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## PEER REVIEW COMMITTEE

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**Steven M. Wise** is President of the Center for the Expansion of Fundamental Rights, Inc. 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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**TO PROTECT ANIMALS, FIRST WE MUST PROTECT LAW ENFORCEMENT OFFICERS**

DAWN RAULT, STACY NOWICKI, CINDY ADAMS, MELANIE ROCK<sup>1\*</sup>

**I. INTRODUCTION**

On August 30, 2014, a Calgary Police Service Detective, two Calgary Humane Society Level One Community Peace Officers, and a

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**Acknowledgements:**

*This article is dedicated to Officer Rodney Lazenby, may you rest in peace. We sincerely thank the interview participants for their valuable insights, and the editors for their guidance. This research was made possible by funding from the Canadian Institutes of Health Research [CIHR-MOP-130569; UCalgary/CHREB13-1101]. During the research process, Dawn Rault held an Indigenous Graduate Award from the Province of Alberta and the Captain Nichola K.S. Goddard Memorial Graduate Scholarship from the University of Calgary. Our analysis benefited from presentations at conferences convened by the Alberta Association of Community Peace Officers and by the Alberta Municipal Enforcement Association.*

forensic veterinarian acted on a tip from a concerned citizen to attend a private residence in Calgary, Alberta, Canada.<sup>2</sup> The residence belonged to Anthony and Christine Berry, a then-married couple who were known in the community to breed and show rabbits.<sup>3</sup>

When the Calgary Police and humane society officers entered the residence, they discovered shocking and deplorable conditions that immediately suggested animal hoarding.<sup>4</sup> First, the officers described the overwhelming smell of ammonia and feces from within the home.<sup>5</sup> These initial olfactory cues often alert officers to the severity of a hoarding situation.<sup>6</sup> When the team walked up the stairs to the living room, they observed twenty-six rabbits in cages that contained two to three inches of compacted feces.<sup>7</sup> Moving further into the home down the hallway, the team noted a back room that contained cages of mice and hamsters in very poor and unsanitary conditions.<sup>8</sup> As they walked down the stairs to the basement of the residence, the situation worsened.<sup>9</sup> The officers stepped onto a basement floor covered in two to three feet of hardened feces, almost eliminating the need for the final stair.<sup>10</sup> The basement ceiling was covered in a sheet of spider webs, and the poor air quality caused the team to experience breathing difficulties.<sup>11</sup> Scanning the basement, the officers observed over thirty rabbits in medical distress, some of which appeared to be missing limbs and eyes.<sup>12</sup> By then, the officers realized they were dealing with a significant animal seizure situation and subsequent investigation under both the Animal Protection Act of Alberta and the Criminal Code of Canada.<sup>13</sup>

During the course of the investigation in his home, Anthony Berry became visibly agitated and aggressive with the officers.<sup>14</sup> First, he verbally objected to the removal of the animals, stating that “[t]here [we] re going to be dead bodies,” prompting the detective to draw her service firearm.<sup>15</sup> Berry further stated that “[n]o one was taking the rabbits, no one was leaving... you’ll have to kill me first.”<sup>16</sup> One of the officers

attempted to verbally de-escalate the situation, but Berry surprised the team by producing an eight-inch rusty kitchen knife.<sup>17</sup> When instructed to drop the knife, Berry begged the detective to shoot him.<sup>18</sup> Anthony Berry then stabbed the kitchen knife into a wall, grabbed an empty bottle, smashed it over his head, and stabbed himself in the neck.<sup>19</sup>

Anthony and Christine Berry were charged under the Animal Protection Act of Alberta and the Criminal Code of Canada for the unnecessary pain and suffering of the animals.<sup>20</sup> Crown Prosecutor Gordon Haight and Defense Paul Brunnen made a joint sentencing recommendation for Anthony and Christine Berry that reflected their marital and financial situation and the results of a forensic assessment conducted with Anthony Berry.<sup>21</sup> The assessment concluded that his mental health issues did not contribute to the commission of the hoarding offense. The Crown recommended that each offender receive a \$6,000 fine, given the aggravating factors of the offense, but it should be noted that this was reduced from \$10,000, due to Christine Berry’s unemployed status, the Berry’s pending divorce, and the foreclosure of their home.<sup>22</sup> Attorneys for both the Crown and the Berry’s recommended a 15% victim surcharge be added to each fine. In addition to the monetary fine, each offender has a lifetime ban on pet ownership, with the exception of either one cat or one dog that must be altered and receive veterinary care at least once per year.<sup>23</sup> In addition, each offender must allow peace officers to inspect his or her residence to confirm the animals are being cared for.<sup>24</sup>

The Berry’s defense lawyer further suggested that Anthony Berry would benefit from regular counseling to address his mental health issues.<sup>25</sup> The counseling is delivered through a one-year probation

<sup>2</sup> Slade, *Psychiatric Tests*, supra note 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Tora Holmberg, *Sensuous Governance: Assessing Urban Animal Hoarding*, 31 HOUS., THEORY & SOC’Y 464, 476 (2014).

<sup>7</sup> Slade, *Psychiatric Tests*, supra note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see Animal Protection Act, R.S.A. 2000, c A-41; *Criminal Code*, R.S.C. 1985, c C-46.

<sup>14</sup> Slade, *Psychiatric Tests*, supra note 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> David Boushy, *Man accused of neglecting animals admits to assault*, GLOBAL NEWS (Oct. 2, 2014), <https://globalnews.ca/news/1595458/man-accused-of-neglecting-animals-admits-to-assault/>.

<sup>20</sup> See generally *Criminal Code*, R.S.C. 1985, c C-46, s. 445.1.

<sup>21</sup> Kevin Martin, *Couple fined \$12,000 for failure to care for 91 pets in filthy home*, CALGARY HERALD (Nov. 3, 2016), <http://calgaryherald.com/news/local-news/couple-fined-12000-for-failure-to-care-for-91-pets-in-filthy-home>.

<sup>22</sup> See generally Pat O’Malley, *Theorizing Fines*, 11 PUNISHMENT & SOC’Y 67, 76 (2009) (discussing why monetary fines are socially acceptable for certain crimes, but not others).

<sup>23</sup> Meghan Grant, *Couple whose 91 animals seized from feces-caked home fined \$12K*, CBC NEWS (Nov. 3, 2016), <http://www.cbc.ca/news/canada/calgary/anthony-christine-berry-animal-seizure-rabbit-feces-sentence-1.3834686>.

<sup>24</sup> *Id.*

<sup>25</sup> Erika Tucker, *Calgary ‘rabbit enthusiasts’ sentenced after 92 animals seized from home in 2014*, GLOBAL NEWS (Nov. 3, 2016), <https://globalnews.ca/news/3044746/calgary-rabbit-enthusiasts-sentenced-after-92-animals-seized-from-home-in-2014/>.

order.<sup>26</sup> Both offenders took responsibility and apologized for their actions, and the judge accepted the joint sentencing submission.<sup>27</sup>

Although the Berry incident can be described as a “close call” in terms of officer safety, on August 10, 2012—two years before the Berry case—Community Peace Officer Rodney Lazenby was killed in the line of duty.<sup>28</sup> Lazenby was appointed as a Level Two Community Peace Officer and was hired to enforce the Dog Control Bylaw and the Community Standards Bylaw.<sup>29</sup> In the province of Alberta, Level Two Community Peace Officers fulfill a range of roles that are generally described as “administrative in nature or have a narrow focus.”<sup>30</sup> Animal control specialists fall under this definition.<sup>31</sup> Officers have no uniform requirements, training is provided at the discretion of the employer,<sup>32</sup> and officers are only permitted to carry a baton after successfully completing the application process.<sup>33</sup>

Officer Lazenby was investigating a complaint under the “Dog Control Bylaw” in a small town just south of Calgary, Alberta, Canada.<sup>34</sup> For almost one year, Lazenby had been in contact with the accused, Trevor Kloschinsky, the renter of the property, regarding the number of dogs on his property, complaints made by neighbors about barking, and reports of an aggressive dog.<sup>35</sup> Under the Municipal District of Foothills Dog Control Bylaw, owners are not permitted to keep more than three adult dogs on a property unless they possess a dog kennel permit issued under the bylaw.<sup>36</sup> Kloschinsky was running an informal dog breeding business and had over thirty Australian Cattle type-dogs on his property at the time of the offense, many of which were poorly cared for and required veterinary care upon seizure.<sup>37</sup> A stop-order had been issued on May 4, 2012, requiring Kloschinsky to remove all dogs from the

property.<sup>38</sup> He did not comply with that order.<sup>39</sup>

Officer Lazenby had been attending Kloschinsky’s property on a regular basis during the ongoing investigation.<sup>40</sup> Kloschinsky’s landlord described Kloschinsky as “kind of a loose cannon” who did not like having anyone on the property.<sup>41</sup> To make matters worse, Kloschinsky had been evicted from the home on the property, and was temporarily residing in a quonset with his dogs on the rural property.<sup>42</sup> This was not the first time Kloschinsky had been evicted.<sup>43</sup> In 2009, he was evicted from a nearby property after neighbors also complained about barking.<sup>44</sup>

During this period, Kloschinsky was in contact with the local Royal Canadian Mounted Police (RCMP) detachment thirteen times complaining of things like breaking and entering, after five of his dogs were reportedly released from their kennels.<sup>45</sup> Kloschinsky came to believe that Officer Lazenby was stealing his dogs.<sup>46</sup> Kloschinsky had a fixed belief that police officers were corrupt and worked within a corrupt system—a belief he still holds today.<sup>47</sup>

In retaliation, Kloschinsky stole handcuffs from a local adults-only store and hid out on his property for three days prior to ambushing Officer Lazenby in an unprovoked attack.<sup>48</sup> Kloschinsky then loaded Lazenby’s body into his own work vehicle and drove to a Calgary Police District Office.<sup>49</sup> Upon arriving at the District Office on August 10, 2012 at approximately 10:30 a.m., he announced that he “got [the] guy who was trying to steal his dogs, but... caught him and brought him (to the CPS police station).”<sup>50</sup> First responders failed in their efforts to resuscitate Lazenby, who had suffered fifty-six injuries.<sup>51</sup> The principal

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Graveland, *Stealing Dogs*, *supra* note 1.

<sup>29</sup> Investigation Report, Peace Officer Fatality Report, Gov’t of Alta., 7 (Aug. 10, 2012) [hereinafter Peace Officer Fatality Report].

<sup>30</sup> Public Security Peace Officer Program Policy & Procedures Manual, Province of Alta., 14 (2007) [hereinafter Policy & Procedures Manual].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 14-15.

<sup>33</sup> *Id.* at 58-59.

<sup>34</sup> Graveland, *Stealing Dogs*, *supra* note 1.

<sup>35</sup> Royal Canadian Mounted Police File: 2012-1015998, Form 1 (Section 487 Criminal Code) Information to Obtain a Search Warrant, S.D. Wan 9, 11, 12 (2012) [hereinafter RCMP File], <http://www.cbc.ca/news/canada/calgary/alberta-peace-officer-killed-in-ambush-documents-say-1.1306320>.

<sup>36</sup> M.D. of Foothills No. 31, *supra* note 1.

<sup>37</sup> *Dogs seized from accused murderer Trevor Kloschinsky’s Priddis ranch*, CTV NEWS CALGARY (Aug. 28, 2012), <https://calgary.ctvnews.ca/dogs-seized-from-accused-murderer-trevor-kloschinsky-s-priddis-ranch-1.933805>.

