.⁹⁸ It has also been fostering discussions on various animal welfare issues; the OIE has been very active through its regional offices to build awareness of animal welfare issues and facilitate the development of regional strategies on animal welfare.⁹⁹ Since the OIE is an inter-governmental international organization with more than 180 member states,¹⁰⁰ its work is a clear indication of the commitment by states to ensure animal welfare globally.

Advances in the promotion of animal welfare are visible in the work of NGOs and international movements. Perhaps the peak of the process was the finalization of the draft Convention on Animal Health And Protection (“UNCAHP”), which was proposed by a group of NGOs under the leadership of the Global Animal Law Association.¹⁰¹ The drafters of the document intend to address the UN General Assembly, urging them to adopt this document, which would furnish it with higher legitimacy.¹⁰² This declaration of principles is a non-binding instrument

⁹⁵ ALAN E. BOYLE & CHRISTINE M. CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 212-213 (Malcom Evans & Phoebe Okowa eds., 2007).

⁹⁶ For animal activism see Pamela D. Frasch, Katherine M. Hessler and Sonia S. Waisman eds. *Animal Law in a Nutshell* (2nd ed., 2016) 431-462.

⁹⁷ See generally WHAT IS ANIMAL WELFARE?, <http://www.oie.int/en/animal-welfare/animal-welfare-at-a-glance> (last visited Mar. 18, 2020) (the official web-site of the OIE).

⁹⁸ These Standards can be accessed on the official website of the OIE <https://www.oie.int/en/standard-setting/overview/> (last visited June 7, 2020).

⁹⁹ Vapnek, *supra* note 66, at 24.

¹⁰⁰ For the period of drafting this article, the OIE had 182 members, updated list of the OIE members can be seen on the official web-site of the OIE <https://www.oie.int/en/about-us/our-members/member-countries/> [last visited 07.06.2020].

¹⁰¹ United Nations Convention on Animal Health and Protection, Aug. 23, 2018, <https://www.globalanimallaw.org/database/universal.html> (first draft) [hereinafter UNCAHP].

¹⁰² Annual Report of the GAL Association (2018), 19. Available at: <https://projects.globalanimallaw.org/assets/Uploads/GAL-JB-EN-2018.pdf> [last visited 07.06.2020].

of soft law.¹⁰³ Even so, *Brels* suggests that the declaration can trigger further developments internationally and encourage the creation or improvement of animal legislation at the national level.¹⁰⁴ Its adoption could constitute a first step toward a hard law agreement on animal welfare at the international level.

The UNCAHP stands on the basic premise that animals are sentient beings and their welfare should be respected.¹⁰⁵ Animal welfare is defined as a positive state of well-being, which encompasses both the physical and psychological state of the animal.¹⁰⁶ At the same time, the UNCAHP obliges states to take all necessary measures to prevent animal cruelty and suffering by introducing and improving national animal welfare legislations, encouraging businesses to adopt animal welfare policies, and by positively changing public attitudes towards animals.¹⁰⁷

The UNCAHP is a valuable attempt to lobby for animal interests on a global level, and indeed, as *Brels* notes, the universal protection of some interests, such as those recognized for humans, generally developing for the environment, and now emerging for animals, may achieve consensus initially in soft law instruments before becoming widely acknowledged as binding on a global level.¹⁰⁸

IV. INTERNATIONAL CONSENSUS AS AN INTEGRAL ELEMENT FOR THE FORMATION OF INTERNATIONAL LEGAL NORMS

International law formation is an inclusive process; it requires engaging various actors to determine whether the international community is committed, or at least not obstructive, to adding a certain legal framework to the global legal system. This part of the paper analyzes whether the emergence of global animal law, through the transnational (global) legal process, meets the consensus required by international law in order to claim a separate place in the international legal order.

Verma notes that international law is a dynamic, regularly functioning process that rejects or improves old rules and approves of new rules to clarify or substitute existing precedent.¹⁰⁹ The very notion

¹⁰³ Dinah Shelton, *supra* note 94.

¹⁰⁴ Sabine Brels, 'The Evolution of International Animal Law: From Wildlife Conservation to Animal Welfare' in *What Can Animal Law Learn from Environmental Law?* 375 (Randall S. Abate ed., 2015).

¹⁰⁵ UNCAHP, *supra* note 101, at art. 1.

¹⁰⁶ *Id.*, art. 2(1).

¹⁰⁷ *Id.*, art. 4(1-2).

¹⁰⁸ Brels, *supra* note 6, at 375.

¹⁰⁹ D.P. Verma, *Rethinking About New International Law-Making Process*, 29 INDIAN J. OF INT'L L., 38, 44 (1989).

of approval implies an agreement among actors in the international community on the new norms, which may be added to the existing international legal rules or may substitute them. This agreement legitimizes international law and, though not in the formal sense, renders it binding. *Hansen* considers the legitimacy of international law the most important element in relation to its ability to carry out the public policy of the international community.¹¹⁰ According to some commentators, states are the only actors that legitimize international law because they are the sole subject-creators¹¹¹ or because the international legal order is primarily a state-to-state system.¹¹² Others put emphasis on the diminished role of the nation-state as a law-maker as a consequence of law-making carried out by others, and in forms other than intra- or inter-state legislative procedures.¹¹³ It is predicted that the state, as a primarily territorially grounded entity for law-making, will be phased out and other kinds of law-making entities, not necessarily territorially defined, will arise.¹¹⁴ Even the authors, who consider states as being “at the heart of the international legal system,”¹¹⁵ admit that a focus solely on state actions gives a misleading picture of international law-making.¹¹⁶

This diversification of actors in law-making comes hand in hand with the globalization of international law, which, according to *Silva*, is a legal system that is not merely Euro-centric, but also takes into account the valuable contribution of other legal systems of the world.¹¹⁷ The transnational (or global) legal process has features distinct from the classical international law making process. The transnational law-making process is dynamic. As *Koh* describes, transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back again.¹¹⁸ Overall, the homogeneous international society from which classical

¹¹⁰ Robin F. Hansen, *The Public Policy Dimensions of MNE Legal Personality: Is It Time to Unveil the Masters of Globalization?*, in *INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION* 262-63 (Andrew Byrnes et al., eds., 2013).

¹¹¹ Anthony D’Amato, *What ‘Counts’ as Law?* in *Law-Making in Global Community*, 99 (Carolina Academic Press, 1982).

¹¹² Hansen, *supra* note 110.

¹¹³ Inger Osterdahl, *(International) Law!* in *INTERNATIONAL LAW-MAKING: ESSAYS IN HONOR OF JAN KLABBERS* 123, (Routledge, 2014).

¹¹⁴ *Id.*

¹¹⁵ Rosalyn Higgins, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*, 39 (Oxford Univ. Press, 1993).

¹¹⁶ *Id.* at 41.

¹¹⁷ Gerardo E. do Nascimento e Silva, *The Widening Scope of International Law*, *Theory of International Law at the Threshold of the 21st Century: Essays in Honor of Krzysztof Skubiszewski* 238 (Kluwer Law International, 1996).

¹¹⁸ Harold Hongju Koh, *Transnational Legal Process*, *General Theory of International Law* 240 (Nijhoff, 2017).

international law came forth, is long gone, and international law of today must function in a different and complex atmosphere, in which the law-making process has become rather cumbersome.¹¹⁹

Given the absence of clearly expressed, binding international law instruments relating to animal welfare, the article now proceeds to analyze whether there is a general agreement within the international community to develop global animal law as a separate branch of international law. In doing so, this article will follow the argumentation developed by the Judge *Trindade* in his book *International Law for Humankind: Towards a New Jus Gentium*.¹²⁰ Speaking on the process of formation of contemporary international law, *Trindade* diverges from the formal sources theory and suggests that international consensus should be identified for the evolution of new norms in international law.¹²¹ He notes that, previously, states' consent was the only way to determine the binding nature of international legal obligations.¹²² However, according to the contemporary outlook, in the evolution of international law, "individual consent could never constitute the ultimate 'source' of legal obligation," and the emergence of a new and clear tendency in favor of consensus in the formation of norms of international law is evident.¹²³ This view is shared by other authors who similarly maintain that the formation of international legal norms does not require unanimous consent.¹²⁴

Trindade does not provide an explanation on how this "international consensus" should be traced, but merely leans on the notion of *opinio iuris* which, according to him, came to assume a considerably broader dimension than that of the subjective element constitutive of custom.¹²⁵ Furthermore, according to *Trindade*, the notion of *opinio iuris* plays a key role in the emergence and identification of the norms of general international law; *opinio iuris* is affirmed as a key factor in the formation of international law itself.¹²⁶ Thus, *opinio iuris* should be considered a major manifestation of "international consensus" on the formation of new norms of international law. Moreover, *Trindade* notes that the formation of the norms of general international law

¹¹⁹ Verma, *supra* note 109, at 39.

¹²⁰ See generally, Antonio Augusto Cancado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Nijhoff, 2010).

¹²¹ *Id.* at 132.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Palmer Geoffrey, *New Ways to Make International Environmental Law, in Sustainable Development and International Environmental Law*, 146 (Cambridge Univ. Press, 1992).

¹²⁵ *Trindade, supra* note 120, at 137.

¹²⁶ *Id.* at 137-38.

should be agreed upon not only among states, but also among other actors, such as international organizations, peoples, “organized civil society[,] and of groups of individuals at the international level.”¹²⁷ This approach may be characterized as global law, the formation of which is no longer the sole privilege of sovereign states, but a task vested to all actors present at a global level. *Opinio iuris*, shaped in this way, gives expression to the “juridical conscience,” not only of nations and peoples, but of the international community as a whole.¹²⁸ Notably, this unorthodox understanding of *opinio iuris communis* has been applied by Judge Trindade himself in relation to animal welfare.¹²⁹ In particular, his separate opinion in the *Whaling in the Antarctic* case, Trindade opined that granting greater protection to certain whale species, which is not necessarily dictated by their sustainable use, indicates an evolving *opinio iuris communis* on the matter.¹³⁰

Pursuant to the above-mentioned reasoning, the paper shall now examine whether an international consensus has already been achieved on the formation of global animal law. Perhaps, global animal law is one of the legal systems that clearly demonstrates a broad engagement of actors in the process of its formation. This broadness includes not only states, but also other actors, such as international organizations, civil society movements, non-governmental organizations and corporations. Amid the absence of a binding universal instrument, which would regulate issues related to animal welfare on a global level, international consensus on this matter can still be found in various documents, statements, decisions and actions of international actors which ultimately indicate the existence of *opinio iuris* that animal law be formed as global law. Perhaps the major evidence of an international consensus is the *EC Seal Products* case, in which the WTO dispute settlement body rightfully affirmed the existence of the emerging consensus in international doctrine, that animal welfare is an issue of global concern, protection of which is a moral responsibility of humans.¹³¹ However, if not for other important developments, described below, this case alone would not suffice for shaping international consensus on this matter.

¹²⁷ *Id.* at 135.

¹²⁸ Peter Hagggenmacher, *La doctrine des deux elements du droit coutumier dans la pratique de la Cour Internationale*, 90 *Revue generale de Droit international public* 101, 109, 124 (1986).

¹²⁹ *Whaling in the Antarctic case*, *supra* note 39, at 39.

¹³⁰ *Id.*

¹³¹ See generally Panel Reports, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, annexes B-1—B3; Panel Report, *supra* note 38, at 122, 125.

The European consensus is also evident on both the European Union level as well as on the Council of Europe level, notwithstanding the low rate of ratification of international conventions adopted under the framework of the latter.¹³² Basic concepts of animal welfare are incorporated into the national legislations of many countries, and in some countries are even considered an integral part of their constitutions.¹³³ Animal welfare has attracted some elements of formal recognition in the international legal context, but not necessarily a ‘recognition’ manifested in hard-law form. The fact that the OIE’s mandate has been recently expanded to embrace a general animal welfare and “support attracted by the World Society for the Protection of Animals (WSPA) for its non-binding universal declaration on animal welfare” is already an indication that a suitable inter-governmental institution has been set up, and the negotiation of an overarching legal instrument on animal welfare has been ongoing in various forums.¹³⁴

Furthermore, as mentioned above, Judge Trindade made it clear that throughout the years, since the ICRW was adopted, the conscience of the international community has been reshaped to adhere more to whale protection principles than whale conservation and sustainability.¹³⁵ This altered attitude towards animals, whales in this particular instance, may also serve as an apparent manifestation of an emergent international consensus on the globalization of animal law.

All the developments in this sphere discussed above confirm that the welfare of individual animals has emerged as a significant concern in the international community, which points to evidence of an international consensus among this community that animal law should be regulated on a global level. Albeit, the level of attention towards this issue is not high enough to instigate all-encompassing discussions on how to finalize the formation of animal law on a global level, and the responses to these developments are not as consistent and uniform as to avoid future risks of possible fragmentation. The final part of this paper makes several suggestions on certain reforms, which may be desirable solutions in developing a more coherent and synchronized regime of global animal law.

¹³² For details see the above section “Regional Developments” of this Article.

¹³³ Katie Sykes, *supra* note 15.

¹³⁴ MICHAEL BOWMAN, PETER DAVIES & CATHERINE REDGWELL, *LYSTER’S INTERNATIONAL WILDLIFE LAW* 679, 698 (2d ed., 2010).

¹³⁵ Whaling in the Antarctic, *supra* note 58, at 358 (separate Opinion of Judge Trindade).

V. VARIOUS OPTIONS AHEAD

After identifying the existence of an international consensus towards the formation of global animal law as an autonomous part of international law, several options for the successful finalization of the process of animal law formation on the international level shall be discussed below.

The most desirable solution to successfully end this process would be the adoption of an international, multilateral treaty on animal welfare with a broad participation of states. However, other developments could pave the way for the elaboration of an international treaty, which may be the climax of the entire process.

One option is inclusion of animal law in the agenda of the International Law Commission (ILC), a body of experts responsible for generating and implementing international law, which would study and analyse global animal law norms in light of progressive development and codification of international law.¹³⁶ Codification of this rather unorthodox branch of law may seem unconventional for the Commission, but looking through the historical practices of the Commission, it has evidently embarked on codifying other ‘odd’ topics such as international law on disaster relief and international rules dealing with the status of diplomatic couriers or diplomatic bags.¹³⁷ Moreover, as Trindade puts forward, “the criteria for the identification of topics for codification have been, most often and above all, the fulfilment of the pressing needs of the international community in the juridical domain.”¹³⁸ Codification and progressive development help the international community to respond to its normative needs and contribute to the construction of a truly universal international law.¹³⁹ It is argued that the ILC is unlikely to initiate the lengthy process of codification if there is little prospect of states agreeing to a codified set of rules.¹⁴⁰ However, where animal welfare is concerned, given the international consensus on forming animal law on a global level, it is obvious that the topic is one of real international concern, and it is one that may successfully be codified and be subsequently endorsed by states.

¹³⁶ See INTERNATIONAL LAW COMMISSION, Historical Antecedents, <https://legal.un.org/ilc/ilcintro.shtml> (last visited April 8, 2020).

¹³⁷ See INTERNATIONAL LAW COMMISSION, Programme of Work <http://legal.un.org/ilc/programme.shtml> (last visited Mar.18, 2020).

¹³⁸ Trindade, *supra* note 120, at 625.

¹³⁹ *Id.* at 631.

¹⁴⁰ See generally M.R. Anderson et al., *The International Law Commission and the Future of International Law* 9 (The British Institute of International and Comparative Law, 1998).

Another alternative would be the adoption of a resolution by the UN General Assembly. From the outset, it would not be a binding document, but a soft law instrument, which would form a legal basis for strengthening its binding character in the future, even attaining the level of customary international law. This would be largely dependent on the practice of states and their subjective attitude towards the obligations provided in such a resolution.

A final alternative might be a global summit for animal welfare. This global summit would be organized by a group of states or even non-state actors, such as international organizations, NGOs etc., and would ensure the participation of as many states as possible. The adoption of commonly agreed principles for animal welfare should be the ultimate goal of such a summit. Even a non-binding document adopted as an outcome of this summit would enjoy a high degree of legitimacy, and it would serve as evidence of the will of states to be bound by certain principles related to animal welfare. In fact, the Rio declaration was adopted as non-binding document, but has become considerable source of international environmental law.¹⁴¹ Apart from the outcome document, the global summit could also potentially invite states to voluntarily make pledges and commitments through unilateral declarations. Such pledges and commitments would create international legal obligations for those who consented to abide by them, and then compliance with these norms would be international obligations of those states. A similar method of imposing obligations on states is employed by the International Red Cross and Red Crescent Conference, which has resulted in hundreds of unilateral pledges and commitments for states to be bound by various norms of international humanitarian law.¹⁴²

It should be noted that the above-mentioned scenarios are not mutually exclusive, and all of them can simultaneously be put into practice, resulting in positive steps towards advancing animal welfare on a global level. As *Kelch* rightfully notes, “there is a need for animal law to come of age in our globalized world, and the global nature of modern animal law must be embraced and pursued in a unified and cross-culturally understandable manner as a strategy to promote the global interests of animals.”¹⁴³ However, such expansion of animal law norms bears a risk of fragmentation and isolation between different regimes.

¹⁴¹ James Crawford Brownlie’s *Principles of Public International Law* (9th Edition), 339 (2019).

¹⁴² For example, Wolfke does not exclude the possibility that unilateral declarations of states may form international law and be a separate source of it. See Karol Wolfke, *Some Reflections on Kinds of Rules and International Law-making by Practice*, *The Theory of International Law at the Threshold of the 21st Century* 587, 588 (Jerzy Makarczyk ed., 1996).

¹⁴³ *Kelch*, *supra* note 31, at 291.

Fragmentation is defined as “emergence of specialized and autonomous rules or rule complexes, legal institutions and spheres of legal practice.”¹⁴⁴ Although fragmentation itself does not imply an inherently positive or negative value judgment, it reflects an unprecedented regulatory and institutional expansion of international law or a positive demonstration of the responsiveness of legal imagination to social change.¹⁴⁵

Discussing the globalization and fragmentation of environmental law, some authors argue that globalization encompasses notions of interdependence and linkages between problems and solutions, whereas fragmentation implies isolation and disconnection between regimes and institutions.¹⁴⁶ Applying the same idea to the future expansion process of animal law, Peters stresses that addressing the theme of animal welfare in a unified manner, as “global animal law” serves to develop a brace that guards against the fragmentation of international law.¹⁴⁷

The political will of decision makers is an inevitable element of international law formation. The success of forming animal law on a global level largely relies upon political decision makers giving approval in the international arena, which dwells little on theory and even less on jurisprudence. As Palmer notes, political leaders desire practicality, and the greater challenge is to design a regime that will satisfy them and meet their very political needs.¹⁴⁸ Therefore, it is the task of those involved in the process of forming global animal law, such as international organizations, NGOs, and academia, to plan and implement the process in such a way that would engage increasingly more political actors and would secure their alignment to the idea of the protection and promotion of animal welfare worldwide.

¹⁴⁴ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, ¶ 8 UN Doc A/CN.4/L.682, (April 13, 2006).

¹⁴⁵ See Anne Peters *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15(3) *Int’ J. of Con. L.*, 671, 671-704 (explaining effects of fragmentation,).

¹⁴⁶ Keren N. Scott, *Managing Fragmentation through Governance: International Environmental Law in a Globalised World*, 12 *Melb. J. Int’l L.*, 177, 178 (2013).

¹⁴⁷ Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 *TEL* 9, 22 (2016).

¹⁴⁸ Palmer, *supra* note 124, at 271.

TOWARDS AN EU ANIMAL WELFARE LAW: THE CASE OF ANIMAL TESTING AND THE LIMITS OF NEW WELFARISM

ILJA RICHARD PAVONE

I. INTRODUCTION

Nowadays, the mass slaughter of animals is on the rise for several reasons. Animals are mainly exploited for food, (following the logic that they must feed all 7.5 billion of humans), kept in poor conditions in factory farming, and slaughtered for futile reasons, such as luxury foods (the cruel practices of shark finning and *foie gras*), recreation (sport hunting and fishing), and fashion (fur farming industry for skin production).¹ Intensive livestock farming is one of the main causes of global warming,² and that several fish stocks are close to collapse due to overfishing and Illegal, Unreported and Unregulated (IUU) Fishing.³ The pandemic of COVID-19 probably originated from a wet market in Wuhan, a place where the sale of wild animals—without the respect of minimum standards of animal welfare and food safety—is a major source of zoonotic infections.⁴

Statistical data shows a steady increase in the use of animals both in agriculture and in science.⁵ Due to this alarming picture, the

¹ Michela de Soucey, *Contested Tastes: Foie Gras and the Politics of Food*, 194 (Princeton University Press 2016)

² See generally Bruce Myers & Linda Breggin, *What can Animal Law learn from Environmental Law?* 117, (Randall S. Abate ed. 2015).

³ See generally John Charles Kunigh, *Losing Nemo: The Mass Extinction Now Threatening the World's Ocean Hotspots*, 30 Colum. J. Envtl. L. 1 (2005); Ilja Richard Pavone, *Race to Extinction: Shark Conservation Under International and European Law and Its Limits*, 23 Ocean & Coastal L., 45 (2018).

⁴ See generally Tommy Tsan-Yuk Lam et al, *Identifying SARS-CoV-2 related coronaviruses in Malayan pangolins*, Nature, (2020), <https://www.nature.com/articles/s41586-020-2169-0>.

⁵ According to FAO statistical data from 2017, meat consumption has been growing at 56%, especially in developing countries. Food and Agricultural Organization of the United Nations, *Livestock Primary*, <http://www.fao.org/faostat/en/#data/QL> (last visited Nov. 2, 2020). *2019 report on the statistics on the use of animals for scientific purposes in the Member States of the European Union in 2015-2017*, (May 2, 2020) <https://ec.europa.eu/info/sites/info/files/com-2020-16-f1-en-main-part-1.pdf> (stating that the total amount of animals used for the first time in research and testing in the EU is below 10 million animals annually. The main species used in research are mice, fish, rats and birds (they represent 92% of the total number of animals). Species that raise attention by the public opinion, such as cats, dogs, and Non-Human Primates

animal welfare issue as gained much public attention in recent years, and animal protection has now become a major topic in the bioethical debate.⁶ In 2009, Richard L. Cupp highlighted the rise of animal law in the field of bioethics, as animal welfare came to the foreground, resulting in legal developments and doctrinal discussion.⁷ In particular, relevant legal advancements have been registered in the field of the welfare of animals used for scientific purposes. The European Union (EU) was at the forefront when it adopted Directive 2010/63/EU,⁸ which sets one of the highest animal welfare standards in the world in the field of biomedical research.⁹

Research on animals continues to play a fundamental role in scientific and medical developments, and it improves our comprehension of a multitude of human and animal diseases.¹⁰ It is argued that progress made in the fields of drug diseases, regenerative medicine, and cancer research are heavily dependent on *in vivo* models to validate *in vitro* observation.¹¹ At the same time, research on animals raises several

(NHPs) amount to less than 0.3% of the total number of animals, while Great Apes are no longer used in experiments in the EU.)