<sup>38</sup> RCMP File, *supra* note 37, at 14; Peace Officer Fatality Report, *supra* note 31.

<sup>39</sup> Peace Officer Fatality Report, *supra* note 31.

<sup>40</sup> *Id.* at 11.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Trevor Kloschinsky arrested in death of former mountie Rod Lazenby*, CTV NEWS CALGARY (AUG. 11, 2012), [HTTPS://CALGARY.CTVNEWS.CA/TREVOR-KLOSCHINSKY-ARRESTED-IN-DEATH-OF-FORMER-MOUNTIE-ROD-LAZENBY-1.910817](https://calgary.ctvnews.ca/trevor-kloschinsky-arrested-in-death-of-former-mountie-rod-lazenby-1.910817).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> The Alberta Review Board reviews dispositions concerning any accused person for whom a verdict of “not criminally responsible because of mental disorder” is rendered. Rault attended the hearing and received the Alberta Review Board Disposition report for Trevor Jay Kloschinsky (2017).

<sup>48</sup> RCMP FILE, *supra* note 37, at 13.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> Daryl Slade, *Kloschinsky found not criminally responsible for death of peace officer Rod Lazenby*, CALGARY HERALD (Dec. 11, 2014) [hereinafter Slade, Not Criminally Responsible], <http://calgaryherald.com/news/crime/kloschinsky-found-not-criminally-responsible-for-death-of-foothills-peace-officer>.

cause of death was determined to be strangulation.<sup>52</sup> The death of Peace Officer Lazenby shook the law enforcement community in Alberta and beyond.

Lazenby was not a new, inexperienced, or unskilled peace officer. Prior to joining the Municipal District of Foothills enforcement team, he had retired from thirty-five years of service with the RCMP, Canada's federal policing agency.<sup>53</sup> During his time with the RCMP, Lazenby worked on a number of high profile cases, including extensive undercover work.<sup>54</sup> He chose employment during his retirement with the Municipal District of Foothills because of family ties in the area.<sup>55</sup>

Trevor Kloschinsky was charged with first degree murder under Section 235 of the Criminal Code of Canada,<sup>56</sup> but was found not criminally responsible on account of his mental health disorder.<sup>57</sup> Kloschinsky's forensic psychiatrist, Dr. Sergio Santana, explained that Kloschinsky "displayed a delusional system that he was being persecuted by a number of agencies and it had been going on for some time...he developed the idea that this victim planned to destroy him financially...that Lazenby was a corrupt police officer."<sup>58</sup> Kloschinsky currently resides at a secure forensic psychiatric center and is in partial remission.<sup>59</sup> He receives some programming and therapy in the community on unsupervised passes, with the ultimate goal of securing meaningful employment.<sup>60</sup>

The Berry and Kloschinsky cases demonstrate the inherent risks to officers enforcing animal laws in Canada. This article explains the dangers to officers and provides solutions to keep officers safer upon responding to animal-related calls. Part II develops an overview of Canadian animal laws and enforcement, detailing federal, provincial, and municipal responsibilities. Part III explains the problem of officer safety, specifically a lack of equipment and information in animal enforcement cases, and analyzes occupational health and safety laws in Canada. Part IV offers solutions for officers responding to animal calls and addresses training, equipment, and information sharing.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Bill Graveland, *Trevor Kloschinsky 'actively psychotic' during slaying of peace officer, says psychiatrist*, THE CAN. PRESS (Dec. 9, 2014) [hereinafter Graveland, *Actively Psychotic*], <http://www.cbc.ca/news/canada/calgary/trevor-kloschinsky-actively-psychotic-during-slaying-of-peace-officer-says-psychiatrist-1.2866640>.

<sup>55</sup> *Id.*

<sup>56</sup> *Criminal Code*, R.S.C. 1985, c C-46, s. 235.

<sup>57</sup> Slade, *Not Criminally Responsible*, supra note 53.

<sup>58</sup> Meghan Grant, *Not criminally responsible: Mathew de Grood and 7 other NCR cases*, CBC NEWS (May 25, 2016), <http://www.cbc.ca/news/canada/calgary/ncr-matthew-degrood-brentwood-stabbing-1.3599964>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

## II. OVERVIEW OF CANADIAN ANIMAL LAWS AND ENFORCEMENT

In Canada, federal and provincial legislation protect animals from cruelty and abuse. Municipal bylaws help protect people from being harmed or threatened by animals.<sup>61</sup> Although the division of power and responsibilities pertaining to domestic animals in Canada can be somewhat complex, this section aims to clarify the legal and geographical jurisdiction, and relevant enforcement authorities, pertaining to the two cases discussed in this paper. Further, this distinction in law is also important for officer safety. Given the hierarchical nature of law enforcement, officers who enforce municipal bylaws or provincial statutes have limited access to training, equipment, and information sharing compared to police officers who enforce the Criminal Code. Although one case may involve charges under various statutes, it is not uncommon for a bylaw or peace officer to investigate first, then consult with a police officer regarding the possibility to charge under the Criminal Code.<sup>62</sup>

### *a. Federal Laws and Enforcement*

#### i. Federal Anti-Cruelty Laws

Generally, the Criminal Code of Canada (CCC, also referred to as "the Code") aims to promote a peaceful and safe society and reflects the social values and morals that "sets down the minimum standard of permissible behavior in respect of animals through a series of criminal offen[s]es."<sup>63</sup> In Canada, the federal government has exclusive jurisdiction and power to enact criminal law pertaining to animals.<sup>64</sup> Criminal laws are codified in the Code, which is enforced uniformly across all provinces and territories.<sup>65</sup> Animal cruelty falls within Part Six of the Code in Sections 444-447.1, which addresses property offenses; however, bestiality (Section 160) and uttering threats (Section 264) fall outside these sections.<sup>66</sup>

<sup>61</sup> See generally Kathryn M. Campbell, *The Paradox of Animal Hoarding and the Limits of Canadian Criminal Law*, 9 J. ANIMAL & NAT. RESOURCE L. 45 (2013); see generally LESLI BISGOULD, *ANIMALS AND THE LAW* (2011); see generally Prosecuting Crimes against Animals, CAN. FED'N OF HUMANE SOC'YS [hereinafter CFHS MANUAL], [http://www.ncpac.ca/companion\\_manual](http://www.ncpac.ca/companion_manual).

<sup>62</sup> See generally *Criminal Code*, R.S.C. 1985, c C-46.

<sup>63</sup> Joanne Klineberg, *Cruelty to Animals and the Criminal Code of Canada*, AN INTRODUCTION TO ANIMALS AND THE LAW (Oct. 2007).

<sup>64</sup> CFHS MANUAL, supra note 63.

<sup>65</sup> See generally *id.*

<sup>66</sup> *Criminal Code*, R.S.C. 1985, c C-46, s. 444-447.1.

Criminal laws specific to animals were first enacted in 1892, but have not been substantially amended since their enactment, with the exception of sentencing increases<sup>67</sup> and the introduction of Quanto's law (Section 445), which pertains to killing or injuring a law enforcement or assistance animal.<sup>68</sup> Quanto's law received Royal Assent and came into force in 2015.<sup>69</sup>

## ii. Federal Enforcement Authorities

In Canada, only certain agencies are appointed to enforce the federal Criminal Code, and this varies by province.<sup>70</sup> For example, municipal police officers, RCMP, some Society for the Prevention of Cruelty to Animals (SPCA) Peace Officers (in British Columbia, Ontario, Nova Scotia and Quebec), Newfoundland Constabulary, Ontario Provincial Police, the Department of Agriculture and Forestry in Prince Edward Island, and the Quebec Provincial Police are all appointed to enforce the Criminal Code.<sup>71</sup> If an officer observes a Criminal Code offense, but is not appointed to enforce the Code, he or she must request assistance from another law enforcement agency to lay charges.<sup>72</sup>

There are some parallels between the enforcement of animal laws in Canada and the United States.<sup>73</sup> In the United States, both police officers and specialized humane law enforcement officers can enforce laws relating to the humane treatment of animals, but county or municipal laws, such as animal control initiatives, are enforced by local animal care and control officers.<sup>74</sup> Although there is great variability in animal laws across U.S. jurisdictions, the enforcement structure is generally similar.

<sup>67</sup> See Antonio R. Verbora, *The Political Landscape Surrounding Anti-Cruelty Legislation in Canada*, 23 *SOC'Y & ANIMALS* 45 (2015); see BISGOULD, *supra* note 63.

<sup>68</sup> Quanto was a police dog killed in the line of duty working with the Edmonton Police Service. See *Quanto's Law: New Legislation Enacts Tough Penalties for Killing Police Dogs, Service Animals*, HUFFINGTON POST (July 24, 2016), [http://www.huffingtonpost.ca/2015/07/24/new-law-enacts-tough-penalties-for-killing-police-dogs-and-service-animals\\_n\\_7862326.html?utm\\_hp\\_ref=ca-qua](http://www.huffingtonpost.ca/2015/07/24/new-law-enacts-tough-penalties-for-killing-police-dogs-and-service-animals_n_7862326.html?utm_hp_ref=ca-qua).

<sup>69</sup> Justice for Animals in Service Act (Quanto's Law), R.S.C. 2015, c C-34.

<sup>70</sup> CFHS MANUAL, *supra* note 63.

<sup>71</sup> *Id.*

<sup>72</sup> Policy & Procedures Manual, *supra* note 32.

<sup>73</sup> Arnold Arluke, *Brute Force: Animal Police and the Challenge of Cruelty* (2004); see generally Stephen Aronson, *Animal Control Management: A New Look at a Public Responsibility* (2010).

<sup>74</sup> See generally *Introduction to Animal Law*, ANIMAL LAW RES. CTR., <http://animallaw.com/animal-law.cfm> (last visited Oct. 11, 2017).

## b. Provincial and Territorial Laws and Enforcement

### i. Provincial and Territorial Animal Protection Laws

All provinces and territories in Canada have regulatory animal protection laws that vary widely across jurisdictions in terms of the issues they cover and the level of protection they afford animals.<sup>75</sup> In 1822, the province of Nova Scotia was the first to enact anti-cruelty legislation, and Quebec was the last in 2015.<sup>76</sup> Overlap does exist between provincial and territorial animal protection laws, and officers may lay charges under one, or both, depending on the circumstances of the offense.<sup>77</sup>

Provincial and territorial animal protection laws are strict liability offenses, so a lower burden of proof is required to lay charges.<sup>78</sup> Offenses relate to animals in distress (*i.e.*, deprived of adequate food, shelter, or water), unnecessary suffering (*i.e.*, causing an animal unnecessary pain, suffering, or injury), or specific offenses, such as agricultural and commercial practices, which vary considerably by jurisdiction.<sup>79</sup>

### ii. Provincial and Territorial Enforcement Authorities

Across Canada, provincial and territorial animal protection laws are generally investigated, inspected, and enforced by officers employed through animal welfare agencies, like a humane society.<sup>80</sup> However, some exceptions exist.<sup>81</sup> In Alberta, a Public Security Peace Officer (PSPO) has limited powers and authority, and in reference to the enforcement of animal laws, officers are appointed as either a Community Peace Officer Level One or Level Two.<sup>82</sup>

Peace officers employed through the Alberta Solicitor General and Public Safety as a Community Peace Officer Level One (CPO 1) (*i.e.*, humane society officers) are employed to enforce provincial statutes

<sup>75</sup> CFHS MANUAL, *supra* note 63, at 8.

<sup>76</sup> Bisgould, *supra* note 63.