⁶ Rob Irvine, Chris Degeling & Ian Kerridge, *Bioethics and Nonhuman Animals*, JOURNAL OF BIOETHICAL INQUIRY 435 (2013).

⁷ Richard L. Cupp, Jr, *Bioethics and the Explosive Rise of Animal Law*, The American Journal of Bioethics, 1. (2009). However, animal welfare is far from being recognized as a common principle at the international level. As highlighted by Anne Peters, the international landscape is characterized by a lack of binding rules addressing animal welfare, and the concept of animal welfare itself is not devoid of criticism by animal rights supporters; Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 Transnational L., 9 (2016). *See also*, Saba Pippia, *Formation of Animal Law as an Autonomous Branch of International Law*, MPIL Research Paper Series No. 2019-07 (2019).

⁸ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (276) at 33.

⁹ *See* European Court of Auditors, Special Report No. 31/2018, *Animal welfare in the EU: closing the gap between ambitious goals and practical implementation (pursuant to Article 287(4), second subparagraph, TFEU)*, (July 22, 2019), https://www.eca.europa.eu/Lists/ECADocuments/SR18_31/SR_ANIMAL_WELFARE_EN.pdf, accessed July 22, 2019. The animal protection index ranks Austria, Switzerland and the United Kingdom at the highest level of protection. Switzerland, in particular, recognizes the dignity of all living beings, including animals, in its Constitution; Art. 120 of the Swiss Constitution states: “The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, it shall take account of the dignity of living beings as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species”; *see* Jessica Eisen, *Animals in the constitutional state*’ 15 (4) Int. J. Const. L., 2 (2017).

¹⁰ Nuno Henrique Franco, *Animal Experimentations in Biomedical Research: A Historical Perspective*, 3 Animals, 238 (2013).

¹¹ Jean Swingle Greek, C. Ray Greek, *Medical Research for the Twenty-First*

ethical concerns, as well as animal welfare and animal rights issues. These concerns, among others, will be discussed in this article. The main points can be summarized as: analyzing the development of EU law on laboratory animals; criticizing EU law on moral grounds; and, finally, discussing the implementation of Directive 2010/63/EU in selected legislations specifically in Germany and Italy, and examine the drivers underpinning the current legal approach to animal welfare.

These European countries were chosen on the basis of their comparatively high animal welfare standards. At the same time, they represent two radically different types of policy on laboratory animals, as they are more attentive to animal welfare in Italy, and more in favor of scientific research in Germany. The article is organized as follows. Part I will open with an overview of the bioethical debate on the concept of animal welfare, as expounded by Robert Garner amongst others, from its first development in the UK (the Brambell Report), until its intersection, as well as the contrast with the utilitarian theoretical view (Peter Singer) and the animal rights position (Tom Regan). This section will suggest that, in its “New Welfarist” interpretation (a term coined by Gary Francione), the animal welfare position constitutes the theoretical underpinning of EU animal law.

Part II will turn to the existing EU legal framework on the protection of animals (“EU Animal Welfare Law”) and its ethical background. Focusing on Directive 2010/63/EU (hereinafter “the Directive”), this part of the article will pay attention to its most positive and most controversial provisions, and it will compare its content with that of the former directive, 86/609.¹² Amongst the most positive elements, reference will be made to the fact that the Directive is founded on the 3Rs System (Replacement, Reduction, and Refinement of animal testing) put forward by William Russel and Rex Burch in 1959.¹³ The

Century: What will we do if we don't experiment on animals? Trafford (2006). In this regard, the UK Royal Society stated in 2015 that “at present the use of animals in research remains the only way for some areas of research to progress”. The Royal Society Statement of the Royal Society’s Position on the use of Animals in Research, The Royal Society (May 13, 2015), <https://royalsociety.org/topics-policy/ethics-conduct/animal-testing/>.

¹² Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes 1986 O.J. (L 358) 1. (regarding the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes).

¹³ William Russell & Rex Burch, *The Principles of Humane Experimental Technique*, Methuen (1959); see Martin L. Stephens, Nina S. Mak, *History of the 3Rs in Toxicity Testing: From Russel and Burch to 21st Century Toxicology*, (David G. Allen, Michael D. Waters eds.) (2013); see also *Reducing, Refining and Replacing the Use of Animals in Toxicity Testing* RSC Publishing, (2014).

3Rs System promotes alternative methods, although the most correct wording should be non-animal approach and methods.¹⁴ On the other hand, the use of Non-Human Primates (“NHPs”) in research, which is highly controversial due to their sentience, consciousness, high degrees of sociability, and ability to interact with one another in a complex way, is a topic that has not been clarified by the Directive.¹⁵

Although the Directive prohibits research on NHPs as a general principle (“... they shall not be used in procedures”),¹⁶ it also establishes some legal loopholes that weaken the scope of the rule and still allow experiments on primates.¹⁷ This scheme, composed of a principle with the addition of exception clauses, has been used with reference to animals taken from the wild,¹⁸ animals bred for use in procedures,¹⁹ as well as stray and feral animals of domestic species.²⁰ It left Member States a

¹⁴ In this regard, as highlighted in a report of ProAnima entitled ‘Evaluation of the implementation of the Directive 2010/63/EU on the protection of animals used for scientific purposes, and request for review, a clear distinction must be drawn between New Approach Methodologies (“NAM’s”) that do not use animals in research, which includes Replacement, along with Reduction and Refinement methods that do not envisage research without animals. Florence Burgat et. al, Evaluation of the implementation of the Directive 2010/63/EU on the protection of animals used for scientific purposes, and request for review, Proanima (2010).

¹⁵ Kate Chatfieldm, David Morton, *The Use of Non-human Primates in Research*, in *Ethics Dumping. Springer Briefs in Research and Innovation Governance* (2013) 81 ss.

¹⁶ *Supra* note 14 Directive at Art. 8, Para. 2.

¹⁷ *Supra* note 14 Directive at Art. 8, Para. 1.

¹⁸ Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes 1986 O.J. (L 358) 1, 3. Article 9 states “Animals taken from the wild shall not be used in procedures. Competent authorities may grant exemptions from paragraph 1 on the basis of scientific justification to the effect that the purpose of the procedure cannot be achieved by the use of an animal which has been bred for use in procedures. The capture of animals in the wild shall be carried out only by competent persons using methods which do not cause the animals avoidable pain, suffering, distress or lasting harm. Any animal found, at or after capture, to be injured or in poor health shall be examined by a veterinarian or another competent person and action shall be taken to minimise the suffering of the animal. Competent authorities may grant exemptions from the requirement of taking action to minimise the suffering of the animal if there is scientific justification.”

¹⁹ *Id.* at Article 10, Para. 1, affirms that “Member States shall ensure that animals belonging to the species listed in Annex I may only be used in procedures where those animals have been bred for use in procedures”, while Para. 3 envisages that “Competent authorities may grant exemptions from paragraph 1 on the basis of scientific justification”.

²⁰ *Id.* at Article 11 asserts that “Stray and feral animals of domestic species shall not be used in procedures. The competent authorities may only grant exemptions from paragraph 1 subject to the following conditions: (a) there is an essential need

wide margin of appreciation in the implementation of the Directive, and it resulted in an increase of 15% in the use of NHPs for scientific purposes in 2015 through 2017, (contradicting the ultimate goal of the Directive, which is full replacement of animals used in research).²¹

The article will then turn in Part III to the major issues concerning the transposition of the Directive in Germany and Italy.²² These two countries faced some difficulties in the transposition process, albeit for different reasons, while this procedure has been easier and faster for States such as the United Kingdom, as well as most EU countries. In this regard, it is necessary to clarify to what extent the specific obligations flowing from the Directive are discharged by the States through their regulations and practices. The article will argue that the legal framework is still evolving, and that EU institutions should clarify the scope of some controversial dispositions of the Directive.

II. THE CONCEPT OF ANIMAL WELFARE

Animal welfare is a “multi-faceted issue” which implies “important scientific, ethical, economic and political dimensions.”²³ It has recently become the object of a growing philosophical debate and

for studies concerning the health and welfare of the animals or serious threats to the environment or to human or animal health; and (b) there is scientific justification to the effect that the purpose of the procedure can be achieved only by the use of a stray or a feral animal.”

²¹ Food and Agricultural Organization of the United Nations, *supra* note 4; REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL 2019 -COM(2020)16/1and COM(2020)16/2 (reporting on the statistics on the use of animals for scientific purposes in the Member States of the European Union in 2015-2017; *See also* COMMISSION STAFF WORKING DOCUMENT Accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL 2019 report on the statistics on the use of animals for scientific purposes in the Member States of the European Union in 2015-2017 SWD/2020/10 final, https://ec.europa.eu/environment/chemicals/lab_animals/reports_en.htm (last visited, Apr. 30, 2020).

²² *See*, Michael Bobek, *The effects of EU Law in the national legal systems*, in Catherine Barnard, Steve Peers, *European Union Law* (2nd Edition) (Oxford University Press 2017), 143. Under Art. 288, Para. 3 of the TFEU, Member States are obliged to achieve the results established by a directive. The entire process by which duties arising from Art. 288, Para. 3, are fulfilled is encompassed in the term “implementation.” This process can be divided into separate stages, depending on obligations upon States. The first stage of the implementation process, in particular, requests the transposition of the directive into domestic legislation through the adoption of general measures of a legislative nature. The second and third stages of the implementation process are referred to as “application” and “enforcement.”

²³ Vonne Lund et al., *Animal Welfare Science-Working at the Interface between the Natural and Social Sciences*, 97 *Applied Animal Behaviour Science*, 37 (2006).

has gained legal status at the level of the European Union and its Member States, as well as in other countries, such as Australia,²⁴ Canada,²⁵ New Zealand,²⁶ and the United States.²⁷ The minimum of modern animal welfare legislation is represented by the recognition of animal sentience,²⁸ which means accepting they are capable of experiencing positive and negative feelings.²⁹

²⁴ See, Australian Animal Welfare Standards and Guidelines, Australian Government Department of Agriculture, Water and the Environment (last visited Mar. 5, 2020), <http://www.agriculture.gov.au/animal/welfare/standards-guidelines>. Australia has developed national standards and guidelines addressing the welfare of farmed animals (sheep, cattle, poultry, exhibited animals, livestock at saleyards and depots are at various stages of development)

²⁵ David Fraser et al., *Toward a harmonized approach to animal welfare law in Canada*, 59 *The Canadian Veterinary Journal* 293, 294 (2018) In Canada, all provinces and territories have laws addressing animal welfare. The Criminal Code of Canada prohibits anyone from willfully causing animals to suffer from neglect, pain or injury (Sect. 446). There are, however, exceptions for “generally accepted practices” and, furthermore, the anti-cruelty regulation only applies to “unnecessary” cruelty.

²⁶ See, *Animal Welfare Matters New Zealand Animal Welfare Strategy*, Ministry for Primary Industries (2013). Section 4 of the Animal Welfare Act includes under the Definition of physical, health, and behavioural needs: (a) proper and sufficient food, (ab) proper and sufficient water, (b) adequate shelter, (c) opportunity to display normal patterns of behaviour, (d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress, (e) protection from, and rapid diagnosis of, any significant injury or disease. The needs are however targeted according to “the species, environment, and circumstances of the animal.”

²⁷ See, Animal Welfare Act, National Agricultural Library U.S. Department of Agriculture (last visited May. 3, 2020), <https://www.nal.usda.gov/awic/animal-welfare-act>. In the United States, the Animal Welfare Act of 1966 is a federal law that covers the welfare of animals in research, exhibition, and transport.

²⁸ Ian Roberston, *To Feel or not to Feel; That Is the Legal Question*, *The New Zealand Law Journal*, 10 et seq, (2017). In New Zealand, for instance, animals have recently been recognized as sentient through an amendment to the Animal Welfare Act (“Animal Welfare Amendment Act”) adopted on May 5, 2015. The amended Animal Welfare Act now states “An Act to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and in particular (i) to recognize that animals are sentient...”. See, Charles F. Hall & David S. Favre, *Comparative National Animal Welfare Laws*, Michigan State University College of Law - Animal Legal & Historical Center, (last visited April 30, 2020), <https://www.animallaw.info/article/comparative-national-animal-welfare-laws-0>. Many more countries have done so: Austria, Colombia, Czech Republic, Germany, Portugal, Spain, Switzerland.

²⁹ Helen S. Proctor et al., *Searching for Animal Sentience: A Systematic Review of the Scientific Literature*, (3), *Animals*, 882 (2013) et seq; Jessica Allen, *Consider whether animal welfare legislation should be extended to include decapods*, 2 (1) *UK Journal of Animal Law*, 9 (2018). Sentience is the ability to perceive or feel things, and is commonly accepted as a distinctive characteristic of terrestrial and marine mammals and of invertebrates, such as cephalopods. Sentience in fish, insects, and crustaceans is, instead, still questioned.

Animal welfare is a key element in agricultural and development policies, as well as one of the key components of the safety and the quality of agro-food products.³⁰ They mainly address farmed animals, fisheries, and animals in labs, but not animals in the wild. Environmental law, meaning biodiversity and wildlife law, does not make reference to the concept of animal welfare, but rather to the “protection” of some categories of animals, i.e. those most threatened by extinction.³¹ Welfare issues attract attention only in instances where wild animals are caught by humans and extracted from the wild.³² The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) is, to date, the only environmental treaty that references animal welfare, although only in an incidental manner in cases of animals caught or removed from the wild.³³ As animals are brought under human control, a minimum standard of welfare, i.e. animals not being treated “*in a cruel manner*,”³⁴ must be guaranteed by domestic authorities from confinement in cages, through shipment and transport, and to the point of delivery to the recipient country.³⁵ For instance, Art. VIII, Para. 3 states, “[t]he Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.”³⁶

³⁰ Lucas J.Lara, Marcos H.Rostagno, *Animal Welfare and Food Safety in Modern Animal Production, Food Science, Technology and Nutrition*, (2018) 91 et seq.

³¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar., 3 1973, 27 U.S.T. 1087, T.I.A.S., No. 8249; Michael Bowman et al., *Lyster’s International Wildlife Law* (Cambridge University Press 1996), 14; see Guillaume Futhazar, *Biodiversity, Species Protection and Animal Welfare under International Law*, A. Peters (eds), *STUDIES IN GLOBAL ANIMAL LAW* (Heidelberg, 2020), 95 ss (discussing the lack of any reflection on animal welfare in wildlife law).

³² Stuart R. Harrop, *The Dynamics of Wild Animal Welfare Law*, 9 *Journal of Environmental Law* (1997), 287 et seq.

³³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar., 3 1973, 27 U.S.T. 1087, T.I.A.S., No. 8249; Stuart R. Harrop, *Wild animal welfare in international law: the present position and the scope for development*, 4 *Global Policy*, 381, 387-88 (2013); Paul C. Paquet, *Wildlife conservation and animal welfare: Two sides of the same coin?*, 19 (2) *Animal Welfare*, 177 (2010) et seq.

³⁴ See Art. III, Para. 2 lit c, Para. 4 let. b, Art. IV, Para. 2, let. c, Para. 5, let. b, Para. 6, let. b; Art. V, Para. 2, let. b. The formula adopted with reference to the phases that go from preparation to shipping and delivery is as follows: “...any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment”.

³⁵ Sophie Riley, *Wildlife law and animal welfare: competing interests and ethics*, W. Scholtz, *ANIMAL WELFARE AND INTERNATIONAL ENVIRONMENTAL LAW* (Cheltenham, Northampton, 2019), 162 et seq.

³⁶ Michael Bowman, *Conflict or compatibility? The trade, conservation and animal welfare dimensions of cites*, 1 *Journal of International Wildlife Law & Policy*, 9, 89 (1998).

a. *The first ethical reflections*

In the West, the first ethical reflections on the concept of animal welfare can be traced back to the writings of Jeremy Bentham during the Enlightenment.³⁷ His animal welfare position differentiates between *use* and *treatment*.³⁸ Bentham contends that the determination of whether animals have the capacity to suffer is crucial when evaluating the moral status of animals.³⁹

Ruth Harrison's seminal book *Animal Machine*, raised awareness of the poor living conditions farmed animals in the UK suffered.⁴⁰ In particular, Harrison highlighted problems that remain prevalent practices in intensive livestock farming, including the point that animals are often confined in crowded, unsanitary conditions.⁴¹

Harrison's work inspired bioethical debates and resulted in the creation of a technical commission to conduct an enquiry on the issue.⁴² The resulting report, named the Brambell Report,⁴³ contained for the first time a list of freedoms to which animals were entitled, focusing primarily on the space that should be made available to animals.⁴⁴ This list was later adapted by the UK Farm Animals Advisory Committee to form the well-known list of the five freedoms: to stand up, to lie

³⁷ Nathaniel Wolloch, *Animals in Enlightenment Historiography*, 75 HUNTINGTON LIBRARY QUARTERLY (2012), 53-68.

³⁸ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 143-44, 143 n.1 (Jonathan Bennett ed., 2d ed. 1823); Bernard A. Foëx, *The Ethics of Animal Experimentation*, 24 EMERGENCY MED. J., 750 (2007) (as stated by Bentham in the famous passage contained in *Introduction to the Principles of Morals and Legislation*, "[t]he question is not, Can they reason? Nor, Can they talk? But, Can they suffer?"); Endre Szücs, *Animal Welfare in Different Human Cultures, Traditions and Religious Faiths*, 25 ASIAN-AUSTRALASIAN J. ANIMAL ETHICS 1499, 1501-02, (2012) (Indian cultures have a much longer history of animal ethics).

³⁹ Johannes Kniess, *Bentham on animal welfare*, 27 BRITISH JOURNAL FOR THE HISTORY OF PHILOSOPHY 556-572, (2019), at 557.

⁴⁰ EDWARD N. EADIE, UNDERSTANDING ANIMAL WELFARE: AN INTEGRATED APPROACH 26 (Springer 2012).

⁴¹ See generally PETA, FACTORY FARMING: MISERY FOR ANIMALS, www.peta.org/issues/animals-used-for-food/factory-farming (last visited Apr. 30, 2020).

⁴² See Emily Patterson Kane & Gail C. Colab, *History, Philosophies and Concepts of Animal Welfare*, in LABORATORY ANIMAL WELFARE 2 (Kathryn Bayne & Patricia Turner eds., Academic Press 2013); see generally TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS, REPORT, 1965, Cmnd. 2836 (UK) [hereinafter Brambell Report].

⁴³ BRAMBELL COMMITTEE . REPORT OF THE TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF LIVESTOCK KEPT UNDER INTENSIVE CONDITIONS. Her Majesty's Stationery Office; London, 1965. Command Paper 2836.

⁴⁴ Melissa Elischer, *The Five Freedoms: A history lesson in animal care and welfare*, Michigan State University Extension (September 6, 2019), https://www.canr.msu.edu/news/an_animal_welfare_history_lesson_on_the_five_freedoms.

down, to turn around, to groom themselves, and to stretch their limbs.⁴⁵ The list is based on the necessity to avoid unnecessary suffering and to guarantee the provision of basic needs; it is generally considered the landmark standard for farmed animal welfare in the UK.⁴⁶

The Brambell Report recognized that animals are sentient beings, capable of suffering from pain, exhaustion, fright, and frustration.⁴⁷ They are able to experience emotions such as rage, apprehension, and pleasure.⁴⁸ The Report repudiated some animal mutilations, including chicken debeaking (or beak trimming) and pig tail-docking. However, it also stated that battery cages could not be banned due to the lack of a better alternative.⁴⁹ The Brambell Report affirmed that animal welfare is a wide term that comprises both the physical and mental well-being of animals.⁵⁰ At the end of the day, however, the Report was based on an anthropocentric vision of animal ethics, meaning it aimed to find ways to mitigate animal suffering only so as to preserve their economic value.⁵¹

The UK Agriculture (Miscellaneous Provisions) Act 1968⁵² incorporated the term “welfare” for the first time, but as observed by Mike Radford, unlike the term “cruelty,” “welfare” had never been defined by UK law until that point.⁵³ The body of treaties on animal

⁴⁵ David J. Mellor, *Updating Animal Welfare Thinking: Moving beyond the “Five Freedoms” towards “A Life Worth Living”*, ANIMALS, Mar. 2016, at 2.

⁴⁶ HAROLD D. GUITER, *ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL MOVEMENT* (Southern Illinois University Press 1998).

⁴⁷ Brambell Report, *supra* note 38, at 28.

⁴⁸ See Rhoda Wilkie, *Animals as Sentient Commodities*, in THE OXFORD HANDBOOK OF ANIMAL STUDIES 279 (Linda Khalof ed., Oxford University Press 2017) (discussing the objectification of animals and the effects that animal domestication had on humans and animals); Brambell Report, *supra* note 38, at 10.

⁴⁹ Brambell Report, *supra* note 38, at 30.

⁵⁰ Brambell Report, *supra* note 38, at 25.

⁵¹ Steven P. McCulloch, *A Critique of FAWC’s Five Freedoms as a Framework for the Analysis of Animal Welfare*, 25 (5) JOURNAL OF AGRICULTURAL AND ENVIRONMENTAL ETHICS (2013) 959 et seq.

⁵² See Agriculture (Miscellaneous Provisions) Act 1968, c.34, paras. 2-4 (Eng.). text available at <https://www.legislation.gov.uk/ukpga/1968/34/contents>.