<sup>77</sup> CFHS MANUAL, *supra* note 63, at 8.

<sup>78</sup> *Id.*

<sup>79</sup> BISGOULD, *supra* note 63.

<sup>80</sup> *Id.*; CFHS MANUAL, *supra* note 63, at 8.

<sup>81</sup> Such is the case in Manitoba with the RCMP and police officers enforcing alongside the Office of the Chief Veterinarian; Manitoba Agriculture, Food, and Rural Development; the Nova Scotia Department of Agriculture; the Royal Newfoundland Constabulary and Department of Natural Resources in Newfoundland and Labrador; the Ontario Provincial Police; and the Department of Agriculture and Forestry in Prince Edward Island; as well as various ministries of Agriculture and Development in Quebec.

<sup>82</sup> *Peace Officers*, ALTA. JUSTICE & SOLICITOR GEN., [HTTPS://WWW.SOLGPS.ALBERTA.CA/PROGRAMS\\_AND\\_SERVICES/PUBLIC\\_SECURITY/PEACE\\_OFFICERS/PAGES/DEFAULT.ASPX?WT.SVL=PROGRAMS](https://www.solgps.alberta.ca/PROGRAMS_AND_SERVICES/PUBLIC_SECURITY/PEACE_OFFICERS/PAGES/DEFAULT.ASPX?WT.SVL=PROGRAMS) (last visited Oct. 11, 2017).

like moving violations under the Traffic Safety Act and the Gaming and Liquor Act.<sup>83</sup> Level One Community Peace Officers are permitted to carry a baton and/or OC spray (pepper spray).<sup>84</sup> Other examples of Level One CPOs include transit security officers and municipal patrol services.<sup>85</sup> Transit officers in Alberta do have additional powers and authority, but are the exception amongst their Level One CPO colleagues.<sup>86</sup>

Level Two Community Peace Officers (CPO 2) (*i.e.*, Officer Lazenby) conduct duties that are classified as administrative in nature, including non-moving violations under the Traffic Safety Act and Municipal Bylaws on pets.<sup>87</sup> Despite the work of Level Two Officers often being described as administrative in nature, officers who enforce pet bylaws often work in the field, interacting with animals and their owners on private and public property.<sup>88</sup> CPO 2 Officers are not permitted to carry pepper spray, but may apply to carry a baton.<sup>89</sup> A CPO 2 has more authority than a municipal bylaw officer, but less authority than a CPO 1.<sup>90</sup> Officers in Alberta may possess dual appointments, allowing them to enforce provincial acts and municipal bylaws if also appointed under the authority of the Alberta Municipal Government Act.<sup>91</sup> Dual appointments are discussed later in this paper.

In Alberta, Public Security Peace Officers (PSPOs) are given specific powers and authority under the Alberta Peace Officer Act of 2007.<sup>92</sup> The Act stipulates that “[a] Peace Officer’s authority is limited to the statutes listed on their appointment, within the territorial jurisdiction specified.”<sup>93</sup> According to the Alberta Justice and Solicitor General, which has authority over the Peace Officer program, there are over 3,000 PSPOs in Alberta, working for over 280 different agencies.<sup>94</sup> Importantly, peace officers appointed under the Peace Officer Act fall within the definition of “peace officer” under S.2 of the Criminal Code.<sup>95</sup>

<sup>83</sup> POLICY & PROCEDURES MANUAL, *supra* note 32, at 12.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Alberta Municipal Government Act, S.A. 2000, c M-26.

<sup>92</sup> Alberta Peace Officer Act, S.A. 2006 c P-3.5.

<sup>93</sup> POLICY & PROCEDURES MANUAL, *supra* note 32, at 2; *see generally* Alberta Peace Officer Act, S.A. 2006 c P-3.5.

<sup>94</sup> Peace Officers, *supra* note 84.

<sup>95</sup> Policy & Procedures Manual, *supra* note 32, at 2.

### *c. Municipal Bylaws and Enforcement*

#### *i. Municipal Bylaws on Pets*

Municipal animal control bylaws were created to protect people from animals by addressing issues such as public health concerns (*i.e.*, pet waste, dog bites), safety (*i.e.*, being threatened or chased by a dog) and nuisances (*i.e.*, the neighbor’s cat digging up your garden) at the municipal level.<sup>96</sup> In Canada, “[m]unicipalities derive their powers from the delegation of authority by the province in municipal statutes.”<sup>97</sup> However, municipalities cannot encroach on higher authorities, such as provincial or federal jurisdiction.<sup>98</sup> Although significant variability in animal bylaws exists across municipalities, these laws aim to promote responsible pet ownership and include provisions such as animal licensing and the control of dangerous dogs.<sup>99</sup> In some cases, officers may indirectly address animal hoarding through the enforcement of municipal bylaws that limit the number of animals that can be kept at a residence.<sup>100</sup> In Alberta, municipalities receive their powers under the Municipal Government Act which enables municipalities to provide governance and maintain safe communities.<sup>101</sup> The Municipal Government Act defines many functions performed by municipalities relating to public peace and “the behavior of people, activities, and things in, on, or near a public place that is open to the public.”<sup>102</sup> Pets legally qualify as property, and therefore fall under municipal law.<sup>103</sup>

#### *ii. Municipal Enforcement Authorities*

Bylaw enforcement officers have the authority to enforce municipal bylaws, but, for example, Alberta provincial peace officers may enforce bylaws if the peace officers are also appointed under the

<sup>96</sup> *See* CFHS MANUAL, *supra* note 63, at 11.

<sup>97</sup> Patricia Farnese & Barbara von Tigerstrom, *Report on the Legal Framework for Animal Health in Canada*, AGRIC. & AGRI-FOOD CAN. 7 (2009), [http://publications.gc.ca/collections/collection\\_2013/aac-aafc/A34-20-2013-eng.pdf](http://publications.gc.ca/collections/collection_2013/aac-aafc/A34-20-2013-eng.pdf).

<sup>98</sup> *Id.*

<sup>99</sup> In the United States, these offenses are referred to as ordinances.

<sup>100</sup> The Kloschinsky case was never categorized as a hoarding case; rather, law enforcement described the case as an illegal breeding operation. Campbell, *supra* note 63, at 54, n.45.

<sup>101</sup> *See* Edward Lesage & Meville McMillan, *Alberta in Foundations of Governance: Municipal Government in Canada’s Provinces* 396 (Andrew Sanction & Robert Young eds., 2009).

<sup>102</sup> *Id.* at 397.

<sup>103</sup> *See* Melanie Rock & Chris Degeling, *Public Health Ethics and a Status for Pets as Person-Things*, 10 J. OF BIOETHICAL INQUIRY, 485, 492 (2013).

authority of sections 555 and 556 of the Municipal Government Act.<sup>104</sup> Officers in some municipalities enforce only municipal bylaws; whereas in others, officers may hold both municipal and provincial appointments.<sup>105</sup>

Varying Canadian law enforcement responsibilities create a complex environment for officers to investigate municipal bylaws and provincial statutes. These responsibilities create implications for officer safety for many reasons. For example, in Alberta, “a peace officer’s authority is limited by the first part of Section 7(5) which limits their status as peace officers to the performance of duties specified on their appointment.”<sup>106</sup> These limitations, coupled with an owner’s strong attachment to his or her animals, can create unsafe conditions for the officer, especially in cases of hoarding.<sup>107</sup> One peace officer, with over ten years’ experience on the job, explained his perceptions of these unsafe situations and the challenges his enforcement team has experienced in dealing with hoarding situations, stating that:

There’s an inherent risk that you take on in doing this job, whether it’s the safety around animals, like being mauled, or we deal with a lot of mental illness in the field and people can be dangerous, so those wake-up calls that you get, you need to be vigilant.<sup>108</sup>

### III. THE PROBLEM OF OFFICER SAFETY

Both the Berry and Kloschinsky cases illustrate the risks officers take in responding to calls concerning animals. National statistics additionally demonstrate that officers, regardless of enforcement duties, consistently take on the risk of bodily harm or death.<sup>109</sup>

For example, in 2009, Statistics Canada released a report documenting trends in police-reported serious assaults substantiated by Canadian Police Services between 1983 and 2008.<sup>110</sup> Statistics Canada includes statistics from both bylaw and peace officers in its reported assaults.<sup>111</sup> The inclusion of both categories is consistent with the Criminal Code of Canada’s definition of “peace officer,” which

<sup>104</sup> *Community Peace Officers*, ALTA. URBAN MUNICIPALITIES ASS’N, <https://auma.ca/advocacy-services/programs-initiatives/policing-hub/law-enforcement-personnel/community-peace-officers> (last visited Oct. 11, 2017).

<sup>105</sup> *Id.*

<sup>106</sup> Policy & Procedures Manual, *supra* note 32, at 2.

<sup>107</sup> *See generally* Campbell, *supra* note 63.

<sup>108</sup> Under the guidance of the Conjoint Health Research Ethics Board, the identity of research participants is protected. *See* Conjoint Health Research Ethics Board, <https://www.ucalgary.ca/research/researchers/ethics-compliance/chreb>.

<sup>109</sup> *See* Mia Dauvergne, *Trends in police-reported serious assault*, JURISTAT (2009), <https://www.statcan.gc.ca/pub/85-002-x/2009004/article/10930-eng.htm>.

<sup>110</sup> *Id.*

<sup>111</sup> *See Id.*

encompasses multiple levels of law enforcement.<sup>112</sup>

In 2008, there were 9,699 reported assaults (a rate of 29.1 per 100,000 population) against peace officers committed by 7,000 accused.<sup>113</sup> A quarter of these assaults occurred during the commission of another serious violent offense; moreover, seven out of ten of these reported assaults against peace officers involved the commission of another offense such as obstructing a peace officer (36%), level one assault (21%), uttering threats (18%), or mischief (14%).<sup>114</sup> Importantly, only 14% of assaults against a peace officer involved a weapon, and, of those assaults with a weapon, only 1% required the officer to seek medical assistance.<sup>115</sup> Only 3,665 of the 9,699 reported assaults against peace officers were formally processed through the justice system.<sup>116</sup> Of those 3,665 cases that were addressed in the justice system, 73.7% concluded with a finding of guilt, resulting in a higher conviction rate in assaults against officers when compared to assaults against non-officers.<sup>117</sup>

A robust body of both academic and grey literature focuses on assaults against police officers, but no academic literature exists that specifically examines the experiences of assault against bylaw and peace officers who enforce animal laws. This lack of literature persists despite ongoing media reports of officer assaults throughout Canada and the United States.<sup>118</sup> Some of these assaults have resulted in officers being pepper sprayed, threatened with weapons, beaten with a skateboard, and assaulted when asking a transit patron to leave a closing train station, ultimately resulting in officers requiring medical attention and hospitalization.<sup>119</sup> An officer with over thirty years of law enforcement experience reflected on being assaulted on the job, stating “I’ve been in that position at least half a dozen times, if not more in that very position, and by the grace of angels and maybe a fast tongue I’ve always been able to extract myself out of that. But I’ve totally been there.”<sup>120</sup>

<sup>112</sup> *See id.*

<sup>113</sup> *See Id.*

<sup>114</sup> *See Id.*

<sup>115</sup> *See Id.*

<sup>116</sup> *See Id.*

<sup>117</sup> *See Id.*

<sup>118</sup> *See Red Deer RCMP arrest man after assault on peace officer*, RED DEER EXPRESS (July 13, 2017), <http://www.reddeerexpress.com/news/red-deer-rcmp-arrest-man-after-assault-on-peace-officer/>; *see* Glynn Brothen, *Concerns growing over peace officer assaults in Kamloops*, INFONEWS.CA (Oct. 26, 2015), <http://infotel.ca/newsitem/concerns-growing-over-peace-officer-assaults-in-kamloops/it24406>; *see* Ryan White, *Transit officers pepper sprayed of southwest LRT platform*, CTV NEWS (Apr. 12, 2016), <http://calgary.ctvnews.ca/transit-officers-pepper-sprayed-on-southwest-lrt-platform-1.2856139>.

<sup>119</sup> *See* White, *supra* note 120.

<sup>120</sup> *See* Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

Unlike the 2009 Statistics Canada report on officers assaulted in the line of duty, current Canadian statistics on officers murdered in the line of duty in Canada exclude bylaw and peace officers.<sup>121</sup> Despite this oversight, the Berry and Kloschinsky cases, among others, show that all levels of law enforcement involve risk, including death by homicide. Data from the Homicide Survey shows that 133 *police* officers were killed in the line of duty between 1961 and 2009.<sup>122</sup> Of those fallen officers, 129 were men, who on average were thirty-four years old with under five years of service experience, and 46% of those 129 fallen male officers were working alone at the time of their death.<sup>123</sup> Ninety-two percent of the homicides were committed with the use of a firearm, and nearly eight of every ten officers shot were not wearing protective body armor, such as a bulletproof vest.<sup>124</sup>

Regardless of enforcement responsibilities, officers risk assault and death on a regular basis. These risks of harm are exacerbated by a lack of mandated training, standardized personal protective equipment, and reliable forms of communication and intelligence-sharing between agencies.

#### *a. Officers Lack Equipment*

Historically, a failure to wear protective equipment by law enforcement professionals was more common in the 1960s and 1970s.<sup>125</sup> Since then, technological improvements and acceptance of protective equipment use has improved considerably.<sup>126</sup> Despite these positive improvements, some bylaw and peace officers still lack access to protective equipment.<sup>127</sup>

The death of Officer Roy Marcum emphasizes this reality.<sup>128</sup> Officer Marcum was shot and killed in California in the line of duty while tending to abandoned animals as the result of an eviction.<sup>129</sup> The American Society for the Prevention of Cruelty to Animals (ASPCA) provided a \$100,000 grant to the National Animal Care & Control Association (NACA) to provide funds for the purchase of ballistic vests

for animal control officers to recognize “the valuable and dangerous work animal control officers across the country carry out each day.”<sup>130</sup> NACA received funding requests for 704 vests from 136 agencies, but the organization was only able to provide 250 vests to 59 agencies across 29 states.<sup>131</sup> Those remaining officers lacking a vest are without the personal protective equipment they need to safely perform their duties.<sup>132</sup> However, officers who are provided vests by their employers can now donate their used vests to organizations like Armor of God, an organization that helps offer vests to officers who have none.<sup>133</sup> The donation system helps to address the overwhelming disparity in access to personal protective equipment. Although most vests have a five-year warranty, officers recognize that a used vest is better than no vest at all.<sup>134</sup> Despite the good intentions of these non-profit organizations, access to basic personal protective equipment should not be dependent on a charitable donation or the re-distribution of expired second-hand equipment.

One officer explained this unfortunate reality in Alberta, stating that “[t]here’s so many peace officers working out there alone, working remotely without proper safety equipment.”<sup>135</sup> He went on to explain that a close call at his agency allowed him to “invest in some better communication equipment, so [the officers] now have the phones and the two-way radios, dispatch keeps a better eye on us at this point, we invested in some ballistic vests” and that “in order for me to provide more resources to my officers, somebody’s gotta [sic] open up the pocketbook.”<sup>136</sup> Uptake of safety and protective equipment has been slow across the province and beyond. For example, Society for Prevention of Cruelty to Animals (SPCA) officers in the province of Nova Scotia in Eastern Canada did not receive protective vests until 2016.<sup>137</sup> Officers described how their work was becoming increasingly dangerous, stating that “[w]e had officers that were assaulted on scene, our vehicle was rammed,” said Jo-Anne Lansburg, the chief provincial inspector for

<sup>121</sup> See Sara Dunn, *Police officers murdered in the line of duty, 1961 to 2009*, JURISTAT (2010), <https://www.statcan.gc.ca/pub/85-002-x/2010003/article/11354-eng.htm>; Dauvergne, *supra* note 111.

<sup>122</sup> Dunn, *supra* note 123.

<sup>123</sup> See *Id.*

<sup>124</sup> See *Id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> *Officer Roy Marcum Ballistic Vest Grant*, NAT’L ANIMAL CARE & CONTROL ASS’N, [http://www.nacanet.org/default.asp?page=Roy\\_Marcum](http://www.nacanet.org/default.asp?page=Roy_Marcum) (last visited Oct. 11, 2017).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (Some organizations, like Armor of God, accessible at [www.vestforlife.com](http://www.vestforlife.com), work to supply vests to those officers in need).

<sup>133</sup> Erica Stark, *Alberta peace officers donate bulletproof vest to U.S. cops*, CALGARY HERALD (July 23, 2015), <http://calgaryherald.com/news/local-news/alberta-peace-officers-donate-bulletproof-vests-to-u-s-cops>.

<sup>134</sup> *Id.*

<sup>135</sup> See Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>136</sup> *Id.*

<sup>137</sup> David Burke, *SPCA officers don body armour as animal cruelty prosecutions mount*, CBC NEWS (Feb. 17, 2017), <http://www.cbc.ca/news/canada/nova-scotia/spca-officers-animal-cruelty-charges-crime-armor-1.3985651>.

the Nova Scotia SPCA.<sup>138</sup> “It’s becoming more and more dangerous out there.”<sup>139</sup> Some municipal enforcement agencies require approval and funding from their council, and some councils fail to recognize the inherent risks associated with enforcing animal laws.

*b. Officers Lack Information*

Lack of equipment is not the only failure to protect officers. Lack of information can also be harmful, and the information available to officers varies based upon their role. For instance, police officers have access to information about an accused person’s history of violence, but bylaw or peace officers attending a residence often know little about the resident and whether extra safety precautions are required.<sup>140</sup> In the case of Anthony and Christine Berry, there was indeed cause for concern. Anthony Berry had a history of violence and involvement in the criminal justice system dating back to 1990 when he was convicted of the dangerous operation of a motor vehicle after he deliberately drove his car at a group of people.<sup>141</sup> The following year, Berry was convicted of assaulting his girlfriend, and in 1993, he was again convicted of assault.<sup>142</sup>

In 1996, Berry pleaded guilty to charges of aggravated assault, assault causing bodily harm, and uttering a threat to cause death or bodily harm.<sup>143</sup> Berry admitted to assaulting his ex-wife and her male friend when he discovered them packing up his wife’s belongings after a period of separation.<sup>144</sup> Berry became very agitated that his wife was leaving with a man whom he perceived she was romantically involved with.<sup>145</sup> During the argument with the male friend, Anthony Berry produced a decorative sword and began swinging it.<sup>146</sup> Mrs. Berry came between her estranged husband and the male friend in an attempt to defuse the situation, but was struck in the arm and cut.<sup>147</sup> As the three fell to the ground, Anthony Berry stabbed the male friend in the thigh with a smaller knife, and attempted to stab him again in the hip, but missed, and ended up stabbing him in the abdomen.<sup>148</sup> Mrs. Berry and her male friend fled to a nearby shopping center, but were followed by Anthony

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>141</sup> R. v. Berry (1998), 175 W.A.C. 89, 91 (Can. Alta.).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Berry, who verbally threatened the male friend, stating that if he called the police, “He’d be a dead man when he got out.”<sup>149</sup> Anthony Berry went to jail following the altercation.<sup>150</sup>

Anthony Berry’s pre-sentence report, conducted by Dr. Patrick Baillie, indicated that he showed some remorse for his behavior, but generally “showed no sign of any empathy for his victims.”<sup>151</sup> Dr. Baillie further stated that Berry had “a significant history of difficulties with anger management, with a tendency towards self-destructive behaviors, accompanied by occasional violent outbursts directed at others.”<sup>152</sup>

Anthony Berry’s history of violence and involvement with the justice system would be available to police officers, but bylaw and peace officers rely exclusively (with some exceptions)<sup>153</sup> on information provided by the complainant or any previous interactions the agency may have had with the individual or residence of interest.<sup>154</sup> One manager highlighted this concern, stating that “the biggest challenge that we run into is the lack of...information to keep our officers safe.”<sup>155</sup> Despite efforts to establish a positive working relationship with their police counterparts, the RCMP is unable to share whether or not a specific residence presents safety concerns for officers.<sup>156</sup> The manager went on to say:

What bothers me the most is...when we contact them...to find out whether we need to have somebody [backup] there, they won’t say ‘yes or no.’ They say, ‘well you gotta [sic] do what you need to do we can’t tell you anything’...that’s probably the biggest frustration that we have...of course we’re all working for the community and we’re all trying to keep...the public safe.

This past year, a bronze statue was unveiled in Alberta that features a male police officer and female peace officers “symbolizing their cooperation and dedication to the public’s safety.”<sup>157</sup> The manager

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 91.

<sup>151</sup> *Id.* at 92.

<sup>152</sup> *Id.*

<sup>153</sup> Select peace officers can apply to have access to CPIC. This application requires an enhanced criminal record check and security screening, including a copy of fingerprints. Sean Bonneteau, *Bulletin 11-2016*, ALTA. JUSTICE & SOLICITOR GEN. (Nov. 9, 2016), [https://www.solgps.alberta.ca/programs\\_and\\_services/public\\_security/peace\\_officers/Bulletin/Bulletin%2011-2016%20CPIC%20Access.pdf](https://www.solgps.alberta.ca/programs_and_services/public_security/peace_officers/Bulletin/Bulletin%2011-2016%20CPIC%20Access.pdf).

<sup>154</sup> Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (stating that because of legal, jurisdictional issues, and privacy concerns, the police of jurisdiction (in this case, the RCMP) cannot share any information with officers because they are not authorized to do so).

<sup>157</sup> Britt Prendergast, *RCMP and peace officer statue unveiled*, FORTSASKONLINE (July 28, 2017), <https://fortsaskonline.com/local/rcmp-and-municipal-peace-officer-statue-unveiled>.

went on to explain that he feels directly responsible for the well-being of his officers every day.<sup>158</sup>

In the case of Anthony and Christine Berry, officers from the Humane Society had concerns about the mental health status of Anthony Berry after a lengthy phone conversation and a face-to-face interaction at the shelter. Based on these conversations, the officers contacted Detective Baldwin at the Calgary Police Service, with whom they had developed a positive, but informal, working relationship, to request backup when attending the residence. If Detective Baldwin's force had not provided backup to the unarmed Humane Society officers, the situation would have likely escalated, and injuries to both the accused and Humane Society officers could have been deadly, especially considering Berry's strong attachment to his rabbits, volatile nature, and history of violence.<sup>159</sup> During interviews, other officers spoke about the potential volatility that is created with animal seizures:

You never know how [the accused is] going to react. The pet that they have is their life. A lot of people, their pets are their lives and they take it very seriously. If they feel threatened that you're going to remove the animals from them or cause them any financial issues... they're going to take it very seriously.<sup>160</sup>

The inconsistent provision of personal protective equipment and the unavailability of information to some officers based on their roles are weaknesses in the Canadian law enforcement system. Occupational Health and Safety (OHS) laws could help address the problem, but there are several inadequacies with OHS standards as well.