⁵³ 7 MIKE RADFORD, *ANIMAL WELFARE LAW IN BRITAIN: REGULATION AND RESPONSIBILITY* 264 (Oxford University Press, 2001); WORLD ORGANIZATION FOR ANIMAL HEALTH, *TERRESTRIAL ANIMAL HEALTH CODE*, General Provisions § 7.1.1 (20th ed. 2011) (“Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear and distress. Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane slaughter/killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry and humane

protection developed by the Council of Europe in the 1970s, as well as subsequent domestic legislations, codes, and guidelines on the protection of farmed animals, drew inspiration from the Brambell Report.⁵⁴ The European Convention for the Protection of Animals Kept for Farming Purposes was the first multilateral treaty addressing the welfare of farmed animals.⁵⁵ In 1993, the United Kingdom Farm Animal Welfare Council (“FAWC”) updated the five freedoms on the basis of the concept of “minimum acceptable treatment” of animals.⁵⁶ A minimum standard (a life worth living) should be guaranteed to all farmed animals during their life cycle, spanning from their lifetime in the farm, to the conditions of transport, to the moment of slaughter at the abattoir.

b. Animal rights

The emergence of the animal rights position in the 1980s heavily challenged the dominant animal welfare approach.⁵⁷ This school of thought affirms that animal policies and legislations should directly address the use of animals, and it should therefore banish any form of exploitation.⁵⁸ Veganism, or at least vegetarianism, is the moral baseline in order to achieve at least a minimum standard of decency and civilization regarding non-human beings.⁵⁹

treatment”); Marian Stamp Dawkins, *The Science of Animal Suffering*, 114 *ETHOLOGY* 937, 937(2008) (stating “Improvements in animal welfare can be based on the answers of two questions: Q1: Will it improve animal health? and Q2: Will it give animals something they want?”).

⁵⁴ JOAN E. SCHAFFNER, *AN INTRODUCTION TO ANIMALS AND THE LAW*, 113 (Palgrave MacMillan 2011).

⁵⁵ *See generally* European Convention for the Protection of Animals Kept for Farming Purposes, October 3, 1976, E.T.S. No. 087.

⁵⁶ FARM ANIMAL WELFARE COUNCIL, *REPORT ON PRIORITIES FOR ANIMAL WELFARE RESEARCH AND DEVELOPMENT* (1993).

⁵⁷ J. Baird Callicott, *Animal Liberation: A Triangular Affair*, 2 *ENVTL ETHICS* 312 (1980); *see generally* Ian J. Campbell, *Animal Welfare and Environmental Ethics: It’s Complicated*, 23 *ETHICS & ENV’T* 49(2018) (analysing Callicott’s animal rights theory and discussing its impact).

⁵⁸ *See* Aurélien Barrau and Louis Schweitzer, *L’animal est-il un homme comme les autres? Les droits des animaux en question* (Dunod, 2018), 25; Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011). Among the many different animal rights positions, we have to distinguish at least two: abolitionism, as argued by Francione et al. (who call not only for the abolition of the use of domesticated animals, but also for their non-existence), and a more utopian animal rights position, as defended by Donaldson and Kymlicka, arguing that animals have rights to inclusion and membership in our society, and that ensuring their non-existence is again an act of injustice.

⁵⁹ Tom Regan, *The Moral Basis of Vegetarianism*, 5 *Canadian Journal of Philosophy* 181 (1975).

It is commonly understood that arguments in favor of the idea that animals have the same moral status as human beings were first formulated by the Australian philosopher Peter Singer in 1975, sparking the debate on animal rights.⁶⁰ However, it is a common misconception that Singer formulated an animal rights position; Singer did not develop a theory of animal rights, and is himself quite critical of the rights framework.⁶¹ His approach is utilitarian, not rights-based, and can be summed up in Bentham's formulation: "rights are nonsense upon stilts."⁶² In fact, Singer advocates for equality of consideration of interests rather than equality of rights.⁶³

Singer founded his work on the thought of Jeremy Bentham, the founder of utilitarianism. Bentham's "Utility Maximisation",⁶⁴ which is based on the assumption that people tend to maximize the predominance of pleasure over pain,⁶⁵ requires each individual to act morally. Bentham's "Utility Maximisation" principle extended to sentient animals ("preference utilitarianism").⁶⁶ Singer maintains the premises of Bentham's thought, but he asserts that the only thing that counts is suffering.⁶⁷ Accordingly, only those sentient living beings, including animals, capable of experiencing physical and psychological pain shall be granted equal consideration to humans, and should be prevented from suffering, with the slaughtering of farmed animals considered the real

⁶⁰ Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals*, 23 (Harper Collins Publishers 1975).

⁶¹ Eugene C. Hargrove, *THE ANIMAL RIGHTS/ENVIRONMENTAL ETHICS DEBATE. THE ENVIRONMENTAL PERSPECTIVE* (State University of New York Press, 1992), at 14.

⁶² Jeremy Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, (P. Schofield, C. Pease-Watkin, C. Blamires, ed) Oxford, 2002 (The Collected Works of Jeremy Bentham), 317 et seq. at 317; see also Lori Gruen, *The Moral Status of Animals*, The Stanford Encyclopedia of Philosophy (2017), <https://plato.stanford.edu/entries/moral-animal/> (last visited Apr. 22, 2019); compare Peter Singer, *Utilitarianism and Vegetarianism*, *4 Philosophy & Public Affairs*, 325 (1980), with Renzo Llorente, *The Moral Framework of Peter Singer's Animal Liberation: An Alternative to Utilitarianism*, *1 Ethical Perspectives*, 61 et seq. (2009) (arguing that Singer's argumentation is not based upon utilitarianism, but rather on the principle of non-maleficence).

⁶³ Brian Duingan, *Speciesism*, *Enciclopedia Britannica*, <https://www.britannica.com/topic/philosophy>.

⁶⁴ For an in-depth analysis of Bentham's thought, see Matthias Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 3 (Nomos, 2015).

⁶⁵ Peter Singer, *Practical Ethics*, 86-87 (Cambridge University Press 1973).

⁶⁶ Preference utilitarianism was developed by the English philosopher R.M. Hare; Mauro Cardoso Simões, Hare's preference utilitarianism: an overview and critique, 36 *Trans/Form/Ação*, (2013), https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-31732013000200008.

⁶⁷ Peter Singer, *The significance of animal suffering*, 13 *Behavioral and Brain Sciences*, 9-12 (1990).

great evil.⁶⁸ From this consideration, Singer developed, together with Helga Kuhse, the most controversial and miscomprehended elements of his doctrine in their influential book, *Should the Baby Live?*,⁶⁹ in favour of infanticide and child euthanasia. They argued, according to their opponents, that newborn human babies with several disabilities (i.e. spina bifida), which they claimed do not have consciousness, should be euthanized in order to avoid serious suffering (selective infanticide).⁷⁰ Singer subsequently claimed that his position on delicate issues such as abortion and infanticide had been heavily misunderstood,⁷¹ stating that he has tried to affirm that these acts cannot be considered morally equivalent to acts such as the murder of an individual who is capable of “knowing what existence is.”⁷² Therefore, Singer can be considered as belonging to the “second position” of welfarism; he does not challenge the property status of animals, nor does he consider it immoral in itself to kill an animal.⁷³ Lastly, he does not advocate abolitionism as the ultimate goal of animal policies.⁷⁴

Singer’s most influential argument is his critique of speciesism. Together with other forms of prejudice such as racism, sexism, and discrimination against people with disabilities, speciesism is a violation of the core principle of equality. Speciesism is defined by Singer as “a prejudice or attitude of bias toward the interest of members of one’s own species and against those of members of other species.”⁷⁵ Typically,

⁶⁸ Emilie Dardenne, *From Jeremy Bentham to Peter Singer* 7 *Revue d’études benthamiennes*, 1. (2010); Peter Singer, ‘Killing Humans and Killing Animals’, 22 *Inquiry: An Interdisciplinary Journal of Philosophy* 145 (1975).

⁶⁹ Peter Singer and Helga Kuhse, *Should the Baby Live? The Problem of Handicapped Infants* (Oxford University Press 1985).

⁷⁰ On the debate concerning Singer’s controversial positions in Germany, see Erik B. Brown, *Dilemmas for German Bioethics*, 5 *New Atlantis* 37 (2004); Fritz Oehlschlaeger, *Procreative Ethics: Philosophical and Christian Approaches to Questions at the Beginning of Life* 300 (Wipf & Stock Pub, 2005); Suzanne Uniacke, H.J. McCloskey, *Peter Singer and Non-Voluntary ‘Euthanasia’: tripping down the slippery slope*, 9 *JOURNAL OF APPLIED PHILOSOPHY*, 203 (1992).

⁷¹ Peter Singer, *A German Attack on Applied Ethics: A statement by Peter Singer*, 9 *JOURNAL OF APPLIED PHILOSOPHY*, 85 (1992).

⁷² Peter Singer, *Discussing Infanticide*, 39 *JOURNAL OF MEDICAL ETHICS*, 260 (2013).

⁷³ Peter Singer, *Killing Humans and killing Animals*, 22 *An Interdisciplinary Journal of Philosophy* (1979) 145 et seq.

⁷⁴ Gary L. Francione, *Animal Rights Movements, New Welfarism*, in Mark Bekoff (eds.) *Encyclopedia of Animal Rights and Animal Welfare* 40, 2nd ed. Vol. I, (Routledge 2010).

⁷⁵ Peter Singer, *Animal Liberation* 6 (Bodley Head, 1975); see also Richard D. Ryder, *Animal Revolution: Changing Attitudes toward Speciesism* (Berg Pub Ltd, 2000) (for the origin of the term “speciesism”); but see, Shelly Kagan, *What’s Wrong with Speciesism*, 33 *Journal of Applied Philosophy*, 1 (2016) (illustrating a different position in favour of speciesism on the basis of the concept of “modal personism”).

humans exhibit speciesism when they give less weight to the interests of nonhuman animals when compared to similar interests of human beings.

A further branch of the animal rights position is represented by the work of Tom Regan who, in *The Case for Animal Rights*, expressed his doctrine not on the basis of utilitarianism, but rather from a deontological viewpoint.⁷⁶ All nonhuman animals who have interests and autonomy are considered subjects-of-a-life.⁷⁷ As such, they have inherent value and their own rights and interests, also referred to as the species-egalitarian position.⁷⁸ His right-based position is premised on an abolitionist claim; every form of exploitation of animals by human beings for food, entertainment, or research should be banned.⁷⁹ Therefore, he rejects any policy with the goal of improving animal welfare, claiming that “animal rights require empty cages, not larger cages.”⁸⁰ One might interpret this statement to mean that he would never comprehend situations where the benefit of a certain number of sentient beings (not only humans but also animals) could justify the use (and sacrifice) of other living creatures for experimental purposes. And yet, as Regan explains in the well-known lifeboat cases (highly contested even by Singer himself), in an extreme situation, where four persons and one dog are aboard and one must be sacrificed to save the others, it will always be the dog, even if it were a million dogs, they would still be the ones to be thrown overboard.⁸¹

Human rights and speciesism can sometimes conflict with animal rights. However, most animal rights advocates stress, very carefully, that their demands on behalf of animals are not antagonistic to human rights, and Regan himself acknowledged that any case for animal rights

⁷⁶ Dale Jamieson, *Rights, Justice, and Duties to Provide Assistance: A Critique of Regan’s Theory of Rights*, 2 *Ethics* (1990) 349 et seq.

⁷⁷ European Convention for the Protection of Animals Kept for Farming Purposes, *supra* note 50; *see also* Regan, *infra* note 73.

⁷⁸ TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 243 (1st ed. 1983). Regan’s main conceptual tool is the “subjects-of-a-life criterion”; in this regard, he stated that “individuals are subjects-of-a-life if they have beliefs and desires; perception, memory and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare- interests; the ability to initiate action in pursuit of their desires and goals; a psycho-physical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else’s interests.”

⁷⁹ Corine Pelluchon, *Animal Ethics*, in *ENCYCLOPEDIA OF GLOBAL BIOETHICS* 1, 4 (Henk ten Have ed., 2015).

⁸⁰ TOM REGAN, *EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS* 10 (2004).

⁸¹ Tom Regan, reply by Peter Singer, *The Dog in the Lifeboat: An Exchange*, 32(7) *N.Y. REV. BOOKS* (1985), available at <https://www.nybooks.com/articles/1985/04/25/the-dog-in-the-lifeboat-an-exchange/>.

is a case for human rights, too.⁸² For instance, the use of prisoners as trial subjects instead of animals would be against the principle of human dignity and the right to life enshrined in several human rights treaties and declarations. Also, the human right to own property *prima facie* clashes with at least some animal interests, but only superficially. In reality, use of property is subject to several restrictions, while speciesism claims the priority of human interests above the interests of animals.⁸³

c. The Ethics of Welfarism

The ethics of Welfarism, as developed by the UK moral and political philosopher Robert Garner,⁸⁴ represents a different point of view on animal ethics. His theory is based on the key assumption that, although humans are morally superior, animals have some moral worth, and, therefore, we are not entitled to inflict unnecessary suffering on them.⁸⁵ According to the Welfarist position expressed by Garner, even though animal suffering is morally relevant, the exploitation of animals is ethically permissible (animals are in fact legally considered as property or goods).⁸⁶ At the same time, exploitation must be strictly regulated, and high standards must be set up to avoid unnecessary suffering, in line with Garner's definition of the concept of justice.⁸⁷

Conversely, scholars such as Francione (an abolitionist and supporter of animal rights) advocate that the animal welfare argument has failed in its practice since animals continue to be slaughtered and exploited in a cruel manner worldwide.⁸⁸

The concept of animal welfare is indeed at odds with the position that recognizes animal rights, which received a significant impulse within applied ethics.⁸⁹ The animal rights viewpoint is based on the assumption that animals, as bearers of rights, cannot be used by human

⁸² MARK ROWLANDS, *ANIMAL RIGHTS: MORAL THEORY AND PRACTICE* (Palgrave 2009), 58 et seq.

⁸³ IAN A. ROBERTSON, *ANIMALS, WELFARE AND THE LAW: FUNDAMENTAL PRINCIPLES AND CRITICAL ASSESSMENT* (London, New York, 2015).

⁸⁴ ROBERT GARNER, *ANIMALS, POLITICS AND MORALITY* (2d ed. 2004).

⁸⁵ ROBERT GARNER, *ANIMAL ETHICS* 15-17 (2005).

⁸⁶ *Supra* note 78, Garner, at 38.

⁸⁷ ROBERT GARNER, *A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NON IDEAL WORLD* 4 (2013); *see also* Josh Milburn, *Protection for the Sentient in the Nonideal World: A Review of Robert Garner's A Theory of Justice for Animals*, 5 J. ANIMAL ETHICS 69 (2015).

⁸⁸ Gary L. Francione, *Animal Welfare and the Moral Value of Nonhuman Animals*, 6 L., CULTURE & HUMANS 24, 24-25 (2010); *see also* GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE. ABOLITION OR REGULATION?* (2010).

⁸⁹ ALASDAIR COCHRANE, *ANIMAL RIGHTS WITHOUT LIBERATION: APPLIED ETHICS AND HUMAN OBLIGATIONS* (2012).

beings for the satisfaction of human interests, while the animal welfare viewpoint advocates a beneficial use for humans.⁹⁰ Therefore, welfare ethics, separating animal use from animal treatment, considers animal exploitation by human beings as an axiom, investigating how and for which reasons they are exploited and can be exploited in labs and in farms. Humans must respect at least a minimum acceptable standard of treatment of animals.⁹¹

“New Welfarism,” a term critically coined by Francione in *Rain Without Thunder: The Ideology of the Animal Rights Movement*, is a concept that goes beyond the classical welfare notion and tries to reconcile the animal rights and the animal welfare positions.⁹² The proponents of New Welfarism, also labelled “reformists,” believe that animal activists and scholars, as well as practitioners, should have the abolition, or at least substantial reduction, of animal exploitation as an ideal long-term goal.⁹³ But, in the short term, they must be pragmatic and consider the simple improvement of the welfare conditions of animals (without questioning animal use) as the necessary step towards a complete abolition.⁹⁴ This is the so-called “two-track approach.”⁹⁵ The New Welfarist strategy has been embraced by several organizations devoted to animal protection, such as PETA, Vegan Outreach, and Animal Compassion over Killing.⁹⁶ In their practices, these organizations rely on welfarist tactics and strategies, e.g., significant reforms in the farm industry, education on the importance of reducing meat consumption, improved regulation of animal use, that will arguably lead to abolition in the long term, by gradually raising awareness about the necessity of avoiding animal suffering.⁹⁷

⁹⁰ Bernard E. Rollin, *An Ethicist's Commentary on Animal Rights Versus Welfare*, 43 *CAN. VETERINARY J.* 913, 913 (2002); Wayne L. Sumner, *Animal Welfare and Animal Rights*, 13 *J. MED. & PHIL.* 159, 165-66 (1998).

⁹¹ See Michael W. Fox, *Humane Ethics and Animal Rights*, 4 *INT'L J. STUD. ANIMAL PROBS.* 286 (1983) (taking a critical position on this assumption).

⁹² GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 36 (1996).

⁹³ Krysz Forkasiewicz, *Fragments of an Animalist Politics*, John Sorensen (eds.), *CRITICAL ANIMAL STUDIES. THINKING THE UNTHINKABLE* (Toronto, 2014), 46 et seq. at 60.

⁹⁴ Nicola Taylor, *Whither rights? Animal rights and the rise of new welfarism*, 3 (1) *Animal Issues*, 1999, 27 et seq.; Ben Iscaat, *How to do Animal Rights... Legally with Confidence* 35 (2d ed. 2015), available at <http://www.animaethics.org.uk/How-to-Do-Animal-Rights-2015.pdf>.

⁹⁵ Stephen M. Gardiner, *Climate Change*, G. L. Comstock (eds), *LIFE SCIENCE ETHICS* (Dordrecht, 2010), at 324.

⁹⁶ Gary L. Francione, *New Welfarism Fails on its Own Terms*, *Animal Rights: The Abolitionist Approach* (Aug. 30, 2009), <https://www.abolitionistapproach.com/new-welfarism-fails-on-its-own-terms/>.

⁹⁷ Gary L. Francione, *Animal Rights and New Welfarism*, in *Encyclopedia of*

Francione, however, does not believe that changes in the direction of New Welfarism can be progressive, and he maintains that animal welfare reforms cannot and will not lead to animal rights in the long run.⁹⁸ He has outlined in several of his works incremental reforms that he believes are consistent with animal rights philosophy⁹⁹ It is not that he has a problem with incremental reforms in general, he just has a problem with animal welfare ideology.¹⁰⁰ Instead, he firmly maintains that the only solution is veganism.¹⁰¹ In his view, the change of behaviour and lifestyle of masses of people converting to the doctrine of veganism will force the industries that exploit animals to change direction in order to satisfy the new consumer trend.¹⁰²

III. THE EVOLUTION OF EU ANIMAL WELFARE LAW

a. Article 13 of the TFEU

With the growing awareness in Europe of the importance of avoiding actions that unnecessarily cause suffering to non-human individuals, particularly to domesticated animals, animal welfare has become a public issue. It moved beyond the domains of the private sphere and philosophical debate, culminating in Article 13 of the TFEU, which is devoted to animal welfare (Lisbon version).¹⁰³ This Article recognizes the principle of the respect of animal welfare on the basis of their sentience¹⁰⁴ and establishes that the mainstreaming of animal

Animal Rights and Animal Welfare 43, 43 (Mark Bekoff ed., 1998).

⁹⁸ GARY L. FRANCIONE, ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE* (New York, 2010) 5 *et seq.*

⁹⁹ See GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* (Temple University Press, 2000).

¹⁰⁰ Gary L. Francione, *Some brief comments on animal rights*, 10 (1) *Animal Frontiers*, 2020, 29 *et seq.*

¹⁰¹ Prof. Gaary Francione (@garylfrancione), TWITTER (Jan. 22, 2020, 6:26 PM), <https://twitter.com/garylfrancione/status/1220125727137390592>.

¹⁰² GARY L. FRANCIONE & ANNA CHARLTON, *ANIMAL RIGHTS: THE ABOLITIONIST APPROACH I* (Exempla Press 2015).

¹⁰³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1, 49. The Treaty was signed on December 13, 2007 and it entered into force on December 1, 2009; *see also* Consolidated Version of The Treaty on the Functioning of the European Union, art. 4, Oct. 26, 2012, 2012 O.J. (C 326) 47, 54. [hereinafter TFEU]; *see* Diane Ryland & Angus Nurse, *Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market*, 22 *European Energy & Envtl L. Rev.* 101, 101 (2013) (*discussing Article 13 TFEU and its drafting process*).

¹⁰⁴ Sentience and consciousness are two concepts whose difference is minimal; indeed, all sentient beings are at the same time conscious beings (consciousness is the ability to have some kind of subjective experience or awareness of something; *see*

welfare is now a concern for EU institutions.¹⁰⁵ Nevertheless, animal welfare is included neither amongst the founding principles of the EU, which include liberty, democracy, respect for human rights and basic civil liberties, and rule by law, according to Article 2 of the Treaty establishing the European Union (“TEU”), nor amongst the aims of the EU, such as sustainable development or the improvement of the quality of the environment, found in Article 3 of the TEU.¹⁰⁶

The regulation regarding animal welfare originates from the Declaration on the Protection of Animals annexed to the Maastricht Treaty of 1992, which states: “The Conference calls upon the European Parliament, the Council and the Commission, when drafting or implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.” A specific Protocol on Animal Welfare was then included in the Amsterdam Treaty of 1997.¹⁰⁷ This was the first reference in EU law to animals as sentient beings.¹⁰⁸ The upgraded legal status of animals meant they were no longer considered mere “goods” on the same level as agricultural products or plants.

Article 13 of the TFEU states: “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

Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *The Phil. Rev.* 435, 436 (1974). EFSA, in its Report of 24 April 2017 affirmed that “different manifestations of consciousness can be observed in animals (but further refinement is still needed to characterize their level and content in each species).” Pierre Le Neindre et al., *Animal Consciousness 1* (European Food Safety Auth. 2017); *see also* Marian Dawkins, *Animal Welfare With and Without Consciousness*, 301 *J. of Zoology* 1,1 (2017) (discussing a different conception of animal welfare, not necessarily related to the concept of consciousness (‘conscious-free’ definition of animal welfare)).

¹⁰⁵ Diane Ryland, *Animal welfare in there reformed Common Agricultural Policy: Wherefore art thou?* 17 (1) *Environmental Law Review*, 22-43 (2017) at 27.

¹⁰⁶ Armin von Bogdandy, *Founding Principles*, in *Principles of European Constitutional Law* 11, 22 (Armin von Bogdandy and Jurgen Bast eds., 2010); *Consolidated Version of The Treaty of European Union*, art. 2, May 9, 2008, 2008 O.J. (C 115) 13, 17.

¹⁰⁷ Tara Camm & David Bowles, *Animal Welfare and the Treaty of Rome—Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union*, 12 *J. of Env'tl L.* 197, 197 (2000).

¹⁰⁸ Nicholas K. Pedersen, *Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn*, The Animal Legal and Historical Center, Michigan State University College of Law, 2009, <https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn>.

particular to religious rites, cultural traditions and regional heritage.”¹⁰⁹

Sentience implies that animals are different from inanimate objects, and, therefore, have an interest in avoiding unnecessary or unreasonable pain.¹¹⁰ As stated by Rykland and Nurse, “it is a milestone in the evolution of EU law and animal welfare that animals are no longer perceived in law solely as goods, the free movement of which is ensured in an internal market of twenty seven members.”¹¹¹ If we compare the wording of Article 13 of the TFEU with the previous Protocol on Animal Welfare, several changes stand out. In particular, animal welfare requirements are extended to the fields of *fisheries, technological development and space policies*.¹¹² As underlined by Kotzur however, this list “is not to be understood as a complete catalogue but as an *exemplary enumeration*.”¹¹³ In the Lisbon version of Article 13, reference to the space sector is especially significant.¹¹⁴ Space falls within the domains of which the EU has a parallel competence, as laid out in Art. 4, Para. 3, of the TFEU.¹¹⁵ This new domain was included in Article 13 since animals could be used in space activities.¹¹⁶ Indeed, experiments with monkeys, chimpanzees and dogs, launched into space in order to test their capacity to survive in extreme conditions, are well known.¹¹⁷

Article 13 is a milestone in animal protection. With the advent of Article 13, animal welfare is placed on the same level as other

¹⁰⁹ The project of a treaty establishing a constitution for Europe—which was never approved—contained the proposal to insert an Article regarding animal welfare TFEU, *supra* note 67, at 54 (emphasis added).

¹¹⁰ Robertson, *supra* note 54, at 152.

¹¹¹ Ryland & Nurse, *supra* note 67, at 109.

¹¹² CHARLOTTE E. BLATTNER, *PROTECTING ANIMALS WITHIN AND ACROSS BORDERS: EXTRATERRITORIAL JURISDICTION* (Oxford University Press 2019), 328 et seq.

¹¹³ Micaela Lottini, *EU Law on Animal Welfare and Its Correct and Effective Application*, 2 *Roma Tre Law Review* (2019), p. 317 et seq; Markus, Kotzur, *Article 13 TFEU*, in *European Union Treaties* 1, 226 (Rudolf Geiger, Daniel-Erasmus Khan, & Markus Kotzur eds., 2015).

¹¹⁴ Frans G. von der Dunk, *The EU Space Competence as per the Treaty of Lisbon: Sea Change or Empty Shell? Change or Empty Shell?* 66 *Space, Cyber, and Telecommunications Law Program Faculty Publications* (2011), 382 et seq.

¹¹⁵ TFEU, *supra* note 67, at 52; Article 3, para 3. of the TFEU states: “In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.”

¹¹⁶ **EU SPACE POLICY**, <https://www.consilium.europa.eu/en/policies/eu-space-programmes/> (last visited Jul. 5, 2020).

¹¹⁷ *A Brief History of Animals in Space*, NASA (Aug. 2, 2004). Further reference to animals in the TFEU is made in Article 36, which establishes that quantitative restrictions on imports and exports “shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants.”

key principles mentioned in Title 2 of the TFEU (“Provisions having general applications”), such as the promotion of gender equality, the guarantee of social protection, the protection of human health, the fight against discrimination, the promotion of sustainable development, the protection of consumers, and the protection of personal data.¹¹⁸ At the same time, its formulation presents some shortcomings that strongly limit its scope. As mentioned above, the concept of animal welfare is not included amongst the founding principles or the aims of the EU.¹¹⁹ Indeed, Article 13 is based on a welfare ethics that does not intend to call into question the legitimacy of the human exploitation of animals.¹²⁰ Farmed animals continue to be considered goods and the property of the farmer according to EU law, and their utility relies on being a source of income for their owner and of food for EU consumers.¹²¹ Therefore, although strictly regulated, practices such as the slaughter of animals for human consumption or recreation, fishing, and experiments on animals, are not banned. This point is very important because, if the EU had opted for an animal rights approach, this would have implied several bans and called into question the current “dual status of animals”, considered at the same time as sentient beings and as mere commodities.¹²² Indeed, critics have argued that the reference to animal welfare in Article 13 is simply a political move that serves to maintain the EU’s reputation in foreign markets and to appease animal rights supporters.¹²³

¹¹⁸ Title II of the TFEU (Artt. 7-17) is entitled ‘Provisions on Democratic Principles’.

¹¹⁹ According to Art. 2 of the TEU, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. Article 3 affirms that “The Union’s aim is to promote peace, its values and the well-being of its peoples”. See Armin von Bogdandy, ‘Founding Principles’, in Armin von Bogdandy & J Jürgen Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2011) 11; Karl-Peter Sommermann, *Article 3 [The Objectives of the European Union]*, in *The Treaty on the European Union (TEU) 157* (Herman Josef Blanke & Stefano Mangiameli, eds., 2013).

¹²⁰ D. S. Calley, *The international regulation of the food market: precedents and challenges*, H. Röcklinsberg, P. Sandin eds.), *THE ETHICS OF CONSUMPTION. THE CITIZEN, THE MARKET AND THE LAW*, (Wageningen, 2013), 64 *et seq.*

¹²¹ Kea Ovie, *Harmonized Approaches in Intensive Livestock Production Systems in Europe*, in *International Farm Animal, Wildlife and Food Safety Law* (Gabriela Steier & Kiran Patel, eds., 2017), 279.

¹²² In this sense, Anne Peters, *Between Trade and Torture: Animals in EU Law 2 Zeitschrift für Europarechtliche Studien* 173 (2019).

¹²³ Rasso Ludwig, R & Roderic O’Gorman, *A Cock and Bull Story? Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions* 20 *Journal of Environmental Law* 363 (2008).

Two further problematic aspects emerge: the first is concerned with the “soft wording” of Article 13, that envisages that the EU and its Member States shall only *pay full regard* to animal welfare, which does not imply an obligation. With reference to environmental protection, by contrast, policies “*must be integrated* into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”¹²⁴ The second controversial element regards the supremacy that is afforded to the respect for cultural traditions and religious rites as compared to animal protection.¹²⁵ On account of this, some cruel practices related to the consumption of meat products, such as Kosher and Halal slaughter, are still protected, and, therefore, valued as more important than animal welfare requirements.¹²⁶ EU institutions are required to refrain from interfering with religious and cultural traditions, even if this implies unnecessary animal suffering.¹²⁷ Despite its shortcomings, Article 13 of TFEU, which does not confer legislative powers upon the EU, paved the way for the adoption of the “Strategy for the Protection of and Welfare of Animals” (2012-2015),¹²⁸ which places the EU at the forefront of animal protection on the international arena, especially compared to the lower levels of protection in African and Asian countries.¹²⁹

¹²⁴ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 1. (emphasis added).

¹²⁵ See Anne Peters, *Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen* (2018), 5-1 *Canadian Journal of Comparative and Contemporary Law* 269 (2019) (discussing the relationship between freedom of religion and animal welfare in EU law).

¹²⁶ See Report of the Global Research Center, *Legal Restrictions on Religious Slaughter in Europe*, March 2018, <https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf>.

¹²⁷ The supremacy of religious traditions over animal welfare was confirmed by the European Court of Justice in Case 426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Vlaams Gewest* 62016CJ0426; see also Anne Peters, *De-humanisation? CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen on Religious Slaughter*, EJIL: Talk! (June 26, 2018) <https://www.ejiltalk.org/author/anne-peters/>.

¹²⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals, COM (2012) 6 final (Feb. 15, 2012).

¹²⁹ Some developing countries do have legal provisions on the protection of animals. In Northern Africa, Egypt’s 2014 Constitution established under Art. 45 the duty to perform ‘kind treatment of animals’ (*al-rifq bi-hayawan*). In India, due to the influence of the Hindu religion, which banishes the killing of cows as sacred animals as well as the consumption of beef products, animals enjoy a higher standard of protection compared to neighboring countries. Art. 5 (G) of the Indian Constitution states that “It shall be the duty of every citizen of India to protect and

b. EU Legislation on Animal Welfare

EU welfare legislation is mainly based on the set of conventions elaborated under the aegis of the Council of Europe.¹³⁰ The EU adopted the Animal Welfare Strategy 2012-2015, which is still in place as the “New Animal Welfare Strategy for 2016-2020” was never formally approved. It also promoted an EU platform on animal welfare,¹³¹ which included the aim “to contribute to the promotion of Union standards on animal welfare as to valorize the market value of Union products at global level.”¹³²

The various categories of animals protected by EU animal welfare law can be summarized as: farmed animals, wildlife animals,¹³³ experimental animals, zoo animals,¹³⁴ and companion animals.¹³⁵ In the first category, farmed animals, one can highlight three different sets of rules: (1) directives and regulations which lay down minimum standards concerning the welfare of specific kinds of animals, such as laying

improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures” and a Prevention of Cruelty to Animals Act was enacted in 1960. See Jessica Eisen, *Animals in the constitutional State*, 15 Int’l J. of Const. L. 909 (2017).

¹³⁰ The EU never acceded to the European Convention for the Protection of Animals for Slaughter (ETS 102), but it did accede to the European Convention for the Protection of Animals kept for Farming Purposes (ETS 087) on 18 October 1998, as well as to the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS 123) on 30 April 1998. The European Convention for the Protection of Animals during International Transport (ETS 193) was instead signed (but not yet ratified) on 25 June 2004. See Complete List of the Council of Europe’s Treaties, Council of Europe, <http://www.coe.int/en/web/conventions/full-list> (last visited Jul. 28, 2019).

¹³¹ EU Platform on Animal Welfare, European Commission, https://ec.europa.eu/food/animals/welfare/eu-platform-animal-welfare_en (last visited Jul. 28, 2019).

¹³² 2017 O.J. (L 31) 61, 62.

¹³³ With reference to wild animals and the protection of biodiversity, in 2010, the EU adopted an ambitious biodiversity strategy (2011-2020) based on 6 targets (protect species and habitats; maintain and restore ecosystems; achieve more sustainable agriculture and forestry, make fishing more sustainable and seas healthier, combat invasive alien species, help stop the loss of global biodiversity) and horizontal measures for its implementation (financing, partnership, knowledge base). The relevant legislation is provided by the Birds Directive and by the Habitat Directive which established the Natura 2000 ecological network, whose legal foundation is provided by Article 192 TFEU (“Environment”).

¹³⁴ Council Directive 1999/22 of 29 March 1999 relating to the keeping of wild animals in zoos, 1999 O.J. (L 94) 24.

¹³⁵ See Paolo Dalla Villa, *The EU explores options to define a policy framework on dog and cat welfare*, WELFARE OF COMPANION ANIMALS IN EUR.: VIEWS AND PERSPECTIVES (European Commission), Jul. 2013.

hens,¹³⁶ calves,¹³⁷ pigs,¹³⁸ and chickens reared for meat;¹³⁹ (2) directives and regulations which contain provisions that affect all animals, including fish, bred or kept for the production of food, wool, skin or fur, or for other farming purposes (the most important act is commonly referred to as the General Farm Animals Directive,¹⁴⁰ followed by the EU Regulation on the protection of animals at the time of killing);¹⁴¹ (3) regulations concerning food safety and animal health (“Hygiene Package”).¹⁴² The path followed by EU animal welfare law has progressively aligned itself with EU citizens’ growing concerns about the conditions of animals held in captivity including farmed animals, experimental animals, zoo animals, and pets. Undoubtedly, the main driving force that led to a general improvement of animal welfare standards is public opinion.

i. Laboratory animals

The use of animals in research, in particular rodents, seems to be accepted by a majority of EU citizens provided that it has the aim

¹³⁶ Council Directive 1999/74, of 19 July 1999 laying down minimum standards for the protection of laying hens, 1999 O.J. (L203) 53. O.J. (L 203) 53 (EC). (although there are still shortcomings, i.e. millions of male chicks are slaughtered immediately after hatching).

¹³⁷ Council Directive 2008/119, of 18 December 2008 laying down minimum standards for the protection of calves, 2008 O.J. (L 10) 7 (EC).

¹³⁸ Council Directive 2008/120, of 18 December 2008 laying down minimum standards for the protection of pigs, 2008 O.J. (L 47) 5 (EC).

¹³⁹ Council Directive 2007/43, of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, 2007 O.J. (L 182) 19 (EC).

¹⁴⁰ Council Directive 1998/58, of 20 July 1998 concerning the protection of animals kept for farming purposes, 1998 O.J. (L 221) 23 (EC). One fundamental provision in the 1998 Directive is Article 3, which requires EU Member States to “make provisions 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.”

¹⁴¹ Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, 2009 O.J. (L 303) 1.

¹⁴² Council Regulation (EC) No. 429/2016 on the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health (‘Animal Health Law’), 2016 O.J. (L 84) 1 (explaining EU legislation on the prevention of the transmission of animal diseases to human beings, focusing on the scope and content of the recent Regulation on transmissible animal diseases; Council Regulation (EC) No. 882/2004 on the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, 2004 O.J. (L 165) 1 (explaining that in fact, the EU recognizes that animal health and animal welfare are strictly interconnected with and contribute to food safety and the EU adopted one of the highest standards of protection of human health in this field).

of improving medical knowledge, that non-animal methods to achieve such results are not available and that animal suffering is kept to a minimum.¹⁴³ Nevertheless, the admissibility of animal experimentation under an ethical framework remains a controversial issue, with particular reference to research performed on NHPs, including Great Apes.¹⁴⁴ Public attitudes to animal research have oriented EU legal developments on the protection of animals used for experimental purposes.

On the basis of Article 100 TEC (now Art. 114 TFEU) related to the approximation of the provisions laid down by law, the former EEC adopted Directive 86/609/EEC, which was the key piece of legislation covering the protection of laboratory animals.¹⁴⁵ Although its goal was to harmonize domestic laws regulating animal testing, some of the Directive's rules were open to a more or less restrictive interpretation, generating serious problems in the phase of implementation. Indeed, some States set minimal protection rules, others more stringent rules, leading to an asymmetric implementation. Therefore, the former Directive 86/609/EEC failed to reach its ultimate purpose: the approximation of legislations of Member States. Since its adoption, disparities in Member States' rules on animal experimentation have increased instead of decreased. Some countries adopted national implementing measures, assuring a higher level of protection for animals used for scientific purposes,¹⁴⁶ while others decided to only apply the minimum standards established by Directive 86/609/EEC. This lack of harmonization brought forward concerns for competitiveness resulting in market distortions and trade barriers.¹⁴⁷ Accordingly, one of the goals of Directive 2010/63/EU is to provide more detailed rules in order to diminish disparities in legislations across the EU in the treatment of animals used for scientific procedures and to ensure an appropriate

¹⁴³ SPECIAL EUROBAROMETER, SCIENCE AND TECHNOLOGY, 60-63 (2010), https://ec.europa.eu/comfrontoffice/publicopinion/archives/ebs/ebs_340_en.pdf (last visited, June 22, 2020).

¹⁴⁴ Mark Prescott, *Ethics of Primate Use*, *Advances in Sci. & Res. II* (2010).

¹⁴⁵ See Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes 1986 O.J. (L 358) 1, 3; See also Commission Recommendation 2007/526/EC, of 18 June 2007 on guidelines for the accommodation and care of animals used for experimental and other scientific purposes, 2007 O.J. (L 197) 1.

¹⁴⁶ See Susanna Louhimies, *Directive 86/609/EEC on the Protection of Animals Used for Experimental and Other Scientific Purposes*, (2002) 2 Alternatives to Laboratory Animals 217, 217 (*Discussing that In this regard, Italy is one of these countries*); Oskar Rohte, *The Legal Regulations of the European Community on Animal Welfare in the Field of Agriculture and Research*, (1993) 100(1), *Deutsche tierärztliche Wochenschrift*, 19, 19.

¹⁴⁷ Ilja Richard Pavone, *Animal Experimentation and Animal Welfare in the Context of the European Union*, *BioLaw-Rivista di biodiritto*, 75, 75 & 82 (2015).

functioning of the internal market. Two other factors were significant drivers of change, however: (1) growing interest in the public opinion on the issue of animal welfare;¹⁴⁸ (2) availability of new scientific knowledge with respect to factors influencing animal welfare, as well as the capacity of animals to express pain, suffer distress and lasting harm.¹⁴⁹ In fact, in the last twenty years, the scientific basis on which the former Directive was established has changed considerably, thanks to an evolution of the techniques in the field of animal testing.

As to its bioethical roots, the Directive is based on a moderate position with regards to the moral admissibility of experiments on animals (Welfarism).¹⁵⁰ The moderate position acknowledges the role played by research on animals in the advancement of science and medicine in the past, an example is the vaccine for polio, but at the same time it asserts that, nowadays, experiments on animals are no longer justified in every field of research. Although experiments on animals are still necessary, there are alternative and complementary methods that must be fostered. There are techniques that help to minimize the use of animals, such as computer modelling, which in some cases succeeded in completely replacing the use of animals. The Draize Eyes Test is a clear example of research that can be successfully replaced by alternative methodologies.¹⁵¹ Supporters of this position wish to severely curtail experiments on animals and limit them to applied research, but not to

¹⁴⁸ Irmela Ruhdel, "Revision of the EU Directive 86/609/EEC: Results of the Internet Consultations of the European Commission", (2007) 24 (1) *Altex* 41(2007), 41 et seq. Opinions on the subject of animal use in research in the EU Countries continue to vary widely. They range from the view that any form of animal research is completely unjustifiable, to the belief that it is acceptable, provided it is carefully regulated to cause minimal suffering to the animals concerned, and is directed at alleviating human suffering or for the pursuit of knowledge that might in the long term achieve this end.

¹⁴⁹ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, which states "New scientific knowledge is available in respect of factors influencing animal welfare as well as the capacity of animals to sense and express pain, suffering, distress and lasting harm. It is therefore necessary to improve the welfare of animals used in scientific procedures by raising the minimum standards for their protection in line with the latest scientific developments."

¹⁵⁰ See generally Baruch A. Brody, *Defending Animal Research: An International Perspective*, in *Why Animal Experimentation Matters: The Use of Animals in Medical Research* 131, 131-34 (Ellen Frankel Paul & Jeffrey Paul eds., 2001) The US bioethicist Baruch Brody promoted in *Defending Animal Research: An International Perspective* a moderate and rational position, which recognizes a certain (but not full) moral statute to the animals, advocating the reduction of the number of animals used in research as well as the improvement of their welfare conditions (it is a classic Welfarist argumentation).

¹⁵¹ Christian Lotz et al., *Alternative Methods for the Replacement of Eye Irritation Testing*, *Altex* 55, 55 & 63 (2016).

fully ban them. This line of thought is based on the assumption that, since experiments on humans are ethically controversial, animals must be still used in research.

The legal basis of Directive 2010/63/EU can be traced back to Art. 114 of the TFEU “Approximations of Law”, although Art. 179 “Research and Technological Development and Space” is also relevant.¹⁵² The Directive is intended to harmonize animal research standards and practices across Europe, ensuring equal opportunities for both enterprises and scientists. Without it, the distortion of the internal market could have led to significant competitive disadvantages caused by differences in prices, domestic rules, and of procedures and criteria of authorization.

The Directive is characterized by compromise, balancing the opposite stances of the research (and industry) community and animal welfare groups. For this reason, the Directive suffers from several drawbacks and has been criticized by all the stakeholders involved: animal rights groups are concerned about the several exemption clauses that still allow cruel practices as well as research on NHPS;¹⁵³ whereas scientists and firms point out the risk of severely limiting the advancement of biomedical science.¹⁵⁴ While the Directive prohibits some practices as a matter of principle, such as research on Primates, Great Apes and animals kept from the wild, including the performance of experiments without anesthesia, it has open the possibility of legal loopholes that allow exceptions to the general prohibition based on the principle of ‘scientific necessity’.¹⁵⁵

The Directive, devoted to the protection of animals used for scientific purposes, aims to conciliate two adverse claims: on one side,

¹⁵² Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47, 128 [hereinafter TEFU]. (Article 179 TFEU provides that “[T]he Union [has] the objective of strengthening its scientific and technological bases by achieving a European research area...”).

¹⁵³ See WHY WE SAY NO TO DIRECTIVE 2010/63/EU, <https://www.stopvivisection.eu/en/content/why-we-say-no-directive-201063eu> (last visited Apr. 30, 2020).

¹⁵⁴ M. Paterlini, *Animals in research: a stony road. The implementation of the European Union directive on the use of animals in research into national laws is struggling*, 14 (11) EMBO Reports 14 (11) 955 et seq.

¹⁵⁵ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 40 (Article 8, Para. 1 affirms that “specimens of non-human primates shall not be used in procedures”, unless “there is scientific justification to the effect that the purpose of the procedure cannot be achieved by the use of species other than non-human primates”); see Javier Guillén, Jan-Bas Prins, Bryan Howard, Anne-Dominique Degryse, Marcel Gyger, *The European Framework on Research Animal Welfare Regulations and Guidelines, Laboratory Animals 117, 117-202 (2018)*.

the necessity to reduce the number of animals used in research and to replace their use with alternative methodologies, on the other side the need not to hinder in an excessive manner the advancement of science.¹⁵⁶ The dilemma of how to balance freedom of scientific research and animal welfare has been much debated and was first raised by Russell and Burch in *The Principles of Humane Experimental Technique*. Many of the insights advanced by Russell and Burch are no less relevant today than they were in the 50s. In particular, they claimed that a strict adherence to the 3Rs (Replacement, Reduction, Refinement) is the only solution for achieving progress in biomedical research, whilst maintaining the highest standards in terms of animal welfare.¹⁵⁷ In reality, the two can be reconciled if one recognizes the link between animal welfare and good research; indeed, the central issue is the quality of research that can be carried out. In order to meet the demands of modern science, research on animals must meet specific standards that conciliate the advancement of science and respect for animal welfare.