### *c. Occupational Health and Safety (OHS) Standards*

#### *i. Overview of OHS Laws in Canada*

In Canada, because of the constitutional framework, there are fourteen total jurisdictions, including one federal jurisdiction, ten provincial jurisdictions, and three territorial jurisdictions.<sup>161</sup> "Each jurisdiction has [its] own occupational health and safety legislation."<sup>162</sup> Federal government employees have four federal acts which pertain to

<sup>158</sup> Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>159</sup> *R. v. Berry* (1998), 175 W.A.C. 89, 91 (Can. Alta.).

<sup>160</sup> See Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>161</sup> *Acts and Regulations*, CAN. CTR. FOR OCCUPATIONAL HEALTH & SAFETY, <http://www.ccohs.ca/topics/legislation/acts/> (last visited Oct. 11, 2017).

<sup>162</sup> *Id.*

their occupational health and safety: The Hazardous Products Act,<sup>163</sup> the Transportation of Dangerous Goods Act,<sup>164</sup> the Canadian Centre for Occupational Health and Safety Act,<sup>165</sup> and the Canada Labour Code (Part II),<sup>166</sup> which outlines the rights and responsibilities of both employers and employees.<sup>167</sup>

For most workers, unless they are employed with an agency that has federal jurisdiction (*i.e.*, railways, pipelines), their provincial or territorial Occupational Health and Safety Act applies.<sup>168</sup> In Alberta specifically, the Occupational Health and Safety Act, the Occupational Health and Safety Regulation, and the Occupational Health and Safety Code collectively apply.<sup>169</sup>

Both federal and provincial legislation establishes minimum requirements for safety standards, but requires the strong involvement of workplace committees.<sup>170</sup> This approach often combines decentralized authority that relies on "workplace committees to aid the mechanisms of enforcement."<sup>171</sup> This model mirrors the regulatory scheme in the United States.<sup>172</sup> Unlike many other countries, the "Canadian health and safety system exhibits the hands-off approach of Canadian inspectors in trying to convince the employer to comply with regulations; they encourage safety committees and employers to reach mutual agreement."<sup>173</sup>

Under these safety regimes, if an agency has twenty or more employees, it must establish a safety committee consisting of two people, one of which cannot hold a supervisory or managerial role.<sup>174</sup> This approach encourages engagement from workers who understand the day-to-day functions of the job, with the assistance of inspectors if needed.<sup>175</sup> In most countries, however, inspectors are scarce.<sup>176</sup> In

<sup>163</sup> Hazardous Products Act, R.S.C. 1985, c H-3.

<sup>164</sup> Transportation of Dangerous Goods Act, S.C. 1992, c 34.

<sup>165</sup> Canadian Centre for Occupational Health and Safety Act, R.S.C. 1985, c C-13.

<sup>166</sup> Canada Labour Code, R.S.C. 1985, c L-2.

<sup>167</sup> *Royal Canadian Mounted Police External Review Committee: Occupational Health and Safety: An Employer Perspective*, MINISTER OF SUPPLY & SERVS. CAN. (1992), <http://www.erc-cee.gc.ca/cnt/rsrscs/pblctns/dscssn/pdf/dp9-eng.pdf>.

<sup>168</sup> *Id.*

<sup>169</sup> Larry Dunn et al., *The Collision Between Federal and Provincial Occupational Health and Safety Regimes on Energy and Resource Projects*, 51 ALTA. L. REV. 313, 316 (2013).

<sup>170</sup> Daniel B. Klaff, *Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada, and Sweden*, 7 U. PA. J. LAB. & EMP. L. 613, 630 (2004).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 631.

<sup>174</sup> *Id.* at 637.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 647.

the United States, for example, there is one inspector for every 55,976 workers—a ratio grossly disproportionate to the International Labour Organization’s recommendation of one inspector per 10,000 workers.<sup>177</sup> Despite worker participation and the provision for regulatory agency enforcement, this model may not account for the “cultural aspects of occupational health and safety,”<sup>178</sup> which has historically created barriers to safety in law enforcement environments.<sup>179</sup>

In the event of a serious work place incident (defined in Section 18 of the Alberta OHS Act), OHS will investigate to determine the causes and circumstances of the incident, prepare a report, and, if appropriate, submit to Alberta Justice for consideration of prosecution if there is a strong likelihood of conviction, and it is in the best interest of the public.<sup>180</sup> All fatality reports, regardless of whether charges are laid, are published without explicitly naming the victim.

## ii. The Occupational Health and Safety Investigation in the Kloschinsky Case

In January of 2014, Alberta Occupational Health and Safety released the Fatality Report into the death of Officer Lazenby.<sup>181</sup> The report provides a brief timeline of Officer Lazenby’s interactions with Kloschinsky, dating from September 14, 2011 (the day the initial complaint was received), leading up to Lazenby’s death on August 10, 2012.<sup>182</sup> The report makes no mention of Officer Lazenby’s training, equipment, or means of communication with colleagues or dispatch. On March 31, 2014, Alberta Justice reviewed the report and made a discretionary decision to not support any charges under the Occupational Health and Safety legislation.<sup>183</sup> The file was closed in December of 2014.<sup>184</sup>

At the fatality investigation hearing, the lead investigator for OHS testified and confirmed that over twenty corrective issues were identified with the MD of Foothills Protective Services section, and that orders were written to improve workplace safety.<sup>185</sup> Safety issues included

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 640.

<sup>179</sup> See generally Patrick B. Patterson et al., *The Worldview of Hospital Security Staff: Implications for Health Promotion Policy Implementation*, 38 J. CONTEMP. ETHNOGRAPHY, 336, 336-57 (2009).

<sup>180</sup> *OHS incident investigations*, ALTA. LABOUR (Feb. 27, 2017), <https://work.alberta.ca/occupational-health-safety/investigations.html>.

<sup>181</sup> Peace Officer Fatality Report, *supra* note 31, at 6.

<sup>182</sup> *Id.* at 6-7.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> These are the author’s (Rault’s) personal observations from attending the

work-alone policies, risk for potential violence, and risks associated in dealing with dogs and wildlife.<sup>186</sup> The investigator confirmed that little to no controls existed within the Protective Services section, and that Officer Lazenby could have been supplied more personal protective equipment than he was.<sup>187</sup> He went on to state that several “root causes” contributed to his death, including discretion exercised in interacting with Kloschinsky alone, although it remains unclear if Lazenby was aware of threats made by Kloschinsky against Lazenby.<sup>188</sup> None of these issues were documented in the OHS Fatality Report.<sup>189</sup>

Significant efforts were made by the Foothills Protective Services section after Officer Lazenby’s death to address the orders and rectify concerns. These changes included thirteen new Standard Operating Procedures (SOPs) that documented a work-alone policy and a communication policy, amongst other changes.<sup>190</sup> Although Foothills Protective Services now has a healthy and robust set of SOPs based on best practices in other jurisdictions, these SOPs apply only to the MD of Foothills, not any of the other 280 agencies that employ peace officers in the province.<sup>191</sup> All employers have an obligation to not only ensure appropriate protocols are in place, but also to ensure compliance with “[l]aws governing health and safety in Alberta’s workplaces [that] fall under the OHS Act, Regulation and Code.”<sup>192</sup>

## iii. Current Minimum Standards Are Insufficient for Officer Safety

The provincial fatality inquiry into the death of Officer Lazenby took place in June of 2017 in Calgary, Alberta, Canada.<sup>193</sup> In Alberta,

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fatality investigation hearing.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Peace Officer Fatality Report, *supra* note 31.

<sup>190</sup> These are the author’s (Rault’s) personal observations from attending the fatality investigation hearing.

<sup>191</sup> *Id.*

<sup>192</sup> *OHS Laws*, ALTA. LABOUR (July 21, 2017), <https://work.alberta.ca/occupational-health-safety/ohs-laws.html>.

<sup>193</sup> Dave Dormer, *Family of Rod Lazenby call for mandated changes around peace officer safety*, CBC NEWS (June 13, 2017) [hereinafter Dormer, *Family of Rod Lazenby*], <http://www.cbc.ca/news/canada/calgary/rod-lazenby-fatality-inquiry-1.4159666>; Dave Dormer, *Inquiry begins into death of peace officer; Rod Lazenby, killed while responding to a dog complaint*, CBC NEWS (June 13, 2017) [hereinafter Dormer, *Inquiry begins*], <http://www.cbc.ca/news/canada/calgary/alberta-rod-lazenby-fatality-inquiry-1.4156099>; Bill Graveland, *Inquiry focuses on mental health of man who killed Alberta peace officer*, THE CAN. PRESS (June 12, 2017) [hereinafter Graveland, *Inquiry focuses on mental health*], <http://globalnews.ca/>

as in most provinces and federal territories, a fatality inquiry analyzes the circumstances surrounding certain premature deaths.<sup>194</sup> The inquiry is conducted under the direction of the Chief Medical Examiner in a courtroom presided over by a Provincial Court judge.<sup>195</sup> The fatality inquiry process makes no findings of criminal or civil liability, but can issue recommendations to prevent future deaths.<sup>196</sup>

The inquiry was the first involving the death of a peace officer in the line of duty in the province of Alberta. The inquiry focused broadly on issues of officer safety and identified the need for mandatory officer training, standardized personal protective equipment, reliable forms of communication (including 911 dispatch), and intelligence-sharing between law enforcement agencies.<sup>197</sup> The media was highly responsive to the inquiry and coverage included all major print, TV, and radio stations.<sup>198</sup>

The inquiry was a critical point for creating awareness around the risks officers face when enforcing animal laws. The inquiry also increased advocacy for greater standards of occupational health and safety to protect officers who enforce animal laws in Canada. Despite the robust discussion of occupational health and safety issues during the inquiry, Justice and Solicitor General—the government body which oversees the peace officer program in Alberta—was not supportive of the recommendations made regarding mandatory training, standardized personal protective equipment, reliable forms of communication, and intelligence-sharing between law enforcement agencies.<sup>199</sup> Rather, in a bulletin to all 280 employers of peace officers in Alberta (*i.e.*, a humane society or municipality), Justice and Solicitor General stressed it was the responsibility of employers to “mitigate any risks their peace officers may face conducting their duties.”<sup>200</sup> Justice and Solicitor General highlighted that each employer should have a “current workplace hazard assessment[], work alone policies and general work place safety protocols in accordance with Alberta’s employment standards codes and occupational health and safety (OHS) legislation.”<sup>201</sup>

news/3521052/fatality-inquiry-into-peace-officer-rod-lazenbys-death-begins/.

<sup>194</sup> *Public Fatality Inquiries*, ALTA. JUSTICE & SOLICITOR GEN., [https://justice.alberta.ca/programs\\_services/fatality/Pages/default.aspx](https://justice.alberta.ca/programs_services/fatality/Pages/default.aspx) (last visited Oct. 11, 2017).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> These are the author’s (Rault’s) personal observations from attending the fatality investigation hearing.

<sup>198</sup> Dormer, Family of Rod Lazenby, *supra* note 195; Dormer, Inquiry begins, *supra* note 195; Bill Graveland, Inquiry focuses on mental health, *supra* note 195.

<sup>199</sup> These are the author’s (Rault’s) personal observations from attending the fatality investigation hearing.