The 3R have been endorsed by EU institutions as the best approach to tackle the ethical dilemma presented by animal experimentation in which freedom of scientific research clashes with the need to protect animals. Article 13 (“Choice of Methods”) is exemplificative of the clash between these two stances. It recognizes, on the one hand, that animals should be used in research only in the absence of an alternative. In case there is no alternative to animal use, scientists should: employ the minimum number of animals, opting for species with the lowest capacity to experience pain, suffering, distress or lasting harm and cause the least pain, suffering, distress or lasting harm.¹⁵⁸

On the other hand, Article 13 allows for the killing of animals at the end of a procedure, establishing that, if death as the end point of a procedure is unavoidable, it should at least result in the death of as few animals as possible and reduce the duration and intensity of animal suffering to the minimum possible and, as far as possible, ensure a painless death.¹⁵⁹ In reality, although the title of the Directive

¹⁵⁶ *Supra* note 149, at Recital 10 of the Directive, which clearly affirms “while it is desirable to replace the use of live animals in procedures by other methods not entailing the use of live animals, the use of live animals continues to be necessary to protect human and animal health and the environment.”

¹⁵⁷ Russell, *supra* note 12, at 8.

¹⁵⁸ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 42. (Alternative methodologies outside Article 13 include Articles 4 (‘Principle of replacement, reduction and refinement’), 13 (‘Choice of methods’), and 48 (‘Union reference laboratory’), while monitoring and inspection mechanisms are regulated by Articles 34 and 35).

¹⁵⁹ *Id.* at Art. 13, Para. 3, lect. a and b.

refers to the protection of laboratory animals,¹⁶⁰ cruel (or at least controversial) practices are still admitted (although the term “cruelty” is never mentioned): these are listed in Annex IV (“Methods of Killing Animals”) that include cervical dislocation, decapitation, concussion, blow to the head, and VIII (“Severity of Procedures”), that encompassed, for instance, thoracotomy without adequate analgesia, or trauma to produce multiple organ failure, use of metabolic cages involving severe restrictions of movement over a prolonged period of time, electric shock, complete isolation for prolonged periods of time of social species).¹⁶¹

The paradox generated by the assumption of the ultimate goal of the protection of animals and the simultaneous openness towards ethically questionable practices is due, according to Paola Sobbrío, to the rhetoric of the animal welfare language, which is instead uniquely devoted to the improvement of human health.¹⁶² In spite of criticism about the vast array of cases where exceptions to the prohibitions established by the Directive are allowed, leaving room for a considerable range of legal interpretations, it does, however, introduce several improvements.¹⁶³

First, the range of animals under protection has been increased, and now also includes: invertebrates, such as *Cephalopods*, *Cyclostomes*, *Myxini*, and foetal forms of mammals in the last trimester of foetal development (Article 3, a, (i), (ii), (b)), which are instead excluded from the scope of European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes.¹⁶⁴ Recitals 8 and 9 explain respectively the reason for this choice, since “there is scientific evidence of [these animals’] ability to experience pain, suffering, distress and lasting harm,” and “scientific evidence also shows that procedures carried out on embryonic and foetal forms at an earlier stage of development could result in pain, suffering, distress or lasting harm, should the developmental forms be allowed to live beyond

¹⁶⁰ *Id.* at Recital Para. 12, where The Directive specifically states that “animals have an intrinsic value that must be respected... animals should always be treated as sentient beings, and their use in procedures should be restricted to areas which may ultimately benefit human or animal health or environment”.

¹⁶¹ André Menache, *Animals in Scientific Research*, in Jennifer Maher, Harette Pierpoint, Piers Beirne (eds.), *The Palgrave International Handbook of Animal Abuse Studies* (Palgrave Macmillan 2017) 389 *et seq.*, 392.

¹⁶² Paola Sobbrío, *The Relationship between Humans and Other Animals in European Animal Welfare Legislation*, (2013) 1 *Rel.* 33, 34 (2013).

¹⁶³ See Marta Paterlini, *Animals in Research: a Stony Road*, 14 *EMBO Rep.* 955, 955-58 (2013).

¹⁶⁴ *Supra* note 158, at Art.2, Para. 1, (b) of the Convention asserts that “animal, unless otherwise qualified, means any live non-human vertebrate, including free-living and/or reproducing larval forms, but excluding other foetal or embryonic forms.”

the first two thirds of their development.¹⁶⁵ As observed by Jean Pierre Marguénaud, the criterion that determined the extension of the range of laboratory animals protected under the Directive was the capacity of invertebrates and fetuses to experience, pain, suffering and distress.¹⁶⁶

Second, particular attention is paid to the housing and husbandry conditions of laboratory NHPs. Under the Directive, it is now compulsory to house primates in socially stimulating environments, unless there are exemptions for scientific, animal welfare or animal health reasons.¹⁶⁷ In addition, environmental enrichment must be provided to allow performance of a wide range of normal behaviour.¹⁶⁸ Enriched housing conditions can have a positive impact on both the psychological well-being of the animals and the research outcomes.¹⁶⁹

Third, the minimum pain, suffering, and distress must be ensured at the time of killing. However, animals can only be killed “in the establishment of a breeder, supplier, or user by a competent person”¹⁷⁰ The appropriate methods to kill different types of animals are listed in Annex IV, Table 3, ranging, for instance, from anesthetic overdose applicable to all species (fish, amphibians, reptiles, birds, rodents, rabbits, dogs, cats, ferrets and foxes, large mammals, NHPs), to cervical dislocation (birds, rodents, rabbits), to decapitation (Birds, Rodents), to the use of carbon dioxide in rodents.¹⁷¹

Fourth, the Directive contains provisions for the assessment of research projects entailing experiments on animals. According

¹⁶⁵ *Supra* note 158, at Paras. 8-9.

¹⁶⁶ Jean Pierre Marguénaud, ‘Les enjeux de la qualification juridique de l’animal’, in Maryse Baudrez, Thierry Di Manno, Valérie Gomez-Bassac (eds.), *L’animal, un homme comme les autres?* (Parution, 2012), 257 *et seq.*

¹⁶⁷ *Supra* note 158, at Art. 33, Para. 1, states that “Member States shall, as far as the care and accommodation of animals is concerned, ensure that (a) all animals are provided with accommodation, an environment, food, water and care which are appropriate to their health and well-being; (b) any restrictions on the extent to which an animal can satisfy its physiological and ethological needs are kept to a minimum (c) the environmental conditions in which animals are bred, kept or used are checked daily; (d) arrangements are made to ensure that any defect or avoidable pain, suffering, distress or lasting harm discovered is eliminated as quickly as possible; and (e) animals are transported under appropriate conditions. Art. 3, Para. 3, envisages that “Member States may allow exemptions [...] for scientific, animal-welfare or animal-health reasons.”

¹⁶⁸ Javier Guillén, *supra* note 103, at 173-74.

¹⁶⁹ See Darcy L. Hannibal, Eliza Bliss-Moreau, Jessica Vandeleeest, Brenda McCowan, John Capitanio, Laboratory Rhesus Macaque Social Housing and Social Changes: Implications for Research, 79 *Am. J. of Primatology* (2017).

¹⁷⁰ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 42.

¹⁷¹ *Id.* at Annex IV (Methods of Killing of Animals), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0063&from=EN>.

to Recital 39, “it is essential...to ensure that each use of animals is carefully evaluated as to the scientific or educational validity, usefulness and relevance of the expected result of that use. The likely harm to the animals should be balanced against the expected benefits of the project.” The Directive, require a positive evaluation of the research project by the competent authorities,¹⁷² that must evaluate, in an impartial and independent manner: its scientific justification,¹⁷³ its objectives and the predicted scientific benefits and educational value,¹⁷⁴ assess its compliance with the 3Rs requirement,¹⁷⁵ and, finally, carry out a harm-benefit assessment.¹⁷⁶ A retrospective assessment shall be performed, in particular in the case of research on NHPs and involving “severe” procedures.¹⁷⁷ In case of procedures classified as “mild” or “non-recovery,” States may skip the retrospective assessment.¹⁷⁸ On the basis of the documentation submitted, States must evaluate whether the goals

¹⁷² *Id.* at Art. 36, Para. 2, states that “Member States shall ensure that no project is carried out unless a favourable project evaluation by the competent authority has been received in accordance with Article 38.”

¹⁷³ *Id.* at Art. 38, Para. 1, *a*, affirms that “The project evaluation shall be performed with a degree of detail appropriate for the type of project and shall verify that the project meets the following criteria: (a) the project is justified from a scientific or educational point of view or required by law.”

¹⁷⁴ *Id.* at Art. 38, Para 2, *a*, affirms that “The project evaluation shall consist in particular of: “an evaluation of the objectives of the project, the predicted scientific benefits or educational value.”

¹⁷⁵ *Id.* at Art. 38, Para. 2, *b*, establishes that “The project evaluation shall consist in particular of (a) an evaluation of the objectives of the project, the predicted scientific benefits or educational value.”

¹⁷⁶ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 42, which recognizes that “it is also essential, both on moral and scientific grounds, to ensure that each use of an animal is carefully evaluated as to the scientific or educational validity, usefulness and relevance of the expected result of that use. The likely harm to the animal should be balanced against the expected benefits of the project. Therefore, an impartial project evaluation independent of those involved in the study should be carried out as part of the authorisation process of projects involving the use of live animals. Effective implementation of a project evaluation should also allow for an appropriate assessment of the use of any new scientific experimental techniques as they emerge”. Art. 38, Para. 2, *d*, which envisages that “The project evaluation shall consist in particular of a harm-benefit analysis of the project, to assess whether the harm to the animals in terms of suffering, pain and distress is justified by the expected outcome taking into account ethical considerations, and may ultimately benefit human beings, animals or the environment.”

¹⁷⁷ *Id.* at Art. 39, Para. 2, which asserts that “All projects using non-human primates and projects involving procedures classified as ‘severe’, including those referred to in Article 15(2), shall undergo a retrospective assessment.”

¹⁷⁸ *Id.* Art. 39, Para. 3, which states that “...by way of derogation from Article 38(2)(f), Member States may exempt projects involving only procedures classified as ‘mild’ or ‘non-recovery’ from the requirement for a retrospective assessment.”

of the project were fulfilled and must assess the level of harm inflicted on the animals).¹⁷⁹

Grey areas are represented by research on NHPs and the use of animals taken from the wild. The Directive restricts the purposes for which NHPs can be used in research, requiring scientific justification that no other species can be used, and more stringent inspections of establishments keeping or using NHPs (Article 8). At the same time, Article 8 provides scientists a pretty large scope for the use of primates for nearly everything (translational or applied research).¹⁸⁰ After intense lobbying by the scientific community, an exemption clause was introduced allowing basic research on NHPs, provided that this kind of research could not be carried out in any other species.¹⁸¹ This article was considered disappointing by animal protection groups, who hoped for more stringent boundaries on the use of NHPs in the Directive, in line with the former Declaration of the European Parliament of 2007, which explicitly asked the European Commission to “make an end to the use of great apes and wild-caught monkeys in scientific experiments.”¹⁸² Some forms of research on primates, such as in the field of neuroscience, are particularly harmful and distressing to the animals and are therefore the object of serious concern by animal welfare groups.

The underlying philosophy behind the regulation of research on NHPs (not banned, but performed only under strict conditions) was then confirmed by the Final Opinion on Non-human primates testing (2017).¹⁸³

¹⁷⁹ *Id.* at Art. 39, Para. 1, *a* and *b*, which considers that “Member States shall ensure that [...] the retrospective assessment shall be carried out by the competent authority which shall, on the basis of the necessary documentation submitted by the user, evaluate the following: (a) whether the objectives of the project were achieved; (b) the harm inflicted on animals, including the numbers and species of animals used, and the severity of the procedures.”

¹⁸⁰ *E.g.*, Directive 2010/63, of the European Parliament and of the Council of 22 September on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 40-41 (Primates can be used in translational or applied research (Article 8, (a), (i)) with the goal of avoiding, preventing, diagnosing or treating debilitating or potentially threatening conditions (only) in human beings. Therefore, animals and plants listed in Article 5, (b), (i) have been delisted. Research on the preservation of the species has been downgraded to ‘basic research’ (Article 8, (a), (ii)). As a supplementary condition, scientists must prove that the use of primates is necessary for achieving the purposes of their research (Article 8, (b)). These restrictions do not apply to basic research, or research aimed at the preservation of the species, which are therefore completely free.

¹⁸¹ Alison Abbott, Biomedicine: the Changing Face of Primate Research., 506 *Nature* 24, 25 (2014).

¹⁸² Declaration of the European Parliament on primates in scientific experiments, 25 September 2007, https://ec.europa.eu/environment/chemicals/lab_animals/pdf/fische_suite.pdf.

¹⁸³ *See Sci. Committee on Health Env'tl and Emerging Risks, Final Opinion on the Need for Non-human Primates in Biomedical Research, Production and Testing*

The latter affirmed that research on NHPs cannot be completely banned yet (“...the current state of knowledge does not permit to propose a timetable for phasing-out the use of NHP in Europe”).¹⁸⁴ The existence of the document itself is support behind the regulation of research on NHPs.

According to the Directive, animals taken from the wild are not to be used in procedures,¹⁸⁵ since users shall mainly employ animals bred for such purposes, except in cases of exemption based on scientific justification.¹⁸⁶ Exceptions are of course provided. The authority can allow use of wild animals on the basis of a lack of viable alternatives, such as the use of animals bred in captivity. The capture of the animals “shall be carried out only by competent persons using methods which do not cause the animals avoidable pain, suffering or distress or lasting harm”.¹⁸⁷

After capture, actions to minimize the suffering of the animals found in poor health conditions must be undertaken, unless there is a scientific justification not to do so. However, it is not clear in which cases the competent authority might authorize a scientist not to relieve the pain or suffering of an animal. The only plausible case can be that of behavioral experiments aimed at studying the psychological reaction of animals transferred from the wild to the lab environment.

The classification of procedures performed on Laboratory animals is undoubtedly one of the main novelties of Directive 2010/63/EU compared to the former Directive.

Article 15 states that the classification of procedures must be ensured by all States, ranging from non-recovery, mild, moderate, to severe. A severe procedure, according to Annex VIII, implies experiencing severe pain, suffering or distress, or long-lasting moderate pain, suffering, or distress, or severe impairment of the well-being or general condition of the animal. Examples of severe procedures, are single dose acute toxicity testing where death is the end-point.¹⁸⁸ The

of Products and Devices (update 2017), European Commission, https://ec.europa.eu/health/sites/health/files/scientific_committees/scheer/docs/scheer_o_004.pdf (last visited Apr. 22, 2020).

¹⁸⁴ Sci. Committee on Health and Env'tl Risks, *The Need for Non-Human Primates in Biomedical Research, Production, and Testing of Products and Devices*, European Commission, http://ec.europa.eu/environment/chemicals/lab_animals/pdf/scher_o_110.pdf (last visited Jan. 09, 2020).

¹⁸⁵ Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes, 1986 O.J. (L 358) 1, 3.

¹⁸⁶ *Id* at 3.

¹⁸⁷ *Id* .

¹⁸⁸ Directive 2010/63, of the European Parliament and of the Council of 22

institute of the animal welfare body (Articles 26) is another novelty and is the main mechanism established under the Directive to foster animal welfare. It consists of a person in charge of guaranteeing the welfare of animals both during breeding and in the lab.¹⁸⁹ Through this body—as stated by a working document of the European Commission—the Directive aims to reach its goals in terms of animal welfare promotion “in the context of animal keeping, breeding and use.”¹⁹⁰

b. Ethical Foundation of Animal Research Law in the EU

The Directive 2010/63/EU contains what could be considered, at a first glance, an important abolitionist stance when it states: “the Directive represents an important step towards achieving the *final goal* of full replacement of procedures on live animals for scientific and educational purposes, as soon as it is *scientifically possible to do so*.”¹⁹¹ On a closer look, however, the Directive only aspires to end experiments on animals, and does not intend to bring into question the legitimacy of their use in scientific research (it is very difficult to envisage a complete replacement of animals and therefore a full implementation of Recital 10). This is not entirely surprising since the philosophical underpinning of Directive 2010/63/EU is represented by the 3Rs approach of education, replacement, and refinement, which in turn is based on the assumption that research on animals is ethically acceptable.

Indeed, at the basis of the Directive’s structure is a utilitarian ethics, which prescribes that the moral justification of the killing of animals in research lies in the potential benefit to human health. Therefore, a “harm-benefit assessment” is pivotal in the authorization process of projects involving testing on animals if one claims that animals cannot be fully replaced in research (at least in the short period). In this regard, it is important to note that alternative methodologies, recalled in Recital 10 and Article 4, could never imply a complete substitution of animals in research. The animal model is, and will be in the future, necessary in basic research, as well as in translational and applied research.¹⁹² The most feasible scenario implies the development and the enhancement of *complementary* methodologies that could at least reduce the number

September on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 77.

¹⁸⁹ *Id.* at 44.

¹⁹⁰ Directive on Protection of Animal Used for Scientific Purposes, European Commission (Feb. 07, 2019) http://ec.europa.eu/environment/chemicals/lab_animals/pdf/guidance/animal_welfare_bodies/en.pdf (last visited Apr. 20, 2020).

¹⁹¹ *Id.* at Art. 10.

¹⁹² Roberto Camminiti, *Replacement of Animals in Research Will Never Be Possible*, 457 *Nature* 147 (2009).

of animals used in research. The only other choice would be a complete ban of research on animals, but this would imply a political decision by the European Commission.

Now, the interesting thing is that, with the abolitionist stance contained at Recital 10 of Directive 2010/63/EU, EU institutions—at least in the sector of animal testing—embraced the “two-track approach” of “New Welfarism.” As noted above, New Welfarism proposes the improvement of living conditions and treatment of laboratory animals and reduction in their use in the short-term, and, in the long-term, the full replacement of animals with alternative methodologies, but only if the development of alternative methodologies will allow it. To date, Directive 2010/63/EU is the only EU act where an abolitionist goal is formulated, therefore it is only the EU animal testing regulatory framework that is in line with the two-track approach. A similar stance was taken by the Royal Society in its Statement of 2015 on the use of animals in research: “everybody has benefited immensely from scientific research involving animals.... Nonetheless, researchers should seek, where possible, *to avoid the use of animals.*”¹⁹³ As will be discussed later, the abolitionist clause of Directive 2010/63/EU is difficult to put into practice, since it collides with the other statement of paragraph 10. This second part of paragraph 10 states that “the use of live animals continues to be necessary to protect human and animal health and the environment,” and therefore does not call into question the moral legitimacy of experiments on animals. Indeed, as underlined by a report addressed to the members of the European Parliament, the number of animals used in research has not decreased as a consequence of the implementation of Directive 2010/63/EU.¹⁹⁴

The “two-track approach” is also embraced with reference to the issue of the legitimacy of research on NHPs. Due to their genetic similarity with human beings, NHPs can play a crucial role in the development and safety assessment of new pharmaceuticals; therefore their use in some areas of biomedical and biological research is deemed essential for the advancement of biomedical research (in the absence of alternative methodologies).¹⁹⁵ For that reason, experiments on NHPs are not completely phased out by the EU,¹⁹⁶ but are strictly regulated.

¹⁹³ *Statement of the Royal Society's Position on the Use of Animals in Research*, The Royal Society, <https://royalsociety.org/topics-policy/ethics-conduct/animal-testing/> (last visited, Jul. 1, 2019).

¹⁹⁴ Letter from Comité Scientifique Pro Anima to Members of European Parliament (Oct. 5, 2019) <https://www.proanima.fr/wp-content/uploads/2019/10/Request-for-review-of-the-Directive-2010-63-EU-.pdf> (last visited Oct. 21, 2019).

¹⁹⁵ David Weatherhall, *The Use of Non-Human Primates in Research*, (Working Paper Grp.) <https://www.mrc.ac.uk/documents/pdf/the-use-of-non-human-primates-in-research> (last visited Apr. 30, 2020).

¹⁹⁶ Directive on Protection of Animal Used for Scientific Purposes, European

Specifically, the use of NHPs is restricted and limited to translational or applied research which must be with a view to the avoidance, prevention, diagnosis or treatment of debilitating or potentially life-threatening clinical conditions in human beings¹⁹⁷ In addition, the Directive demands implementing the refinement principle by adopting, for instance, the highest standards of NHP housing and husbandry¹⁹⁸ and to follow best practices in the conduct and refinement of scientific procedures.

However, their full replacement with alternative methodologies,¹⁹⁹ will be possible in the future (but not in the present) only if the developments in science allow it, in line with the New Welfarist stance. The New Welfarist turn of the EU is not surprising, since the welfare of human beings is always the central concern of EU regulations. A major strand of environmental law, with which animal welfare law must necessarily interface,²⁰⁰ is also based on a traditionally anthropocentric or human-centred perspective.²⁰¹ In fact, many of the concerns regarding environment protection are strictly interrelated to the way they affect the welfare of human beings (and of future generations), who are the only living entities considered worthy of direct moral status—although environmental law also has ecocentric aspects that apply the same standards of conduct with respect to humans as they do with respect to animals.²⁰²

Commission (Feb. 07, 2019) Recital 17 of the Directive recognizes that the use of NHPs in scientific procedures is still necessary in biomedical research.

¹⁹⁷ *Id.* The document envisages that “the use of non-human primates should be permitted only in those biomedical areas essential for the benefit of human beings, for which no other alternative replacement methods are yet available. Their use should be permitted only for basic research, the preservation of the respective non-human primate species or when the work, including xenotransplantation, is carried out in relation to potentially life-threatening conditions in humans or in relation to cases having a substantial impact on a person’s day-to-day functioning, i.e. debilitating conditions.”

¹⁹⁸ *Id.* at Annex III.

¹⁹⁹ Sci. Committee on Health Env'tl. & Emerging Risks (SCHEER), *The Need for Non-Human Primates in Biomedical Research, Rroduction and Resting of Products and Devices* (May. 18, 2017), http://ec.europa.eu/environment/chemicals/lab_animals/pdf/Scheer_may2017.pdf. The report concerning the use of NHPs in research developed by the Scientific Committee on Health, Environmental, and Emerging Risks—SCHEER, does not fully exclude in the long term the phasing out of research on primates.

²⁰⁰ See generally Bruce Myers & Joyce Tischler, *Animal Protection and Environmentalism: The Time Has Come To Be More Than Just Friends, in What can Animal Law learn from Environmental Law?* (Env'tl. Law Ins. 2015); Stuart Harrop, *Climate Change, Conservation and the Place for Wild Animal Welfare in International Law* J. of Env'tl. Law (2015); Sabrina Tremblay-Huet, *Should Environmental Law Learn From Animal Law?: Compassion as a Guiding Principle for International Environmental Law Instead of Sustainable Development* (2018).

²⁰¹ R. Elliott Atfield, *The Ethics of Environmental Concern* (U. of Geor. Press, 1985).

²⁰² Robyn Eckersley, *Environmentalism and Political Theory: Toward*

Traditionally, in fact, environmental law is not mainly focused on the protection of the ecosystem, that is, the survival and wellbeing of all living species. Rather, it focuses on the negative consequences for human beings and future generations of an unsustainable use of natural resources.²⁰³ For instance, climate change can have negative consequences on crop production and generate an increase in infectious diseases, such as malaria, dengue fever, or adverse climate events, such as hurricanes, storms or tsunamis, all of which affect humans.²⁰⁴

IV. OVERVIEW ON THE TRANSPOSITION OF DIRECTIVE 2010/63/EU

The transposition of Directive 2010/63/EU, which was completed on 22 April 2015, was a long process which required Member States to establish several domestic measures and to set up institutions and bodies. Member States, in particular, were requested to establish national inspection systems;²⁰⁵ national bodies for the protection of laboratory animals;²⁰⁶ and to appoint competent authorities.²⁰⁷

The United Kingdom, for instance, was one of the first countries to implement the Directive, although some of its provisions were even more restrictive than those set out in the Directive. In the United Kingdom, the use of animals in experiments and testing is regulated under the “Animals (Scientific Procedures) Act 1986 Amendment Regulations

an Ecocentric Approach (UCL Press 1992); see generally Helen Kopnina et al., *Anthropocentrism: More than Just a Misunderstood Problem*, 31 *J. of Agric. and Env'tl. Ethics*, 109 (2018).

²⁰³ Katherine V. Kortenkamp, Colleen F. Moore, *Ecocentrism and Anthropocentrism: Moral Reasoning About Ecological Commons Dilemmas* 3 *J. of Env'tl. Psychology* 261 (2001).

²⁰⁴ See Bryan G. Norton, *Environmental ethics and weak anthropocentrism*, 6 (2) *Environmental Ethics*, 131 (1984).

²⁰⁵ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 36, which envisages that “Member States shall ensure that the competent authorities carry out regular inspections of all breeders, suppliers and users, including their establishments, to verify compliance with the requirements of this Directive”.

²⁰⁶ *Id.* at Art. 49, which foresees that “Each Member State shall establish a national committee for the protection of animals used for scientific purposes. It shall advise the competent authorities and animal-welfare bodies on matters dealing with the acquisition, breeding, accommodation, care and use of animals in procedures and ensure sharing of best practice.”

²⁰⁷ *Id.* at Art. 59, which states that “Each Member State shall designate one or more competent authorities responsible for the implementation of this Directive”; I. Anna S. Olsson, et al., *Protecting Animals and Enabling Research in the European Union: An Overview of Development and Implementation of Directive 2010/63/EU*, 57 *ILAR Journal* 347 (2016).

2012”.²⁰⁸ In line with Directive 2010/63/EU, the Act establishes a strict license process for breeders, suppliers and users of animals based on a three-strand system of control (Articles 7-9): individual license, project license, establishment license.²⁰⁹ Indeed, before the beginning of any testing on animals, an *ad hoc* license must be provided to each individual performing research on animals, to the program of work and to the establishment where the research is supposed to be carried out.²¹⁰

The Directive allows Member States to retain domestic provisions already in force on 9 November 2010 that give more extensive protection to animals than those set out in the Directive, so long as they are not used to inhibit the free market. The UK has retained special protections for dogs, cats and horses as well as NHPs (Section B of the Animals Scientific Procedure Act) and has retained the higher UK standard in every case where it will ensure better animal welfare.²¹¹

Switzerland, although not an EU Member State, has put into place a legislation (the Animal Protection Act of 2005, revised in 2008),²¹² which sets a standard of protection for laboratory animals that is even higher than that afforded by Directive 2010/63/EU.²¹³

In Italy, as it will be soon discussed, the transposition process was not easy. Italy was the only EU country that did not manage to complete the transposition by 2014, contravening its duty to implement it within the specified time. In this regard, according to a consolidated jurisprudence of the European Court of Justice, the State cannot plead practical, financial or administrative questions as a justification of its non-compliance with duties established by the EU Treaty.²¹⁴

²⁰⁸ In the United Kingdom, the Animals (Scientific Procedure) Act 1986 (ASPA) regulates the use of animals in experiments. It was revised in order to implement Directive 2010/63/EU. *See Animals (Scientific Procedures) Act 1986*, Gov. UK, (May 6, 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/619140/ConsolidatedASPA1Jan2013.pdf.

²⁰⁹ The complex procedure to obtain a licence is explained in the Guidance for applying for a licence to carry out animal testing, 29 August 2017, <https://www.gov.uk/government/collections/animal-testing-and-research-applying-for-licences>.

²¹⁰ *See* E. Jackson, *Medical Law: Text, Cases and Materials*, 446 (3rd ed. 2013).

²¹¹ *Explanatory Memorandum to the Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012*, Gov.UK (2012) https://www.legislation.gov.uk/ukdsi/2012/9780111530313/pdfs/ukdsiem_9780111530313_en.pdf (last visited Apr. 22, 2019).

²¹² RECUEIL SYSTÉMATIQUE DU DROIT FÉDÉRAL [RS] Animal Welfare Act (2005) (English translation at https://www.zuerchertierschutz.ch/fileadmin/user_upload/Tierschutzthemen/pdf/Tierschutzgesetz_e.pdf).

²¹³ *See* Lena Hehemanna, *The Protection of the Dignity of Laboratory Animals in Switzerland: Different Procedures? Different Standards?* 6 *Global Journal of Animal Law* 3 (2018); *see also* Helena Röcklinsberg, et al., *Animal Ethics in Animal Research* 127 (2017) (discussing another relevant Swiss legal instrument for animal testing, the Ethical Principles and guidelines for Experiments on Animals (EPEG)).

²¹⁴ Case 301/81 Comm’n v. Belgium, 1983 E.C.R. 467; *See also* Case 136/85

V. GERMAN LAWS ON ANIMAL PROTECTION

Germany has a long tradition in animal protection. The first legislation on animal testing was adopted under the Third Reich (the *Reichstierschutzgesetz* of 24 November 1933 was one of the most advanced legislations on animal protection of that historical period).²¹⁵ With this law, Hermann Göring outlawed vivisection, even if the Interior Ministry had the possibility to authorize universities or research centers to use animals for scientific purposes.²¹⁶ In the same period, cutting-edge laws on the protection of human beings during experimentations were also passed.²¹⁷

Afterwards, in his book *Eternal Treblinka*, the Jewish historian Charles Patterson compared the crimes of Nazi doctors in concentration camps to the butchery of animals in slaughterhouses and described in detail (although with some discrepancies) the content of these laws.²¹⁸ In this regard, Kalechofsky criticized the animal rights position expressed by Patterson because in her view, the comparison of concentration camps where humans were slaughtered in the past (in Germany, as well as in Cambodia or Japan) with abattoirs fails.²¹⁹ This parallelism, indeed, risks undermining the efforts of the human rights movement. The German Civil Code (*Bürgerliches Gesetzbuch*), as amended in 1990, Section 90 (a) (“Animals”) recognizes that “animals are not things” and they are therefore protected by special statutes.²²⁰

Comm’n v. Italy 1987 E.C.R. 479.

²¹⁵ Boria Sax, *Animals in the Third Reich*, 35 (2013).

²¹⁶ Mary T. Philips, Jeri A. Sechzer, *Animal Research and Ethical Conflict: An Analysis of the Scientific Literature: 1966–1986*, 11 (1989).

²¹⁷ Hans Martin Sass, *Reichsrundschreiben 1931: pre-Nuremberg German regulations concerning new therapy and human experimentation*, 8 *Journal of Medical Philosophy*, 99 (1983).

²¹⁸ Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust*, 137 ss. (2002).

²¹⁹ Roberta Kalechofsky, *Animal Suffering and the Holocaust: The Problem with Comparisons* (2003);

²²⁰ Bürgerliches Gesetzbuch [BGB] [Civil Code], §90(a), translation at <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Alemao-BGB-German-Civil-Code-BGB-english-version.pdf>; see also Saskia Stucki, *Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?* *VerfBlog*, <http://verfassungsblog.de/toward-hominid-and-other-humanoid-rights-are-we-witnessing-a-legal-revolution> (2016) (Argentinian court recognized that a primate may have human rights); see also Richard L. Cupp Jr., *Animal as more than “Mere Things”, but still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm* 19, *Pepperdine University School of Law Legal Studies Research Paper Series*, 1 (2016) (Scholarly article on the unresolved problem of the legal status of animals); Saskia Stucki, *Grundrechte für Tiere Eine Kritik des geltenden Tierschutzrechts und rechtstheoretische Grundlegung von Tierrechten im Rahmen einer Neupositionierung des Tieres als Rechtssubjekt* (Nomos 2016).

The *Grundgesetz* recognizes and protects freedom of research and teaching.²²¹ In 2002, Article 20a of the *Grundgesetz* was amended to include animals, “die Tiere,” in its scope: “State shall protect the natural foundations of life and animals.” The addition of “and animals” represents a theoretical limit to the constitutionally protected freedom of science, although, in practice, experiments are left to the ethical discretion of the researcher (even if ethics committees evaluate the permissibility of experimentation on animals). According to the structure of the TierSchG (*Tierschutzgesetz*—Animal Protection Act)—which carefully regulates the conduct of animal testing—scientists must provide reasonable evidence that the research carries a “sound reason” represented by a benefit to the well-being of humans, animals or the environment, which justifies harm to animals.²²² As to the protection of animals used for research, Germany does not have a specific law addressing this issue except the Animal Protection Act, which covers, in a few of its articles, experiments on animals.

The *Tierschutzgesetz*,²²³ defined as “an ethics-based animal welfare act,”²²⁴ states, in § 1, that “Niemand darf einem Tier ohne vernünftigen Grund Schmerzen, Leiden oder Schäden zufügen.” Accordingly, the key element of this law is represented by the general prohibition of causing pain, suffering, or harm to animals except for a “sound reason” (“Vernünftiger Grund”). Its footprint is, therefore, clearly based on a utilitarian principle. Death of a vertebrate is considered as the greatest and most irreparable harm and is, hence, punishable, unless sound reasons are not presented. Reference to a “sound reason” uses deliberately ambiguous wording, which leaves a wide “margin of appreciation” in its implementation. It allows, for instance, practices that are deemed “cruel” by some people, such as slaughter, hunting, fishing, the killing of male chicks, and animal testing. These are all considered as normal uses of animals carried out for a sound reason.²²⁵

However, in order to respect the “sound reason” paradigm, any investigation or operation which “may cause pain, suffering or

²²¹ GRUNDGESETZ Art. 5, Para. 3 [GG][BASIC LAW], “Arts and sciences, research and teaching shall be free”. Translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034; see also Art. 33 Costituzione [Cost.] (It.) (The Italian Constitution contains a similar regulation which also states that “The arts and sciences as well as their teaching are free.”).

²²² N.H. Franco & I.A.S. Olsson, *The End of Animal Life: a Start for Ethical Debate* 191 (Franck L.B. Meijboom & Elsbeth N. Stassen eds., 2016).

²²³ TierSchG § 1.

²²⁴ Kate M. Natrass, *Und Die Tiere: Constitutional Protection for Germany’s Animals*, 10 ANIMAL LAW 283, 288 (2004).

²²⁵ See Günter Hager, *Der “vernünftige Grund” im Tierschutzgesetz – zugleich Besprechung der Küken-Entscheidung des Oberverwaltungsgerichts NRW* 3 JOURNAL OF SCIENCE, HUMANITIES AND ARTS, 1 (2016).

harm”,²²⁶ classified as an “experiment on animals,” requires a specific authorization, in line with Article 38 of Directive 2010/63/EU. The applicant, in particular, must prove that the research pursues one of the goals established in, the *Tierschutzgesetz*,²²⁷ which is “to prevent, diagnose or treat diseases, bodily defects or other abnormalities, detect environmental hazards, test substances or drugs, conduct basic research” and that the pain, suffering or harm caused to the laboratory animals is ethically justifiable, and the lasting or repeated severe pain or suffering is expected to be of outstanding importance to the fundamental needs of human beings or animals.”²²⁸ The approval process goes through several steps: researchers submit an application, where they express why their research should be scientifically and ethically acceptable.²²⁹ Then an advisory committee—made of independent experts, including representatives of animal welfare organizations – issues an ethical clearance where it states its position for or against approval.²³⁰ Its opinion is transmitted to the authorities that have the power to approve or to reject the research proposal.²³¹

Article 7, Para. 2, of the *Tierschutzgesetz* highlights the goals for which experiments on animals are allowed: the prevention, diagnosis or treatment of diseases; suffering, bodily defects or other abnormalities or the detection or exertion of influence of physiological conditions or functions in human beings or animals; the detection of environmental hazards; the testing of substances or products to ensure that they are safe in terms of human or animal health or that they are effective against animal pests; basic research. Conversely, experiments on animals are considered unlawful in research related to the development and testing of weapons, munitions, and related equipment.²³² Experiments on animals for the development of “tobacco products, detergents and cosmetics” are instead prohibited in principle, but with the possibility of exceptions.²³³

Alternatives to animal testing are promoted by the Federal Government through several institutions, such as the Foundation for the Promotion of Alternate and Complementary Methods to Reduce Animal Testing (financed by the Federal Ministry of Food and Agriculture—BMEL); the Centre for Documentation and Evaluation of Alternatives to Animal Experiments (ZEBET) at the Federal Institute for Risk

²²⁶ TierSchG Art. 7, Para. 1.

²²⁷ *Id.* at Art. 7, Para. 2.

²²⁸ *Id.* at Art. 7, Para. 3.

²²⁹ *Id.* at Art. 8, Para. 1.

²³⁰ *Id.* at Art. 8, Para. 2.

²³¹ *Id.* at Art. 8, Para. 3.

²³² *Id.* at Art. 7, Para. 4.

²³³ *Id.* at Art. 7, Para. 5.

Assessment; and the German Centre for the Protection of Laboratory Animals (Bf3R) hosted by the German Federal Institute for Risk Assessment (BfR).

a. The implementation of Directive 2010/63/EU in Germany

Germany implemented Directive 2013/63/EU through an amendment to the Animal Welfare Act on 12 July 2013.²³⁴ The Regulation for the Protection of Animals Used for Experimental or Other Scientific Purposes (Animal Welfare Regulation Governing Experimental Animals—*TierSchVersV*)²³⁵ regulates in detail the conduct of animal testing. Amended by Article 6 of the Regulation of 12 December 2013, it traces the content of the EU Directive, with some novelties. Indeed, in some points, it reproduces the wording of Directive 2010/63/EU, with a positive outcome in terms of enhanced protections for animals. While in others, it goes even further than the Directive, establishing a lower level of protection of laboratory animals than that established in other EU countries.

Nevertheless, several bodies and offices devoted to mainstreaming animal welfare have been established in Germany following the implementation of the Directive. Section 5 of the *TierSchVersV* sets up the figure of the “Animal Welfare officer,”²³⁶ who is in charge of looking after the welfare of laboratory animals. The officer must ensure that animal testing is kept to a bare minimum, the authorization process has been followed, the highest standards of animal husbandry and care are put into practice, and that only animals bred in captivity are used.

²³⁴ Verordnung zur Umsetzung der Richtlinie 2010/63/EU des Europäischen Parlaments und des Rates vom 22. September 2010 zum Schutz der für wissenschaftliche Zwecke verwendeten Tiere [Regulation to Implement Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 to Protect Animals Used for Scientific Purposes], Aug. 1, 2013, BGBl I S. at 1206, 1313 (Ger.), https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl113s3125.pdf%27%5D#__bgbl__%2F%2F%5B%40attr_id%3D%27bgbl113s3125.pdf%27%5D__1583264759123. An English translation of the amended Regulation is available at https://www.uni-heidelberg.de/md/ibf/tierschutz/gesetze-tierschversv-englisch-incl_haftungsausschluss.pdf. On the debate in Germany (and the EU) on animal testing, see Anne Peters, Saskia Stucki, Die Tierversuchsrichtlinie 2010-/63/EU: Rechtsgutachten zu ihrer Umsetzung in Deutschland (Schultess, 2014).

²³⁵ Verordnung zur Ablösung der Versuchstiermeldeverordnung und zur Änderung tierschutzrechtlicher Vorschriften [Ordinance to replace the Animal Registration Ordinance and to amend animal welfare regulations], Dec. 12, 2013, BGBl I S. at 1206, 1313 (Ger.), https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl113s3125.pdf%27%5D#__bgbl__%2F%2F%5B%40attr_id%3D%27bgbl113s4145.pdf%27%5D__1583265385999.

²³⁶ *Id.* at Art. 26, Para. 1. Which states that “Member States shall ensure that each breeder, supplier and user sets up an animal-welfare body.”

An Animal Welfare Committee, in charge of supporting the activity of the Animal Welfare Officer, must be appointed by the director of the facility or the persons responsible for an establishment in which vertebrates of cephalopods are kept.²³⁷ The Committee shall be composed of an animal welfare officer, some persons entrusted with the care of animals, and a person who conducts experiments on animals. The element of weaknesses of these institutions set up by the Directive—which can play a key role in mainstreaming animal protection—lies in the fact that they are appointed by the same body that carries out research or breeds the animals; therefore the principles of impartiality and independence are not fully respected. The *TierSchVersV* did not manage to overcome this limitation, which was already intrinsic to the formulation of the Directive.

The National Committee for the Protection of Animals Used for Scientific Purposes for the Federal Republic of Germany has been set up by the Federal Institute for Risk Assessment (BfR) as part of the implementation process of Article 49 of Directive 2010/63/EU.²³⁸ Its legal foundations are traced in Article 15 of the *Tierschutzgesetz*—the BfR was entrusted with carrying out the tasks of the National Committee through the amendment to the Act that came into force on 13 July 2013—and Section 45 of the *TierSchVersV*, which defines these tasks.²³⁹ It is an advisory body that adopts recommendations addressing specific issues related to laboratory animals.²⁴⁰ The Committee performs its activities under the direction of the German Centre for the Protection of Laboratory Animals (Bf3R), which was established within the BfR in 2015. Its activities are intended to reduce animal experiments to an absolute minimum level and to guarantee the best possible protection for laboratory animals.²⁴¹

²³⁷ *Id.* at Section 6.

²³⁸ Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, 2010 O.J. (277) 33, 37.

²³⁹ See *TierSchVersV* § 45.

²⁴⁰ On 6 August 2015, the Committee adopted Recommendation no. 001/2015, Severity assessment of genetically altered fish (bony fish, teleost fish) and on 9 September 2016 it adopted Recommendation no. 002/2016, Severity Assessment of genetically altered mice and rats—Version 2. The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Fisch (Bony Fish, Teleost Fish) (2015), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-fish-bony-fish-teleost-fish.pdf>; The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Mice and Rats - Version 2 (2016), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-mice-and-rats-version-2.pdf>.

²⁴¹ Bettina Bert, Justyna Chmielewska, Andreas Hensel, Barbara Grune, Gilbert Schönfelder, The Animal Experimentation Quandary: Stuck Between Legislation and Scientific Freedom, 17 *EMBO REP.* 790, 790 (2016).

The special care of the fate of animals once the experiment has ended is one of the most positive elements introduced by the new legislation. In particular, the Regulation, states that “vertebrates or cephalopods that have been used in animal experiments but whose use is no longer contemplated, may be permanently accommodated outside a facility or establishment in a housing system suitable for the species concerned”.²⁴² It is possible to save animals’ lives “if the health of the animal allows it and it does not pose any threat to human and animal health and the environment, and appropriate steps have been taken to ensure the well-being of the animals.”²⁴³ Indeed, the fate of animals, once research is ended, is a forgotten issue that had attracted little attention by scholars and researchers until that point: in fact, at the end of an experiment, the normal destiny of laboratory animals is euthanasia.²⁴⁴

Analgesia and anesthesia in laboratory animals is treated in Section 17. The general rule states that a general or local anesthetic must always be administered in order to alleviate pain and suffering in the animal, and used to the lowest possible level unless the goal of the experiment precludes anesthesia and the experiment does not lead to serious injury.²⁴⁵ Re-use of vertebrates and cephalopods is admitted if the animal has been used in a previous experiment classified as “severe,” its general state of health and well-being have been completely restored, the further experimental project is not classified as “severe” and the animal has been examined by a veterinary surgeon. As to the

²⁴² Recommendation no. 002/2016, Severity Assessment of genetically altered mice and rats—Version 2. The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Fisch (Bony Fish, Teleost Fish) (2015), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-fish-bony-fish-teleost-fish.pdf>; The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Mice and Rats - Version 2 (2016), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-mice-and-rats-version-2.pdf>.

²⁴³ *Id.* at Section 10, Para. 1, *i, ii, iii*.

²⁴⁴ The alternative to euthanasia is an adoption programme which must be set up by each institution that carries out research on animals. PETA has argued that in light of the COVID-19 pandemic in 2020 several public institution have decided to curtail laboratory experiments, preferring to test new treatments against SARS-CoV-2 directly on voluntary patients in order to accelerate the process towards a vaccine. As a consequence, they have designated many animals used in testing as not essential and then have euthanized them. <https://support.peta.org/page/18416/action/1>.

²⁴⁵ Recommendation no. 002/2016, Severity Assessment of genetically altered mice and rats—Version 2. The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Fisch (Bony Fish, Teleost Fish) (2015), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-fish-bony-fish-teleost-fish.pdf>; The Ger. Fed. Inst. for Risk Assessment (BfR), Severity Assessment of Genetically Altered Mice and Rats - Version 2 (2016), <https://www.bfr.bund.de/cm/349/severity-assessment-of-genetically-altered-mice-and-rats-version-2.pdf>. Section 17, at Para. 2.

methods of killing of animals listed in Annex II of the Regulations some methods have been extended to types of animals not included in the Directive.²⁴⁶ For instance, the captive bolt has been extended to rabbits and large mammals, concussion and percussive blows to the head to fish, amphibians, reptiles, and inhalation of inert gases to birds and rodents.