<sup>200</sup> *Bulletin 13-2017*, ALTA. JUSTICE & SOLICITOR GEN. (2017), [https://www.solgps.alberta.ca/programs\\_and\\_services/public\\_security/peace\\_officers/Bulletin/Bulletin%2013-2017%20Lazenby%20Fatality%20Inquiry.pdf](https://www.solgps.alberta.ca/programs_and_services/public_security/peace_officers/Bulletin/Bulletin%2013-2017%20Lazenby%20Fatality%20Inquiry.pdf).

<sup>201</sup> *Id.*

Officers who testified at the inquiry argued that these minimum standards were not sufficient to keep bylaw and peace officers safe.<sup>202</sup> Although all employers are required to comply with OHS legislation, one officer described the concerns he had attending calls without any intelligence about the residence, stating that he “never know[s] which one’s going to go off the rail, and it’s never the one you’re most worried about.”<sup>203</sup> Further, the testifying officers argued that if uniforms and markings could be mandated, so could personal protective equipment, which would remove employer discretion from the matter.<sup>204</sup>

Alberta OHS is responsible for enforcing OHS laws and establishing minimum standards for safe and healthy practices in the workplace. All employers must follow these standards.<sup>205</sup> In addition to the responsibilities of employers, officers must be aware of their right to a safe workplace, right to perform their job according to safety standards, and their right to report any incidents or concerns directly to OHS. There are several shortcomings with this model.

First, placing the onus on officers to understand their rights and report safety concerns is problematic. Relying on officers to report safety issues assumes that all 3,000 peace officers in Alberta, who work for over 280 different agencies, know and fully understand their rights and would not be placed in a vulnerable position if they chose to report concerns about their employer. For example, in some small towns and hamlets, there may be only one or two officers who typically work alone, which makes advocacy and anonymous reporting nearly impossible.

Second, in many small towns, officers are supervised by individuals who do not hold an enforcement role and may have little to no understanding of enforcement work. For example, if a supervisor wanted to support an officer’s request to be equipped with a protective vest, that decision may need approval by the local municipal or town council.<sup>206</sup> One manager highlighted his challenges in trying to get protective vests for his officers, stating that the challenge was “a [four]-year fight really...the manager’s perspective at the time was the day the dogs carry guns, you’ll get body armour.”<sup>207</sup> Therefore, managers must educate their town councils on the work and the safety requirements of officers; notably, this includes education on why training or a piece

<sup>202</sup> These are the author’s (Rault’s) personal observations from attending the fatality investigation hearing.

<sup>203</sup> Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>204</sup> These are the author’s (Rault’s) personal observations from attending the fatality investigation hearing.

<sup>205</sup> *OHS Laws*, *supra* note 194.

<sup>206</sup> Conjoint Health Research Ethics Board, *supra* note 110 (discussing the confidentiality of research participants).

<sup>207</sup> *Id.*

of protective equipment is advantageous, while also demonstrating financial feasibility. For example, at the MD of Foothills, prior to Officer Lazenby's death, officers had repeatedly requested that a base radio be provided in the office to help monitor the activities of officers in the field.<sup>208</sup> This request was documented in the MD's meeting minutes, but was never granted.<sup>209</sup> Furthermore, a coworker of Officer Lazenby twice requested additional safety training, but was denied both times by her supervisor, despite an on-the-job fatality occurring within her team just two months prior.<sup>210</sup> These two anecdotal stories, which were presented and discussed at the fatality inquiry,<sup>211</sup> demonstrate a need for mandated training, standardized personal protective equipment, and reliable means of communication. Employer discretion relating to officer safety should be restrained.

Despite safeguards that exist under OHS, the Lazenby tragedy clearly highlights these minimal protocols were wholly insufficient. Unfortunately, these inadequacies continue to exist within many other employers of peace officers throughout the province.

#### iv. OHS in Other Jurisdictions

The aforementioned concerns are not restricted to the province of Alberta. In 2016, Kendra Coulter and Amy Fitzgerald released a report examining the work of animal cruelty investigators in Ontario, Canada, where officers receive over 18,000 complaints of suspected animal cruelty per year through the Ontario Society for the Prevention of Cruelty to Animals (OSPCA).<sup>212</sup>

Although the research focused exclusively on officers employed through the OSPCA, the study uncovered a deeply flawed enforcement system. In Ontario, similar to some jurisdictions in Alberta, officers are often required to cover a large geographical area while often working alone.<sup>213</sup> This isolation is compounded by the fact that officers cannot access the Canadian Police Information Center (CPIC),<sup>214</sup> which is

<sup>208</sup> These are the author's (Rault's) personal observations from attending the fatality investigation hearing.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Kendra Coulter & Amy Fitzgerald, *Difference Makers: Understanding and Improving the OSPCA's Animal Cruelty Investigation Work* (2016), <https://humanejobsdotorg.files.wordpress.com/2016/04/difference-makers-understanding-and-improving-the-ospca-animal-cruelty-investigation-work.pdf>.

<sup>213</sup> *Id.*

<sup>214</sup> See CPIC, *About Us* (2017), <http://www.cpic-cipc.ca/about-ausujet/index-eng.htm>. CPIC provides information about crimes and criminals. It is the only national information-sharing system that links criminal justice and law enforcement partners across Canada and internationally.

accessible by other law enforcement bodies.<sup>215</sup> The isolation is made more challenging by the fact that officers do not carry radios and often operate out of cell phone range.<sup>216</sup> Research shows that these struggles may negatively impact the mental well-being of officers.<sup>217</sup>

To function efficiently, animal welfare agencies like the OSPCA rely heavily on charitable donations and volunteer staffing.<sup>218</sup> Bisgould highlights this funding dilemma in her discussion of provincial animal welfare legislation:

These animal welfare agencies, pursuant to the legislative authority delegated to them, the financial limitations within their budgets, and the broader political and ideological complexities noted, operate under a weighty public expectation that they are generally responsible for the welfare of animals across Canada.<sup>219</sup>

Other countries also struggle with officer safety in enforcing animal cruelty laws. For example, in 2016, an Independent Review of the Royal Society for the Prevention of Cruelty to Animals in the State of Victoria, Australia was released.<sup>220</sup> The review examined the Inspectorate of the Society, which is responsible for investigating and prosecuting offenses of animal cruelty.<sup>221</sup> The review identified numerous shortcomings involving "workplace health and safety issues, training, supervision, staff retention issues, accommodation, equipment, workload management, court brief and prosecution practices, security of information, the absence of an appropriate case management system[,] and analytical and intelligence capabilities."<sup>222</sup> The findings and recommendations generated from the Australian review were similar to those highlighted in the Canadian report by Coulter and Fitzgerald.<sup>223</sup> The Australian report recommended that all necessary actions must be

<sup>215</sup> *Id.*

<sup>216</sup> Coulter & Fitzgerald, *supra* note 214.

<sup>217</sup> ARLUKE, *supra* note 75, at 8 (discussing how the public often trivializes cruelty investigations and how officers struggle to enforce laws that are ambiguous; notably, why these challenges take a toll on the mental well-being of officers. Arluke states "[o]fficers can protect themselves by becoming insensitive to the pain and cruelty they encounter, find psychic solace in cynicism, and/or give themselves over to anger and frustration.").

<sup>218</sup> See BISGOULD, *supra* note 63; see Coulter & Fitzgerald, *supra* note 214; see *A Summary Report on Farm Animal Welfare Law in Canada*, ANIMAL COUNCIL NETWORK (2013), [https://www.nfacc.ca/resources/Farm\\_Animal\\_Welfare\\_Laws\\_Canada.pdf](https://www.nfacc.ca/resources/Farm_Animal_Welfare_Laws_Canada.pdf).

<sup>219</sup> BISGOULD, *supra* note 63, at 102.

<sup>220</sup> Neil Comrie, *Independent Review of the RSPCA Victoria Inspectorate: Transformation of the RSPCA Victoria* 1, 14 (Sept. 1, 2016) [hereinafter *RSPCA Review*], [http://www.rspcavic.org/documents/RSPCA\\_IndependantReview\\_final.pdf](http://www.rspcavic.org/documents/RSPCA_IndependantReview_final.pdf).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 10.

<sup>223</sup> *Compare id.*, with Coulter & Fitzgerald, *supra* note 214.

taken to improve the safety culture at the Inspectorate.<sup>224</sup> As part of the workplace and safety audit, reviewers examined records at the RSPCA indicating that “since 2011, the Inspectorate staff have experienced 58 injuries, 14 ‘near misses[,]’ 22 instances where violence had been threatened[,] and 22 incidents involving property damage while undertaking their duties.”<sup>225</sup> Moreover, the report identified the risk of under-reporting of these incidents due to poor reporting procedures.<sup>226</sup> These incidents were punctuated by the tragic death of a RSPCA Inspector in 1989 in the line of duty, and the injuring of another officer in 1999 who was shot in the face while investigating a farmer who was mistreating his sheep.<sup>227</sup>

Shortcomings for the safety of officers responding to calls involving animals have been identified in Canada, the United States, and Australia. The National Animal Care and Control Association (NACA) in the United States has created useful guidelines based on best practices to help keep officers safe.<sup>228</sup>

#### IV. SOLUTIONS

##### *a. Guidelines for Officer Equipment and Training*

NACA was formed in 1978 to assist officers in performing their duties in a safe and professional manner and to “preserve the human/animal bond by insisting on responsible animal ownership.”<sup>229</sup> NACA’s vision is for “all animal care and control professionals [to be] respected as essential public servants and receive consistent support, resources[,] and training.”<sup>230</sup>

As part of this vision, NACA created guidelines which include numerous recommendations for officer training and access to equipment.<sup>231</sup> NACA has addressed the need for officers to have access to protective vests, a bite stick,<sup>232</sup> pepper (OC) spray, portable radios, safety and wellness training, certification, and minimum training

<sup>224</sup> *RSPCA Review*, *supra* note 222, at 41.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *About NACA*, NAT’L ANIMAL CARE & CONTROL ASS’N, <https://nacenet.site-ym.com/?page=AboutNACA> (last visited Oct. 11, 2017).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *NACA Guidelines*, NAT’L ANIMAL CARE & CONTROL ASS’N (2014), [HTTP://Cymcdn.com/sites/www.nacenet.org/resource/resmgr/docs/naca\\_guidelines.pdf](http://cymcdn.com/sites/www.nacenet.org/resource/resmgr/docs/naca_guidelines.pdf).

<sup>232</sup> The term bite stick and baton are often used interchangeably. In Alberta, a baton is defined in section 4(1)(b) of the Peace Officer Regulation. *POLICY & PROCEDURES MANUAL*, *supra* note 32, app. G.

requirements.<sup>233</sup> Further, NACA highlighted that animal care and control personnel<sup>234</sup> should have access to adequate personal protective gear—gear that provides protection from the dangers officers could encounter while investigating and enforcing animal laws.<sup>235</sup> As part of the standard-issued equipment, officers should have protective vests that are “properly fit[ted]..., inspected, and replaced...accord[ing] [to] the manufacturer’s recommend[at]ions.”<sup>236</sup> In articulating the need for this guideline, NACA identified that “animal care and control personnel encounter individuals with the same or greater frequency than regular law enforcement officers.... The number of assaults on animal care and control personnel has increased and officers have been shot and killed in the course of their duties.”<sup>237</sup> Under the Alberta Occupational Health and Safety Act, employers must take reasonable care to protect the health and safety of their employees.<sup>238</sup>

According to NACA, bite sticks may be used as a defensive tool when dealing with aggressive animals and, if used in accordance with agency protocols, as personal protection from hostile or aggressive people.<sup>239</sup> NACA highlights that no officer should be permitted to carry a bite stick without proper training and an agency policy regarding its use.<sup>240</sup> The same recommendations apply to pepper spray as a viable alternative to lethal force.<sup>241</sup>

Currently, in Alberta, only uniforms and other identifiers, such as vehicle emblems, are mandated by the Office of the Solicitor General and Public Security.<sup>242</sup> The individual employers of peace officers have discretion to determine the equipment and communication needs of the officers.<sup>243</sup> By failing to mandate basic protective equipment at the provincial level, officers may be unnecessarily placed at risk.

<sup>233</sup> *NACA Guidelines*, *supra* note 233, at 48-49, 52-53, 55-57.

<sup>234</sup> In the United States, the term “animal care and control personnel” is commonly used. In Canada, that same term is used in some jurisdictions, but officers are more commonly referred to as bylaw or peace officers because they enforce more than animal laws under their appointments.

<sup>235</sup> *NACA Guidelines*, *supra* note 233, at 48.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Occupational Health and Safety Act, R.S.A. 2000, c O-2 s. 2.

<sup>239</sup> *NACA Guidelines*, *supra* note 233, at 49.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 3 (“An Animal Care & Control professional will never employ unnecessary force or violence, only using such force as is necessary and reasonable in the discharge of duty to protect the public, animals or the Animal Care & Control professional. While the use of force is occasionally unavoidable, every Animal Care & Control professional will refrain from unnecessary infliction of pain or suffering and will never engage in cruel, degrading or inhumane treatment of any person or animal.”).

<sup>242</sup> *Policy & Procedures Manual*, *supra* note 32, at 49.

<sup>243</sup> *Id.* at 49-61.

To further address safety risks, NACA identified the advantages of providing continuing education courses for officers.<sup>244</sup> Training areas could include hard skills such as CPR and first aid, while acknowledging the officers' mental health by offering training and support relating to compassion, fatigue, officer safety, and stress management.<sup>245</sup> Training and certification allows officers to more effectively and safely perform the functions of their job.<sup>246</sup> Currently, the quality and availability of training in Alberta varies depending on an officer's appointment and employer.<sup>247</sup> For example, Rod Lazenby, as a Level Two Community Peace Officer, was "grandfathered" into his position as a peace officer based on his previous experience as an RCMP officer, and therefore required no training.<sup>248</sup> All other Level Two officers must complete an "in-house training program developed by the[ir] authorized employer [with] approv[al] by the Director."<sup>249</sup> Because job roles at this level of appointment are defined by the Solicitor General and Public Security as narrow in scope, the requirements for Level Two training are nominal.<sup>250</sup> In contrast, Level One officers either must attend the Solicitor General and Public Security Staff College, or receive equivalent training by their employer, which is the case in larger municipalities that have the means to train their officers.<sup>251</sup> The robust Peace Officer Induction Course is recommended for both Level One and Level Two officers, but the final decision is at the discretion of the employer.<sup>252</sup> At the fatality inquiry into the death of Officer Lazenby, officers were very critical of the minimal and inconsistent delivery of training for Level Two officers, and they specifically advocated for the need for better training for all officers, regardless their level of appointment.<sup>253</sup>

*b. Communication, Information Sharing, and Access to Intelligence*

The ability to communicate and share information requires the proper equipment to do so. NACA highlights that all agencies should provide their officers with portable radios and cellular telephones.<sup>254</sup> Officers spend most of their time in their vehicles or on foot, and require reliable means of communication to call for backup in case of an

<sup>244</sup> *NACA Guidelines*, *supra* note 233, at 55.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 57.

<sup>247</sup> POLICY & PROCEDURES MANUAL, *supra* note 32, at 33-34.

<sup>248</sup> *Id.*

<sup>249</sup> Policy & Procedures Manual, *supra* note 32, at 15.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 13.

<sup>252</sup> *Id.* at 33-34.

<sup>253</sup> Dormer, Family of Rod Lazenby, *supra* note 195.

<sup>254</sup> *NACA Guidelines*, *supra* note 233, at 53.

emergency.<sup>255</sup> All officers require reliable means of communication with co-workers, their supervisor, and police, including 911 dispatch. NACA acknowledges the cost of providing reliable forms of communication to staff, but highlights that "the safety of the animal care and control personnel and liability concerns should be first and foremost when deciding how to spend funds available."<sup>256</sup>

Currently, only a select few Level One CPOs who have formally applied and been granted access to the CPIC have access to that information,<sup>257</sup> yet officers often deal with the same individuals as police and could benefit from that information. To further compound these issues with CPIC, CPOs are unable to access this information via radio dispatch while they in the field, a feature police officers commonly use.<sup>258</sup> In the Lazenby case, the RCMP was aware of threats made against the MD of Foothills, but it is still unclear whether Officer Lazenby was ever apprised of the threats,<sup>259</sup> since communication between the two policing agencies was informal and information-sharing within the MD of Foothills Protective Services team was limited.<sup>260</sup> Some peace officers have healthy working relationships with their police of jurisdiction, while other officers have fractured relationships that make simple communication problematic. How can we ensure peace officers have reliable means of communication with co-workers, supervisors, and police, including 911 dispatch?

In 2016, the Alberta First Responder Radio Communications System (AFRRCS) went operational in order to provide "quality, cost effective, secure, reliable, accessible, 24/7 voice communications supporting all First Responders."<sup>261</sup> Despite vastly improving communications for many public safety agencies in the province, some agencies are unable to participate due to the cost of the required radio equipment.<sup>262</sup> For some bylaw and peace officers, this reality, along with the 2014 move to encrypted digital radios implemented following the death of three RCMP officers in Eastern Canada, has resulted in a loss of radio contact with their police of jurisdiction.<sup>263</sup> The move to digital

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Policy & Procedures Manual, *supra* note 32, at 81.

<sup>258</sup> *Id.*

<sup>259</sup> Dormer, Family of Rod Lazenby, *supra* note 195.

<sup>260</sup> These are the author's (Rault's) personal observations from attending the fatality investigation hearing.

<sup>261</sup> AFRRCS AGENCY HANDBOOK, AFRRCS AGENCY 4 (Jan. 12, 2016) <https://open.alberta.ca/publications/afrrcs-agency-handbook#summary>.

<sup>262</sup> Bryan Passifume, *Rural first responders express concern over new Alberta provincial radio network*, CALGARY HERALD (Apr. 29, 2017), <http://calgaryherald.com/news/local-news/rural-first-responders-express-concern-over-new-alberta-provincial-radio-network>.

<sup>263</sup> ROYAL CANADIAN MOUNTED POLICE, INDEPENDENT REVIEW—MONCTON

encryption has resulted in some unanticipated consequences for the safety of bylaw and peace officers. In a bulletin dated September 11, 2017, Alberta Justice and Solicitor General addressed concerns raised regarding RCMP-CPO radio communications.<sup>264</sup> The bulletin outlined how RCMP detachments are “currently waiting for direction...as to how they will be interoperating amongst themselves and other first responders collocated within their respective jurisdictions.”<sup>265</sup> In the meantime, the bulletin instructed peace officers to meet with their local RCMP detachment to discuss opportunities to communicate using “talkgroup sharing channels.”<sup>266</sup> A shared talkgroup is an encrypted channel that allows agencies to communicate solely amongst themselves.<sup>267</sup> These groups would require an agency policy for the use of a shared talkgroup. Talkgroups would only be available to those agencies that purchased AFRRCS-permitted radios and were approved to participate in the new radio system;<sup>268</sup> thus, issues of cost and variable access may still exist.

*c. Suggestions for Improving OHS Laws: Alberta Under Review*

In Alberta, the OHS system is currently under review, with public feedback being solicited until October 16, 2017.<sup>269</sup> Alberta has not conducted a comprehensive review of its OHS system since it was enacted in 1976, which fails to reflect the changing nature of the workplace.<sup>270</sup> The goal of this review is to develop best practices to accommodate the needs of the modern workplace.<sup>271</sup> Specifically, this review “examine[s] the legislation, as well as...compliance, enforcement, education, awareness and prevention efforts.”<sup>272</sup> Topics include the clarification of both employer and work responsibilities, improved worker engagement in occupational health and wellness, and a “renewed focus on illness and injury prevention.”<sup>273</sup>

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SHOOTING—June 4, 2014, <http://www.rcmp-grc.gc.ca/en/rcmp-response-macneil-report-independent-review-moncton-shooting-june-4-2014> (last modified Jan. 16, 2015).

<sup>264</sup> *Bulletin 16-2017*, ALTA. JUSTICE & SOLICITOR GEN. 1 (Sept. 11, 2017), [https://www.solgps.alberta.ca/programs\\_and\\_services/public\\_security/peace\\_officers/Bulletin/Bulletin%2016-2017%20AFRCS%20and%20RCMP-CPO%20Communication.pdf](https://www.solgps.alberta.ca/programs_and_services/public_security/peace_officers/Bulletin/Bulletin%2016-2017%20AFRCS%20and%20RCMP-CPO%20Communication.pdf).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See *id.*

<sup>269</sup> OCCUPATIONAL HEALTH & SAFETY REV., ALTA. GOV'T, <https://www.alberta.ca/ohs-system-review.aspx> (last visited Oct. 11, 2017).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

Within the introductory letter inviting feedback, the government conceded that Alberta’s per capita workplace fatality rate remains the highest in the country.<sup>274</sup> Despite substantive changes being made in other jurisdictions’ OHS legal and policy frameworks,<sup>275</sup> Alberta considerably lags behind. The introductory letter further identifies best practices that exist in Canada relating to workplace safety culture, OHS management systems, partnerships and coordination, education, training, engagement by both employers and employees, and finally, progressive and proportional enforcement and public awareness.<sup>276</sup>

The goal of the review is to situate Alberta as a leader in occupational illness and injury prevention. What this might mean for the approximately 3,000 peace officers in Alberta is yet to be determined.

## V. CONCLUSION

Officers face inherent risks when responding to calls involving animals due to the lack of a mandatory training program, lack of standardized personal protective equipment, and lack of reliable forms of communication and information-sharing. These risks are exacerbated by a perception that the work of officers is administrative in nature and narrow in focus. The case studies discussed in this paper highlight these risks and provide insight into systemic issues in an effort to address the occupational health and safety of officers.

Historically, the legal community has focused on the inefficiency of legal sanctions and how laws have failed to protect animals. While addressing the adequacy of laws is critically important, these laws are only as effective as those who enforce them. Advocating for the safety and well-being of officers should be complementary to the discussions of criminal sanctions.

Our collective efforts in addressing occupational health and safety should attempt to avoid “a myopic picture of potential change where problematic systems receive only minor adjustments while the serious structural problems with such systems remain.”<sup>277</sup> Like the airplane metaphor of putting your oxygen mask on before assisting others—if officers are not safe, equipped, and informed, how can they then protect animals?

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Klaff, *supra* note 172, at 658.

**PROPERTY OR “PENUMBRAL” PERSONS?  
AN EXAMINATION OF TWO JURISPRUDENTIAL  
APPROACHES TO THE NONHUMAN RIGHTS  
PROJECT LITIGATION**

ASHLEIGH P. A. BEST\* UNDER THE SUPERVISION OF DR. SOPHIE RILEY\*\*

**I. INTRODUCTION**

On December 2, 2013, the Nonhuman Rights Project (NhRP) filed three identical petitions for common law writs of habeas corpus on behalf of four confined chimpanzees: Tommy, Kiko, Hercules, and Leo. The petitions were brought under Article 70 of the New York Civil Practice Law and Rules (Article 70) in the Supreme Court of New York.<sup>1</sup> This was the first time such a writ had ever been sought for a nonhuman animal.<sup>2</sup> At first instance, each petition was denied. The Honorable Joseph Sise refused to recognize Tommy as a legal person and accordingly dismissed the petitioner’s claim.<sup>3</sup> Similarly, the Honorable Gerard Asher found that since Article 70 applies to persons, it was unavailable to Hercules and Leo.<sup>4</sup> With respect to Kiko, the Honorable Ralph Boniello was unwilling to take “this leap of faith,”<sup>5</sup> and refused to grant the petition. The decisions made concerning Kiko

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<sup>1</sup> N.Y. C.P.L.R. § 7001-12 (2016).