Another sector where German Law implemented Directive 2010/63/EU with some discrepancies is that of research on NHPs. The research on NHPs is a very delicate domain of research, and the object of a debate that began with the scandal following cruel testing practices on non-human primates carried out in Bremen by the neurobiologist Andrea Kreiter (“der Bremer Makaken-Fall”).²⁴⁷ This issue has raised—and still raises, in light of the case of fume tests on primates and humans financed by Volkswagen²⁴⁸—high levels of public concern in the German population about the ethical admissibility of experiments on primates.²⁴⁹

Despite this scandal, research on NHPs continues to be admitted by the German legislation, which establishes a lower level of protection if compared to EU legislation. Hence, Section 23 devoted to the use of primates is less restrictive than Directive 2010/63/EU and enlarges the fields of research on primates. In addition to “debilitating or potentially life-threatening conditions in human beings” mentioned in Article 8 (a) (i) of the Directive, it also lists the production and testing of the quality, efficacy, or safety of substances or products with regard to the impairment to human health.²⁵⁰ Furthermore, competent authorities can authorize, as an exception to the conditions previously established, “the use of primates in animal experiments if the animal experiments serve research with the purpose of preventing, identifying or treating

²⁴⁶ Table 3 of Annex IV of the Directive 2010/63/EU contains a list of methods to kill animals.

²⁴⁷ Günter Hager, *Das Tier in Ethik und Recht* (Mohr Siebeck 2015), 113.

²⁴⁸ The scandal which emerged at the end of January 2018 involved the funding by Volkswagen of tests carried out on primates and humans, in which they were forced to breathe in diesel exhaust for hours at a time. Peter Dockrill, *German Carmakers Exposed Monkeys and Humans to Diesel Fumes in Secret Tests* (Jan. 30, 2018), SCIENCE ALERT, <https://www.sciencealert.com/german-carmaker-tests-intentionally-exposed-monkeys-humans-diesel-fumes-volkswagen-bmw-daimler> (last visited Apr. 28, 2020).

²⁴⁹ Fanny Jiménez, *Bremer Uni darf weiter an Affen forschen [Bremen University is allowed to continue researching monkeys]* (Dec. 12, 2012), WELT, <https://www.welt.de/wissenschaft/article111980298/Bremer-Uni-darf-weiter-an-Affen-forschen.html> (last visited Apr. 28, 2020).

²⁵⁰ Section 23, Para. 2.1, (b), (allowing research on NHPs if it has “the purpose of preventing, identifying or treating diseases, suffering, physical injuries or physical complaints in human beings which can be life-threatening or lead to a reduction in physical or mental capacity, or the development and production of, and testing the quality, efficacy or safety of substances or products with regard to the impairments to human health mentioned.”).

diseases, suffering, physical injuries or physical complaints in human beings, if it is shown with scientific justification that the use of primates is indispensable in order to achieve the above-mentioned purpose of animal experiment.”²⁵¹ The formulation of this Section of the Regulation paves the way to experiments on NHPs that do not directly deal with life-threatening conditions, such as diabetes or obesity. Currently, in light of Section 23 of the Regulation, research on NHPs is mainly performed in the following areas: (a) development and safety testing of pharmaceuticals and medical devices; (b) treatment and prevention of infectious diseases; (c) neuroscience; (d) ophthalmology; and (e) xenotransplantation.²⁵²

With reference to Great Apes, the content of the Regulation is quite different from the Directive. Article 8, para. 3 of the Directive clearly bans research on Great Apes, with the only exception of outbreaks of epidemics or other emergent situations²⁵³ Even so, the Regulation allows research on Great Apes if it is shown with a scientific justification that their use is “necessary”²⁵⁴ (which means treating diseases that are life-threatening or not life-threatening, or in the case of a lack of a valid alternative).²⁵⁵ The terminology of Section 24 “Origins of Primates” is also ambiguous, as it states that species such as Marmoset, Rhesus Monkey, Cynomolgus Monkey can only be used if they are the offspring of primates bred in captivity or sourced from self-sustaining colonies.²⁵⁶

²⁵¹ Section 3, Para. 1.

²⁵² Section 23, Para. 1, and 2, asserting that “Primates shall not be used in animal experiments”, unless “the animal experiment serves a) basic research, b) the purpose of preventing, identifying or treating diseases, suffering, physical injuries or physical complaints in human beings which can be life-threatening or lead to a reduction in physical or mental capacity, or the development and production of, and testing the quality, efficacy or safety of substances or products with regard to the impairments to human health mentioned, or c) research in connection with the preservation of species, and it is shown with scientific justification that the purpose mentioned in number 1 of the animal experiment cannot be achieved by the use of species other than primates”.

²⁵³ Art. 55, Para 2, states that “Where a Member State has justifiable grounds for believing that action is essential for the preservation of the species or in relation to an unexpected outbreak of a life-threatening or debilitating clinical condition in human beings, it may adopt a provisional measure allowing the use of great apes in procedures [...]”.

²⁵⁴ Section 24, Para. (5), (a).

²⁵⁵ According to the Max Planck Society, research on Great Apes has not been performed in Germany since 1991. *See* Max-Planck-Gesellschaft, *Research on Primates*, <https://www.mpg.de/10973426/primates> (last visited Apr. 28, 2020).

²⁵⁶ Section 24, Para. 1, affirms that “Primates listed in Annex II column 1 of Directive 2010/63/EU may, from the dates set out in Annex II column 2 of Directive 2010/63/EU, only be used in animal experiments if they are the offspring of primates which have been bred in captivity or if they are sourced from self-sustaining colonies for the purposes of Article 10(1) subparagraph 3 of Directive 2010/63/EU”.

But competent authorities may authorize the use of primates of different stocks of origin, which means captured in the wild.²⁵⁷

As proof of the several concerns raised by research on NHPs, an independent investigation carried out by *Cruelty Free International* at the Max Planck Institute for Biological Cybernetics in Tübingen, Germany in 2013 and 2014 highlighted experimental techniques carried out on macaques, such as the implanting of devices in the skulls of macaques after brain surgery, which caused severe pain and distress to these animals.²⁵⁸ The investigation inflamed the existing debate in Germany about the scientific and ethical admissibility of the use of primates in brain research.²⁵⁹ These invasive techniques request a balance between different values; on one side the potential *advancement of science*, and on the other side the *welfare of animals* used in scientific experiments. The issue raised by these experiments lies in their scarce practical application. As basic research, brain research does not have an immediate therapeutic effect on the treatment of neurodegenerative diseases and is cruel and painful for the animals involved, who are, in addition, euthanized at the end of the procedure.²⁶⁰ In response to the clamor raised by this umpteenth discrediting of research on primates, on January 12th, 2017, the Max Planck Society (MPS) adopted a *White Paper concerning the Use of Animals in Experiments for Basic Research*.²⁶¹

The MPS added a fourth R to the 3R principles (Replacement, Reduction, Refinement), which stands for the Responsibility of researchers and scientists, as well as a special responsibility of the Max

²⁵⁷ Section 24, Para. 2, states that “In derogation from subsection 1, the competent authority may authorise the use of primates listed in Annex II column 1 of Directive 2010/63/EU of different stock or origin if it is shown with scientific justification that the use of those primates is necessary”.

²⁵⁸ Monkey experiments at Max Planck Institute, Germany, CRUELTY FREE INTERNATIONAL <https://www.crueltyfreeinternational.org/what-we-do/investigations/monkey-experiments-max-planck-institute-germany> (last visited June 22, 2020).

²⁵⁹ See Jarrod Bailey, Katy Taylor, *Non-human primates in Neuroscience Research: The Case against its Scientific Necessity*, ATLA, 43, 43-69 (2016).

²⁶⁰ Gareth Lahvis, *Primate researchers need to explore alternative methods*, The Hill, 20 March 2020, <https://thehill.com/opinion/energy-environment/485888-primate-researchers-need-to-explore-alternative-methods>.

²⁶¹ The text of the report is available at <https://www.mpg.de/10930951/white-paper-animal-research> (last visited Apr. 29, 2020). According to Cruelty Free International, on May 4, 2017, the Max Planck Institute for Biological Cybernetics announced the end of its brain experiments on monkeys. Patrick, Laboratory ends Monkey Brain Research, CRUELTY FREE INTERNATIONAL (May 5, 2017), <https://www.crueltyfreeinternational.org/what-we-do/breaking-news/laboratory-ends-monkey-brain-research>.

Planck Society.²⁶² Responsibility means that researchers and scientists adhere to the principles concerning research integrity, and to using their scientific knowledge in order to promote animal welfare.²⁶³ Expertise in ethics is required from all the scientists and researchers involved in animal testing.

In light of the favorable attitude of German legislation towards animal testing, statistical data show a steady increase in the use of animals in research in 2018 (if compared to 2017, 2016 and 2015, but a decrease if compared to 2014),²⁶⁴ and in particular a rise in experiments using NHPs (up to 3,324 in 2018, 3,472 in 2017, compared to 2,462 in 2016, mostly imported from Asia).²⁶⁵ Germany remains, in fact, the second largest performer of experiments on animals in Europe after the United Kingdom.²⁶⁶ The proportion of mice, rats and fish remained constant, accounting for ninety percent for all animals used in research.²⁶⁷

VI. ITALIAN LAWS ON ANIMAL PROTECTION

Italy has a long tradition in animal protection: the first rule was included in the former Italian Criminal Code, “Codice Zanardelli” (1889-1930), namely at article 491, which punished the mistreatment of animals, considered a criminal act against public morality.²⁶⁸

In the Italian legal framework, however, the protection of the life and welfare of animals finds a limit in the fulfilment of human interests, which are considered prevalent.²⁶⁹ This vision was confirmed

²⁶² *Id.* at p. 40 and 60.

²⁶³ *Id.*

²⁶⁴ *Figures of Animals Used for Scientific Purposes in Germany*, DPZ GERMAN PRIMATE CENTER LEIBNIZ INSTITUTE FOR PRIMATE RESEARCH, <https://www.dpz.eu/en/unit/about-experimental-animal-research/zahlen-und-fakten/tierversuchszahlen-in-deutschland.html> (last visited Apr. 28, 2020). Showing that 2,825,066 million animals were used for research purposes in Germany in 2018 (2,807,297 in 2017, 2,854,586 in 2016, 2,753,062 in 2015). In 2014, this number was 3,313,898. Susanne Diederich, .

²⁶⁵ *Statistik zu Tierversuchen 2017 2,8 Millionen Tiere verwendet oder getötet*, DER SPIEGEL (Dec. 20, 2018), <https://www.spiegel.de/wissenschaft/mensch/tierversuche-2017-2-8-millionen-versuchstiere-wurden-verwendet-a-1244739.html>.

²⁶⁶ *UK, Germany and France are Worst Offenders show EU Animal Test States*, CRUELTY FREE INTERNATIONAL, <https://www.crueltyfreeinternational.org/what-we-do/latest-news-and-updates/uk-germany-and-france-are-worst-offenders-show-eu-animal-test> (last visited Apr. 28, 2020).

²⁶⁷ *2019 report on the statistics on the use of animals for scientific purposes in the Member States of the European Union in 2015-2017*, (May 2, 2020) <https://ec.europa.eu/info/sites/info/files/com-2020-16-f1-en-main-part-1.pdf> at p.5.

²⁶⁸ Sabrina Tonutti, *European Animal Protection*, in THE GLOBAL GUIDE TO ANIMAL PROTECTION, 12, 12 (Andrew Linzey ed., 2013).

²⁶⁹ See also *MALTRATTAMENTO DI ANIMALI - LEGGE 189/2004* <https://www.lav.it/leggi/maltrattamenti> (last visited Apr. 28, 2020).

by the former conception of animals as “objects” or “property” of their owner, who had absolute rights upon them, including the right to kill them without sound reason.²⁷⁰

Now, Articles 544-*bis* and 544-*ter* of the Criminal Code, as modified by Law No. 189/2004,²⁷¹ have introduced new provisions punishing animal cruelty.²⁷² Articles 544 *bis* and 544 *ter* envisage two new crimes: (1) unnecessary or cruel killing of animals (“animalicidio”) and (2) mistreatment of animals (before this law, the killing of one’s own animals was not sanctioned).²⁷³ Furthermore, art. 727 of the Criminal Code prohibits abandoning pets or animals kept in captivity.²⁷⁴ In case of unjustified or cruel killing or of abandonment, the Criminal Code envisages a range of punishments, including fines and imprisonment.²⁷⁵ The novelty, as clarified by the Italian Cassation Court (Judgment No. 24734/2010),²⁷⁶ consists in the fact that unjustified or cruel killing or mistreatment is no longer an offence against private property, but a misconduct against the animal itself, to which people attach a value.²⁷⁷

In line with this view, Legislative Decree No. 116/92 (which implemented the Former Directive 86/609/CEE) authorized the use of animals in biomedical research only for sound scientific reasons.²⁷⁸ Before 1992, scientific experiments involving animals were regulated under Law No. 615/1941, which conferred upon the directors of the institutes and scientific labs direct responsibility of scientific procedures

²⁷⁰ Federico Bacco, *Tra sentimenti ed eguale rispetto: Problemi di legittimazione della tutela penale*, (Giappichelli ed., 2018), p. 76 *et seq.*

²⁷¹ Legge 20 luglio 2004 n. 189 (in G.U. 31 luglio, n. 178) “Disposizioni concernenti il divieto di maltrattamento degli animali, nonché di impiego degli stessi in combattimenti clandestini o competizioni non autorizzate”, come modificata dal Decreto Legislativo 15 marzo 2010 n. 47, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2004-07-31&atto.codiceRedazionale=004G0217&elenco30giorni=false (last visited June 22, 2020).

²⁷² Title IX-*bis* “Dei delitti contro il sentimento per gli animali.”

²⁷³ Giulia Guazzaloca, *Primo: non maltrattare. Storia della protezione degli animali in Italia* (Laterza, 2018), p. 38 *et seq.*

²⁷⁴ Silvana Castignone, *Diritti degli animali*, *Enciclopedia delle scienze sociali* (1993), http://www.treccani.it/enciclopedia/diritti-degli-animali_%28Enciclopedia-delle-scienze-sociali%29/.

²⁷⁵ *Supra* note 271, at Art. 274 *ter*.

²⁷⁶ Cass., sez. un., 1 luglio 2010, n. 24734, http://www.dirittoambiente.net/file/animali_sentenze_123.pdf.

²⁷⁷ Fabio Fasani, *L’animale come bene giuridico*, 2 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 710-746, 710 (2017).

²⁷⁸ Decreto Legislativo 27 gennaio 1992, n. 116. Attuazione della Direttiva 86/609/EEC in materia di protezione degli animali utilizzati a fini sperimentali o ad altri fini scientifici. *G.U.* n. 40, 18 febbraio 1992 (Suppl. Ord); text available at <https://www.gazzettaufficiale.it/eli/id/1992/02/18/092G0157/sgtext> (last visited, May 2, 2020).

performed on animals.²⁷⁹ For the director, it meant complete freedom to authorize experiments on every kind of animal.²⁸⁰ The only constraint was placed by the academic qualification that had to be possessed by scientists authorized to carry out experiments on animals. The academic qualifications required were a degree in Medicine, Veterinary Medicine, Biology and Natural Sciences.²⁸¹

Legislative Decree No. 116 has, therefore, filled a legal vacuum which had lasted for decades, introducing important concepts into the Italian legal system, such as animal welfare and external control on research activities performed on animals.²⁸² The Ministry of Health became the competent authority for verification and surveillance of the correct implementation of the legislation and the release of related authorizations.²⁸³ It should be noted that Italian Law No. 413/1993 recognizes the right to conscientious objection to scientific or educational activities involving animals (“animal CO”).²⁸⁴

a. The Implementation of Directive 2010/63/EU in Italy

Italy is an interesting case study when it comes to the public dimension of the controversy over the legitimacy of animal testing. For instance, the EU-wide initiative *Stop Vivisection* has gained 1,710,326 valid signatures in 28 countries, of which 678,251 are from Italy alone (Germany was the country with the second highest number of signatures, 164,304).²⁸⁵ Despite these statistics, Italy—as a country—is not

²⁷⁹ Paolo Rodinò, Roberto Moccaldi Marcello Raspa, Maria Cristina Riviello, Gianluca Sotis, Annarita Wirz, *Manuale per la gestione integrata degli stabulari. Principi ed indicazioni per la protezione degli animali e la sicurezza dei lavoratori*, (2012) 117 Consiglio Nazionale delle Ricerche. Quaderni de “La ricerca scientifica” 17 *et seq.*

²⁸⁰ Maria Vittoria Ferroni, Carla Campanaro, *Metodi alternativi alla sperimentazione animale* (Giappichelli, 2017), 6 *et seq.*

²⁸¹ *Id.*

²⁸² G. Panzini, R.N. Lorenzini, *Animal experimentation in Italy. Legislation and the authorization of research protocols*, (2004) 40 ANN IST SUPER SANITÀ, 205 *et seq.* For a critical point of view, G. Felicetti, *La legge sta funzionando?* (2001) Rapporti ISTISAN01/23 ISTITUTO SUPERIORE DI SANITÀ, 10 *et seq.*

²⁸³ E. D’Amore, *Il Decreto legislativo n. 116/1992 e il ruolo del Ministero della Sanità e dell’Istituto Superiore di Sanità*, (2001) Rapporti ISTISAN01/23 ISTITUTO SUPERIORE DI SANITÀ, 5 *et seq.*

²⁸⁴ See Iliara Baldelli, Alma Massaro, Susanna Penco, Anna Bassi, Sara Patuzzo, Rosagemma Ciliberti, *Conscientious Objection to Animal Experimentation in Italian Universities*, 7 (3) ANIMALS 24, (Mar. 2017).

²⁸⁵ See Pierre-Luc Germain, et al., *The European politics of animal experimentation: From Victorian Britain to Stop Vivisection*, 64 *Studies in History and Philosophy of Biological and Biomedical Sci.*, 75(2017); Andre Menache, *The European Citizens’ Stop Vivisection Initiative and the revision of Directive*, 44 (4) *Altern Lab. Anim.* 383 (2016).

definitively against vivisection. As the Eurobarometer survey suggests, most Italians (as most EU citizens) are against experiments performed on dogs and primates. Italians are, however, in favor of experiments on mice and consider research on animals necessary.²⁸⁶

However, the implementation of the Directive raised a fierce debate between the Italian scientific community and animal welfare groups (such as the “Lega Anti Vivisezione”—LAV),²⁸⁷ and within public opinion on the legitimacy of animal testing.²⁸⁸ As a consequence of the irreconcilable positions between opponents and supporters of research on animals, Italy was the only EU country that failed to satisfy the Directive within 2014, contravening its duty to enact the necessary measures within a specified timeframe. This delay led to the beginning of an infringement proceeding on January 23rd, 2014 by the European Commission, in compliance with Article 258 of the TFEU.²⁸⁹ The Parliament eventually enacted a restrictive law, in the wake of other restrictive laws and regulations in the field of bioethics (i.e. Law No. 40/2004, “Rules on Medically Assisted Procreation”). This law, according to some scientists, strongly curtails biomedical research in Italy. Oddly enough, animal welfare groups in Italy are in the company of the most intransigent religious groups belonging to the Catholic Church, which are against experiments on human embryos and stem cells.²⁹⁰ Law No. 96/2013—later reproduced by Legislative Decree No. 26 of March 4th, 2014—contains severe restrictions to certain kinds of research. Article 13 of Law No. 96 is the “apple of discord” because, according to some scientists, its content would limit in an excessive manner the freedom of scientific research.²⁹¹

²⁸⁶ Ipsos Public Affairs, *Le opinioni degli italiani sulla sperimentazione animale* (Jan. 2014), https://fisiologiaitaliana.org/_docs/sperimentazione/140123_opinioni_degli_italiani_intervento_14_01_2014.pdf (last visited July 28, 2019).

²⁸⁷ See G. Felicetti, M. Kuan, *Oltre il filo spinato di Green Hill: La vivisezione esiste ancora. Come e perché superarla* (Edizioni Sonda, 2016)(providing a detailed overview of the Italian legal framework governing experiments on animals).

²⁸⁸ See Pierre-Luc Germain, et al., *The European politics of animal experimentation: From Victorian Britain to Stop Vivisection* 64 *Studies in History and Philosophy of Biological and Biomedical Sci* 75, 78-80 (2017).

²⁸⁹ European Commission - Fact Sheet, February infringements package: key decisions, (Feb. 15, 2017) http://europa.eu/rapid/press-release_MEMO-17-234_EN.html.

²⁹⁰ See also Law N. 413/1993 as another relevant regulation that also applies to animal testing and recognizes the right of scientists and researchers to express their conscientious objection to animal experimentation. Of particular importance is Art. 3, Para 5, which obliges public and private structures that perform research on animals to inform all the employees and the students of their right to conscientious objection. Article 4 prohibits any form of discrimination against the objectors, stating that nobody can suffer adverse consequences due to their refusal to carry out or cooperate on experiments on animals.

²⁹¹ See generally, Carlo Petrini, From the Law of European Delegation to

Multiple paragraphs of Article 13 of the above-mentioned law contain severe restrictions to some kinds of research: the breeding or use of cats, dogs and non-human primates and specimens of species in danger of extinction for basic research is forbidden;²⁹² animals of any nature previously employed in procedures classified as of “moderate” severity, “mild” or “non-recovery” according to the definitions of Article 16 of Directive 2010/63/EU cannot be re-used;²⁹³ anesthesia or analgesic agents must be applied during any procedure in which the animal may experience some pain, except in cases where anesthesia or analgesia are the subject of the study;²⁹⁴ the use of genetically modified animals is limited.²⁹⁵

According to a document released by the Italian Committee for Bioethics, the restrictions provided by Law No. 96 could have a negative impact on biomedical research in Italy and constitute a clear violation of the Directive, which prohibits member States from introducing more restrictive rules.²⁹⁶ For instance, the ban on breeding dogs, cats, and NHPs would hinder research in the framework of European research overall. Additionally, it would inevitably dictate the importation of animals, with some discomfort for the animals themselves and additional costs for research. However, despite the alarms raised by the scientific community, the negative impact of the Italian regulation on animal testing was scarcely perceived in clinical practice. Hence, statistical data from 2017 show a slight decrease in the use of laboratory animals (575,352 in total, among which only 548 NHPs, namely Java Macaque, compared to 607,097 in 2016 and 581,935 in 2015). This decrease is, however, in line with the principle of Reduction envisaged by Directive 2010/63/EU.²⁹⁷

the Legislative Decree on Experiments with Animals: Consequences for Biomedical Research, 165 (5) *La Clinica Terapeutica* 373 (2015).

²⁹² *Id.* at Art. 13, lect. B and G.

²⁹³ *Id.* at Art. 13, lect. E.

²⁹⁴ *Id.* at Art. 13, lect. D.

²⁹⁵ *Id.* at Art. 13, lect. E, which states that “the generation of genetically modified animals, such as rodents, will need to take into account the “potential risks to human health, animal welfare and the environment.”

²⁹⁶ See Comitato Nazionale per la Bioetica, “Concerning bioethical issues raised by Article 13, Law No. 96 of August 6, 2013, “Criteria in view of a Governmental Decree for the fulfillment of Directive 2010/63/EU of the European Parliament and of the Council of September 22, 2010” (Jan. 24, 2014), http://www.governo.it/bioetica/pdf/Legge_6_agosto_2013_n.96_testo.pdf (“Response to the query submitted to the National Committee for Bioethics by Senator Prof. Elena Cattaneo”). The English version is available at <http://bioetica.governo.it/en/opinions/opinions-responses/concerning-bioethical-issues-raised-by-article-13-law-no-96-of-august-6-2013-criteria-in-view-of-a-governmental-decree-for-the-fulfillment-of-directive-201063eu-of-the-european-parliament-and-of-the-council-of-september-22-2010/>.

²⁹⁷ Comunicato 02 febbraio 2019, ‘Dati statistici relativi all’ utilizzo di animali

Nevertheless, this small reduction is not due to there being more stringent rules on animal testing. Rather, this decline happened due to an economic crisis in Italy,²⁹⁸ particularly within the research economy (it is worth remembering that the animal model is very expensive).²⁹⁹ It was this quandary and the consequent reduction in the financing to research, rather than the lack of development of alternative methodologies (which is a sector not yet sufficiently developed in Italy) or the existence of excessive bureaucratic practices that influenced animal testing numbers.³⁰⁰ Indeed, the race to obtain research funding for experiments on animals at an EU as well as at a domestic level became evermore challenging. This is made worse by the fact that EU policy clearly favours projects involving alternative methodologies, in line with the 3Rs.

VII. CONCLUDING REMARKS

Despite decades of legislative efforts and philosophical debate, animals in the EU are still subjected to increasingly invasive and harmful treatments, especially in factory farming and biomedical research areas. In this paper, the “New Welfarist” imprinting of EU policies towards animal welfare clearly emerged. According to this imprint, animals continue to be considered “goods” or “commodities” that can be therefore exploited, experimented on, slaughtered and killed for the benefit of human beings. The philosophical viewpoint of “New Welfarism” does not intend to challenge the legitimacy of the human exploitation of animals at least in the short term, but aims to obtain a minimum standard of protection for the animals and to avoid their unnecessary suffering, targeting abolitionism in the long term. Therefore, this Directive did not represent a shift away from the traditional property paradigm, according to which animals can be used for the benefit of human beings, although the abolitionist stance contained in the Preamble leaves the door open to a significant shift in the long term, in line with the New Welfarist strategy (“this Directive represents an important step towards achieving the final goal of full replacement of procedures on live animals for scientific and educational purposes as soon as it is scientifically possible to do so”).

a fini scientifici per l'anno 2017 (19A00632)’, (G.U. Serie Generale, n. 28 del 02 febbraio 2019), <http://www.trovanorme.salute.gov.it/norme/dettaglioAtto?id=67844>, (last visited Feb. 12, 2020).

²⁹⁸ See *Sperimentazione animale: ancora un calo in Italia*, ESSERE ANIMALI (Aug. 29, 2016), <https://www.essereanimali.org/2016/08/sperimentazione-animale-cal-numeri-in-italia>.

²⁹⁹ A. A. Bottini, T. Hartung, *Food for Thought ... on the Economics of Animal Testing*, (2009) 26 ALTEX, 1 et seq.

³⁰⁰ See *Research without Animals*, LAV, <https://www.lav.it/en/what-we-do/research-without-animals> (last visited May 10, 2020).

In a few words, and for the time being, EU institutions do not consider animals' best interest as a political priority. They do, however, still consider the amelioration of the Internal Market – damaged by different levels of animal protection in different Member States—as a goal of the EU. This is witnessed by the fact that animal welfare is not included amongst the EU's general goals listed in Article 3 TEU, such as the establishment of an internal market, human rights protection, promotion of sustainable development and environmental protection.

However, EU institutions are concerned with how to make the exploitation of animals economically efficient and at the same time ethically justifiable, in light of the drivers of change from the consumers' perspective. Indeed, EU citizens are more and more aware of animal issues and animal cruelty and, as a consequence, they orient their market choices based on animal welfare considerations. Therefore, a real wind of change in EU policy will be possible only as a result of a real change of perspective by EU citizens, which would definitively force EU institutions to orient their policies on animal welfare towards higher standards. In order to accelerate this change, the concept of vulnerability³⁰¹ could and should be extended from the realm of human rights to that of research animals.³⁰² Under the legal point of view, it would imply the recognition by EU institutions of the vulnerability of animals, which would entail additional safeguards.

As to the implementation of the Directive in Italy and in Germany, two different models have been described. Germany has opted for a legislation that is in favor of the advancement of scientific research (even if it involves additional exceptions to the principle of animal welfare), therefore implementing the Directive in a less restrictive way. Italy has instead opted for a stricter legislation, more attentive to animal protection, which in some cases—such as in the case of the ban on xenotransplantation—goes even further than the Directive. In sum, it is generally accepted that the Directive reached its goal of harmonizing the legislations of EU Member States at the highest level, impeding single Member States from promoting stricter laws aimed at protecting

³⁰¹ See generally, Bryan S. Turner, *Vulnerability and Human Rights* (Penn. State University Press 2006). The main goal of human rights treaties is to protect those vulnerable to violations of their fundamental human rights. There are some groups that, for several reasons, are considered particularly weak and vulnerable or have traditionally been victims of violence, and are therefore afforded special protection. Human rights treaties consider vulnerable persons or vulnerable groups: women, children and elderly persons, disabled persons, minorities, migrant workers, internally displaced people, indigenous people, lesbian, gay and transgender people.

³⁰² See Jane Johnson, *Vulnerable subjects? The case of nonhuman animals in experimentation*, 10 (4) *J. Bioeth. Inq.*, 497-504 (2013).

animals during experiments, with the only exception of Italy.³⁰³ The case of Italy is particularly relevant, since one of the major novelties of Directive 2010/63/EU was that it prohibited Member States from establishing stricter measures.

Through this Directive, the EU has set one of the highest levels of animal protection in the field of research (Switzerland has even higher standards) and is strongly committed to the development and promotion of alternative methodologies. The compromise between different stakeholders involved accepting animal testing only if suffering is minimized in all experiments, euthanasia as an endpoint of the procedure is avoided as far as possible, and benefits for human and animal health cannot be gained through alternative methodologies.

Statistical data provided by EU Member States in compliance with Article 54, Para. 2, of the Directive, do not show, however, a significant descending trajectory in the use of laboratory animals.³⁰⁴ Therefore, the Directive has not yet fully reached its goal of fostering the 3R's principles in lab practice (at least reducing significantly the number of animals used in research), and in increasing awareness, including the promotion of a culture of care amongst scientists and the recognition that good animal welfare is a synonym for good science.³⁰⁵

³⁰³ See Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions in accordance with Article 58 of Directive 2010/63/EU on the protection of animals used for scientific purposes, COM (2017) 631 final, (November 8, 2017). Section 2 of the Report, in particular, highlights some issues still hindering the promotion of alternatives, such as “lack of knowledge; insufficient communication/spreading of information; acceptability, and cost.”

³⁰⁴ The 2019 report on the statistics on the use of animals for scientific purposes in the EU in 2015-2017 showed, indeed, only a slight decrease in the total number of animals used in research (9,590,379 in 2015, 9,817,946 in 2016, 9,388,162 in 2017). Furthermore, the use of NHPs is increasing, and some of them continue to be imported from Africa and Asia; *see also*, Home Office, Annual Statistics of Scientific Procedures on Living Animals Great Britain, 2016, HC 231, (UK). In the United Kingdom, for instance, the National Report of 13 July 2017 accounts for 3.94 million procedures completed (51% were experimental procedures and 49% related to the creation or breeding of genetically altered animals not used in further procedures); France, on the contrary, statistics show a steady increase in the use of animals in procedures classified as ‘severe’ and, in particular of NHPs; <https://www.recherche-animale.org/en/animal-research-statistics-france> (last visited June 22, 2020).

³⁰⁵ See European Medicines Agency, Reflection paper providing an overview of the current regulatory testing requirements for medicinal products for human use and opportunities for implementation of the 3Rs, October, 18 2018 EMA/CHMP/CVMP/3Rs/742466/2015 Committee for Medicinal Products for Human Use (CHMP). A Reflection Paper by the European Medicines Agency (EMA) of 18 October 2018 has highlighted that a growing number of opportunities for limiting animal testing are now available to scientists and researchers.

BOOK REVIEW

**WHEN ANIMALS SPEAK:
TOWARD AN INTERSPECIES DEMOCRACY**

GREGORY F. TAGUE, PH.D.

By EVA MEIJER, 2019. NY: NEW YORK UNIVERSITY PRESS. U.S. \$35.00.

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Political philosopher Eva Meijer's *When Animals Speak* is a rich and fascinating exploration of human-animal communication, blending theoretical political ideas and scientific empirical studies. This stimulating book is erudite and yet lucid, and I recommend it to animal rights advocates, bioethicists, and social scientists. In her examination of the convergence of human and animal realms, Meijer ably covers a range of species, from insects, to birds, to primates. This engaging book is essential reading for anyone interested in animal studies and the spaces shared by humans and animals. The book is mainly a non-anthropocentric study of—and argument for language in order to create, as her subtitle says, an interspecies democracy.

Meijer raises the provocative question of a social democracy for the cooperation of humans and nonhuman animals. Do animals voice how they want to relate to humans, if at all? Contrary to some widely held views from classical political philosophy (e.g., Aristotle), humans alone are not rational nor are they political, as evidenced in primatologist Frans de Waal's famous book *Chimpanzee Politics* (1982). Indeed, as Meijer asserts and demonstrates beyond a shadow of a doubt, animals are emotionally and thoughtfully expressive. It's not really about how humans must speak for animals, since nonhuman beings have been communicating among themselves, between species, and with humans for millennia. In fact, Meijer points out how some animals, from bees and birds to dolphins and squid, "speak" to each other and even to humans employing grammatical structures. The question of what makes language should not fit a human-only paradigm.

Please note that, like Meijer, I often see the word "animal" used in a pejorative way to distance humans from other species, and this should not be the case; though, for the sake of simplicity, the word *animal* will be used in my review. These concerns touch on a number of crucial subjects in animal studies: the language and government of

other species; human acknowledgement of species diversity; human acceptance of “languaged” others; human recognition of the political voices of other species; and especially, the import of Meijer’s book, the reconstruction of human-animal spaces.

Some ancient thinkers, like Porphyry circa 270 B.C., says Meijer, could see how communication skills and levels of rationality vary among humans and appear on a scale with animals. Then in 1595 Montaigne, notes Meijer, recognized interspecies communication. Meijer goes on to say how these two authors discuss human and animal relations, not a commonly held viewpoint in Western cultures (with the exception of household pets). Highly influential thinkers like Descartes and Heidegger, says Meijer, offered little hope for systems of true human-animal discourse.

Descartes viewed animals as “bêtes-machines” of impulsive needs and desires who did not think. This is different from Montaigne who saw animal language and interspecies communication or, more precisely, miscommunication between humans and animals. Meijer explains how Descartes is looking for some absolute truth with the thinking human “I” (cogito ergo sum) at the center. For Descartes, truth comes via reason, what many misconceive as a human-only capacity. We now know that many animals, from corvids to apes “think,” evident in their tool use. Montaigne, on the other hand, is somewhat phenomenological in his discussion of animal “language” with reference to bodily experience. Meijer says that some of Descartes’ thinking persists to this day, evidenced in the continuation of animal experimentation in spite of laws to protect them. Descartes, after all, was a vivisectionist. Meijer notes how many researchers today also see animals operating only on instinct in order to rationalize the abuse of them. She asks why, then, humans denigrate the importance of “spontaneous behavior” (21) since it has served animals so well. Besides, humans act on instinct, too, in defense of kin and home base or in sexual jealousy. We now know how there is, on the contrary, a biology to morality in humans and animals, as enunciated by, for example, biologists Robert Trivers (“The Evolution of Reciprocal Altruism,” 1971) and Richard Alexander (*The Biology of Moral Systems*, 1987). Moving forward, the ethical approach, Meijer seems to suggest, should gravitate away from centering the human alone to embracing animal domains among humans.

For Heidegger, animals are incapable of forming a world like that constructed by humans; animals don’t experience Dasein, or being in the world; theirs is an enclosed environment according to him. Of course this is untrue, depending on how one defines the terms, when we consider mutualism and interspecies cooperation. Heidegger, Meijer notes, sees an “abyss” separating humans and animals. This flies in the face of work by many interspecies communicators from Koko the gorilla

(working with psychologist Francine Patterson) to dolphins (working with psychologist Diana Reiss). Inter-disciplinarian Laurent Dubreuil and primatologist and psychologist Sue Savage-Rumbaugh, in their book *Dialogues on the Human Ape* (2018), explain their conversations with bonobo “persons” (like Kanzi) who articulate how they think humans unfairly perceive them. Heidgger does not believe animals die; they only perish. This, too, is against the work done by, for example, Barbara J. King (*How Animals Grieve*, 2013) on animal sorrow. Meijer is quick to note how these influential philosophers ignore differences between human and animals in looking for unfair similarities. Reading Darwin one learns that there are differences in degree, not kind; but Darwin’s point (in *Origin of Species*, 1859) is that there are species differences that have evolved over time. Meijer says that animal rights activists push human-animal similarities too far without emphasizing differences.

Meijer then navigates from Jeremy Bentham to utilitarian philosopher Peter Singer (*Animal Liberation*, 1975), culminating in Jacques Derrida (*The Animal That Therefore I Am*, 2008), where the focus shifts not just on the suffering of animals but on their responses. Derrida points out how with issues of feeling and pain, logos questions are irrelevant. This is a reference to how Kantian thinking, seen for example in Christine Korsgaard (*Fellow Creatures*, 2018), has dominated questions of any moral response to animals. For Derrida, the notion of human is infused with power which becomes part of the discourse that significantly borders off “animals” from humans. Rather, Derrida would want to eradicate the human/animal dichotomy to embrace pluralities, though Meijer admits he sees language as a human quality saying how, without language, there is silence. Of course there is no silence. There are eye movements; bodily gestures; shifts in positions whether nearby or across spaces; multiple expressions. Like many animals, we have faces for an adaptive reason—communication. Meijer notes how even silent staring by an animal (or even a human) is a response.

So, this ignorance about denying “speech” to animals is an assertion of human political dominance over them. Part of the problem, Meijer says, is that humans don’t really communicate with animals on their level, except for some researchers. People don’t understand that animal gestures, vocalizations, and behaviors have meaning and intention. These are all part of their evolutionary adaptations. She notes, rightly, how humans need to reconsider, fundamentally, what constitutes “language” if, in a changing climate, we are hoping to inhabit shared spaces with nonhuman beings.

A non-anthropocentric perspective on language comes, notes Meijer, via Ludwig Wittgenstein and his idea of “language games.” With its gestures, language is embodied and like a tool. Language is social

in nature and open, not easily defined. According to Wittgenstein, says Meijer, we need to observe different languages as games of interactive exchanges of meaning between same and other species. She considers, for instance, the problems in trying to teach young Nim Chimpsky (a chimpanzee, 1973-2000, named from Noam Chomsky's idea of a universal human grammar). Here the disaster was in assuming an ape needs grammar and syntax to communicate, to say nothing of how Nim was used as an object of study, left alone, and subjected to intrusive behavior-response experiments with a very sad outcome for the young ape. These types of tests, with the focus on human language, tell us nothing about a species' language, Meijer correctly asserts.

To further provide some empirical foundation for her argument and claims, Meijer discusses the explosive interspecies communication studies of people like psychologist Irene Pepperberg (*The Alex Studies*, 1999) and biologist Joanna Burger (*The Parrot Who Owns Me*, 2001) and their work with parrots Alex and Tiko. Here, the humans and the parrots mutually created meaning on a regular basis. Meijer also spends a good amount of time showing how mimicry (through mirror neurons in primates and birds) permits one species by imitation to communicate with, connect, and attach to a human. For the parrots talking with the humans, this is evident in head nods and feet gestures. Importantly, imitation is related to empathy and the understanding of another's intentions. This leads Meijer into a discussion of the complex grammar of prairie dogs, how some insects communicate by using pheromones, squid conversations with skin pigments, and the communicative sophistication of many other species, from Mexican free-tailed bats, whales, and dolphins. Advances in technology are allowing humans to hear bats and map thousands of variations of lizard foot postures and bodily positions, which reptiles use as language. In play or greeting behaviors, animals exhibit meta-cognitive multilevel communication where intentions change in accordance with minute bodily movements. All of this real "language," says Meijer, stems for Wittgenstein's notion of language games.

The amount of convincing detail Meijer skillfully organizes in the book is more than I can cover in this review. For instance, there is a very good discussion of biologist Gwendolen ("Len") Howard who opened her house to wild birds. Meijer, in fact, as a multi-disciplinarian, wrote a novel about Howard's practices (as *Bird Cottage*, 2016). Over time, Howard was able to communicate with the birds through taps, head movements, and vocalizations. As Meijer perceptively notes, and central to her argument for an interspecies democracy, this was a naturally evolved circumstance of shared space where situation and agency made language through embodiment in the world. Meaning is in the communication itself, and not necessarily in the thinking process. As

Meijer would suggest, bodies speak, perhaps following the embodied cognition of philosopher Shaun Gallagher (*How the Body Shapes the Mind*, 2005) or the eco-psychology of Louise Barrett (*Beyond the Brain*, 2011). There's also a generous discussion of primatologist Barbara Smuts (*Sex and Friendship Among Baboons*, 1985) who lived with these monkeys for two years, sometimes alone, and her ability to communicate with the primates on communal turf. There are also two very lucid case studies in the book, one on Olli, the Romanian feral dog Meijer adopted, and the geese of the Schiphol airport, Netherlands, who were initially welcomed but then disinvited once human development and expansion caused conflicts about the shared use of land and air space.

These cases show the deliberative and political actions of other species among humans. Frankly, I found the case studies invigorating for an academic monograph; they bring to life her points about language games and interspecies voice and free interactions. This leads Meijer to a discussion of consequentialist Singer and deontologist Tom Regan (*The Case for Animal Rights*, 1983). While these philosophers are watershed thinkers, the one for moral consideration, the other for animal rights, their emphasis is on animals as subjects of consideration by humans and not as moral agents themselves. Throughout her book, Meijer drives home the point about animal agency—they are actively involved in expressing what they desire or need. As Meijer points out, power relations need to shift in the animal rights debates to accommodate and accept animal free agency for their own welfare. It is not enough for humans to state a “negative” right (i.e., for an animal not to be killed); rather, there needs to be a philosophically political resolution that affords all animals those rights on par with humans, a type of universal citizenship. This revolutionary change in outlook that Meijer seeks could involve, from a practical standpoint, how human-animal communities are constructed, enabling a variety of animals and people to interact during the course of a normal day.

In other words, greater structures have to be addressed and changed. That is, it might not be enough for any Joe or Jane to make an individual choice and become vegan in the shade of the immense meat industrial complex, unless the vegans are multiplied exponentially. Meijer notes how some animal rights philosophers say that the question is not one of individual ethics, since the vast majority of people willfully ignore the killing of animals to satisfy desire or taste. It's political. This is because the violence heaped on animals stems from humanly-constructed economic needs and demands. Therefore, what is required is the call for a bio-political perspective since we're dealing with industry and governmental administrations that have institutionalized the practice of creating, genetically altering, raising, and then slaughtering animals on a huge scale. As it is, animals with whom we share space (mostly

domestic breeds) negotiate their needs and desires, exhibiting, Meijer says, political agency. This is quite evident in how zoo animals resist oppression by trying to escape or by throwing items at humans. Animals in a small research cage can only resist, she poignantly says, by turning away or by not moving at all. The main point Meijer justifiably drives home repeatedly is that political agency is not limited to humans.

Meijer often relies on the work of philosopher Sue Donaldson and political philosopher Will Kymlicka (*Zoopolis*, 2013) who call for, against rationalized citizen arguments (e.g., moral philosopher John Rawls), normative behavior between species. We see this not only in many examples throughout the book, but especially in her case study of Olli. This type of citizenship would ensure protection of nonhuman animals and access to healthcare, for instance. As it is now, many animals, she correctly says, are “slaves” (137), like cows and chickens producing human-consumable products and whose own bodies will eventually be slaughtered for consumption. Meijer sees democratically inclusive human-animal relations because of the interspecies abilities of communication. Moreover, there are wild animals who should be granted sovereignty over their own lands. For this, she cites the case of fallow deer in nature reserves near the Netherlands. Animal rights to be considered could include: labor rights for working animals; habitat rights; rights for animals as cities plan expansion.

Meijer sees this approach preferable over personhood arguments. Why? In spite (or perhaps because) of animal resistance and civil disobedience, she foresees animal-human interactive communities. Her point is that the notion of political citizenship in a democracy can be challenged, even by animals. There is truth to her claim since nonhuman animals indeed contribute to our communities as, for example, police or guide dogs, elder or nursing companion animals. She says that speaking for, rescuing, or even liberating animals is still somewhat anthropocentric. If humans always speak for animals then their needs and desires are presupposed since they are filtered through human concerns.

Regarding political participation, why should humans create laws for animals without their input? Meijer seems to ask this question especially for animals who participate in or share human communities (e.g., dogs in Moscow who ride trains to and from markets). She resuscitates (via Sue Donaldson) the idea of a Commons so that social animals, perhaps working with humans, can meet others publicly on their own terms, first domestic and then wild animals. Meijer cites the example of Dutch farmers who use an outdoor milking machine that is adjusted time and again to the changing needs of the cows in order to negate “power hierarchies” and to promote justice between humans and animals for the “public good” (220-221). Animal preferences about

food and working conditions can similarly be mapped, since they've been communicating with us for ages, in order, she concludes, to create a mutually beneficial interspecies political dialogue.

In all, I believe Meijer's book makes a valuable contribution in shifting our attention away from the abstraction of what humans perceive as animal rights to animal-human political discourse in an over-crowded and climate-changing world.

—Gregory F. Tague, Ph.D.

Professor of English/Interdisciplinary Studies, St. Francis College, N.Y.