<sup>2</sup> Transcript of May 27, 2015 Hearing at 53-54, *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d 898 (N.Y. 2015) (No. 152736) [hereinafter *Hercules Transcript 2015*]; see also DEBORAH CAO, *ANIMAL LAW IN AUSTRALIA* 94-95 (2d ed. 2015); Michael Mountain, *Press Release re. NhRP Lawsuit, Dec. 2nd 2013*, NONHUMAN RIGHTS PROJECT BLOG, <http://www.nonhumanrightsproject.org/2013/11/30/press-release-re-nhrp-lawsuit-dec-2nd-2013/>.

<sup>3</sup> Transcript of Dec. 3, 2013 Hearing at 27, *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014) (No. 162358) [hereinafter *Tommy Transcript 2013*].

<sup>4</sup> Order to Show Cause & Writ of Habeas Corpus at 2, *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d 898, 911 (N.Y. 2015) (No. 132098) [hereinafter *Hercules Order*].

<sup>5</sup> Transcript of Oral Argument at 15, *Nonhuman Rights Project ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015) (No. 151725) [hereinafter *Kiko Transcript 2013*].

and Tommy went on appeal to the Appellate Division of the Supreme Court of New York. The Appellate Division affirmed the lower court, finding that Kiko’s transfer to a sanctuary did not constitute immediate release, and habeas corpus could not lie.<sup>6</sup> With regard to Tommy, The Appellate Division held that because Tommy could not bear duties, he was not a person for the purpose of a common law writ of habeas corpus.<sup>7</sup> The NhRP’s motions for leave to appeal to the New York Court of Appeals in Tommy and Kiko’s cases were denied.<sup>8</sup> Hercules and Leo’s petition was refiled. After issuing an Order to Show Cause in advance of the hearing, the Honorable Barbara Jaffe determined she was bound by the precedent of the Appellate Division in Tommy’s case and denied the writ of habeas corpus “for now.”<sup>9</sup> Following that decision, petitions were refiled in the cases of Tommy and Kiko, both of which Judge Jaffe denied on the basis that they were not supported by a relevant change in circumstances.<sup>10</sup> These decisions were jointly appealed, where they were affirmed for reasons reminiscent of those proffered in other judgments in these proceedings.<sup>11</sup>

The denial of the claims turned predominantly on the courts’ rejection of the petitioner’s argument that the chimpanzees were persons at common law for the purpose of habeas corpus. This is significant because the law is “set up to focus exclusively on the rights of persons and not of other entities. Persons have rights, duties, and obligations; things do not.”<sup>12</sup> As Article 70 is silent on the definition of “person,” invocation of habeas corpus depends on the chimpanzees’ status as

common law persons.<sup>13</sup> The petitioner argued that the definition of “person” for the purpose of the common law writ of habeas corpus is subject to adaptation by the courts where justice so demands.<sup>14</sup> According to the petitioner, because the chimpanzees possess autonomy and self-determination, they were entitled to bodily liberty protected by the writ of habeas corpus.<sup>15</sup> The chimpanzees’ classification as property is also inconsistent with common law equality; the classification both facilitates the illegitimate purpose of enslaving autonomous beings and denies the chimpanzees equal protection on the basis of a single trait.<sup>16</sup> The New York legislature has conferred animals personhood rights by permitting them to be trust beneficiaries; in turn, the petitioner argued by analogy that the writ of habeas corpus is another purpose for which the law should recognize chimpanzees as persons.<sup>17</sup> However, the New York judiciary’s dubiety surrounding the inclusion of chimpanzees within the definition of “person” and its reluctance to break precedent continually hampered the petitioner’s claims.

This article seeks to establish the mutability of the conclusions reached by the New York judiciary and the impropriety of its theoretical underpinnings in the context of a claim by nonhumans to legal personhood. To achieve this, the article makes two analytical claims, followed by a critically evaluative claim. Analytically, the article argues that the judgments may largely be characterized as an embodiment of Frederick Schauer’s version of legal formalism. The article posits that a court applying H. L. A. Hart’s theory of legal indeterminacy would be more amenable to consideration of the arguments advanced by the petitioner. The article discusses four points where these theories diverge: 1) the indeterminacy of the legal rule in question; 2) the relevance of the rule’s purpose to its content; 3) the breadth of the category to which the rule applies; and 4) the permissibility of judicial participation in the rule’s expansion. The article’s critically evaluative claim is that, due to the nature of legal personhood, Hart’s theory is the more appropriate one when a court considers a claim by nonhuman chimpanzees to habeas corpus. The article does not assert Hartian jurisprudence is the only vehicle for success nor a guarantee of it; however, the article argues that success is consistent with this jurisprudential theory and therefore made

<sup>6</sup> Nonhuman Rights Project *ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652, 653-54 (N.Y. App. Div. 2015); *see also* Nonhuman Rights Project *ex rel. Tommy v. Lavery*, 54 N.Y.S.3d 392, 397 (N.Y. App. Div. 2017).

<sup>7</sup> *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248, 251 (N.Y. App. Div. 2014).

<sup>8</sup> *Nonhuman Rights Project v. Presti*, 999 N.Y.S.2d 652; *People ex rel. Nonhuman Rights Project v. Lavery*, 26 N.Y.3d 902 (N.Y. 2015) (unpublished opinion denying leave to appeal).

<sup>9</sup> Decision and Order at 33, *Nonhuman Rights Project ex rel. Hercules v. Stanley*, 16 N.Y.S.3d 898 (N.Y. 2015) (No. 152736); Amended Order to Show Cause, *Nonhuman Rights Project ex rel. Hercules v. Stanley*, 16 N.Y.S.3d 898 (N.Y. 2015) (No. 152736); Writ of Habeas Corpus, *Nonhuman Rights Project ex rel. Hercules v. Stanley*, 16 N.Y.S.3d 898, 917-18 (N.Y. 2015).

<sup>10</sup> Order to Show Cause and Writ of Habeas Corpus at 2, *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014) (No. 162358); Order and Memoranda of Justice Jaffe at 1-2, *Nonhuman Rights Project ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652 (N.Y. 2016) (No. 150149).

<sup>11</sup> *Nonhuman Rights Project v. Lavery*, 54 N.Y.S.3d at 397.

<sup>12</sup> Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L. J. 369, 372 (2007); *see also* Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GEND. L. POL’Y 45, 68 (2012).

<sup>13</sup> *Nonhuman Rights Project ex rel. Hercules v. Stanley*, 16 N.Y.S.3d 898, 911 (N.Y. 2015); *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 249.

<sup>14</sup> Petitioner’s Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus & Order Granting the Immediate Release of Hercules & Leo at 39-43, *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d 898 (N.Y. 2015) [hereinafter *Hercules Memo* 2013].

<sup>15</sup> *Id.* at 44-46.

<sup>16</sup> *Id.* at 46-54.

<sup>17</sup> *Id.* at 54-56.

a possibility by its application. Further, the article does not evaluate the legal correctness of the petitioner’s arguments.

The significance of the article inheres in the originality of its response to the challenges faced by the NhRP. The NhRP “exhaustively research[ed] the law of each of the fifty states on two dozen critical substantive and procedural legal issues”<sup>18</sup> to “identify those American state jurisdictions that may be most receptive to an array of arguments that favor...legal personhood for at least one nonhuman animal.”<sup>19</sup> The article adds to the literature from which the NhRP may draw as it seeks to identify those jurisdictions that are most favorable to a claim to personhood by nonhumans. As a court’s conceptualization of its role is critical to the viability of the claim, the article suggests that this consideration could form a component of the NhRP’s strategy.<sup>20</sup> By engaging in a jurisprudential analysis of the litigation and characterizing the judgments as an incarnation of Schauer’s formalism, the article identifies “the ideas and assumptions that underlie and thereby define”<sup>21</sup> the New York judiciary’s approach to the proceedings. Therefore, the article isolates those decisional premises adverse to the NhRP’s claim. Conversely, by demonstrating why a court adopting Hart’s theory would be more inclined to accept the arguments advanced, the article pinpoints assumptions that militate in favor of the NhRP. The article’s normative claim furnishes the NhRP with a contextual argument it can deploy to justify the desirability of Hart’s jurisprudence in the context of a claim to personhood for nonhuman animals.<sup>22</sup>

Three levels of research informed this article. The judgments, transcripts, and written memoranda of arguments from the NhRP litigation provided the article’s doctrinal foundation. Analysis and synthesis of these documents illuminated the patterns of reasoning within the New York judiciary that were decisive of the proceedings, the arguments with which the courts were most perplexed, and the legal bases upon which the petitioner made its claims. These features of the litigation revealed the crucial point of divergence between the reasoning of the courts and that of the petitioner concerned the role of the judge in expanding the common law to encompass nonhumans. Whereas the

courts took a rigid, conservative approach to this issue,<sup>23</sup> the petitioners emphasized that judges assume a crucial role in defining and developing the common law. As the cross-temporal debate between Schauer and Hart deals in part with the nature of the judicial task, these theories were selected as the jurisprudential framework by which the litigation would be scrutinized. Research relating to personhood theory and practice was also undertaken to facilitate critical evaluation of the relative satisfactoriness of the theories in the context of a claim by nonhuman chimpanzees to common law habeas corpus.

The first part of the article discusses Schauer’s version of legal formalism and Hart’s theory of legal indeterminacy, while specifically considering the relationship between the theories and the points at which they diverge. In the second part, the article characterizes the approach of the New York judiciary as a reification of Schauer’s formalism. The third part applies Hart’s theory to the arguments advanced by the petitioner, demonstrating the amenability of his jurisprudence to the claim. The relative superiority of Hart’s theory in the context of a claim to legal personhood by a nonhuman animal is established in the fourth part. The article concludes that a common law court adopting Hartian jurisprudence may accept the NhRP’s claim.

## II. PART ONE: THE JURISPRUDENTIAL DEBATE BETWEEN H. L. A. HEART AND FREDERICK SCHAUER

### *a. A cross-temporal debate*

Schauer engages extensively with Hart’s “famous hypothetical”<sup>24</sup> of a rule prohibiting vehicles in the park, featuring in the renowned Hart-Fuller debate of 1958. Hart claims that while such a rule “plainly... forbids an automobile,”<sup>25</sup> the uncertainty of its application to “bicycles, roller skates, [and] toy automobiles”<sup>26</sup> exemplifies how rules have a “core of settled meaning,” as well as “a penumbra of debatable cases.”<sup>27</sup> Only in the penumbra, according to Hart, may a court rely on the law’s “aims, purposes, and policies”<sup>28</sup> to determine the content of the

<sup>18</sup> Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 5 (2010) (discussing the scope of the research).

<sup>19</sup> *Id.*

<sup>20</sup> Steven M. Wise, *Animal Things to Animal Person -Thoughts on Time, Place and Theories*, 5 ANIMAL L. 61, 62-63 (1999) (discussing the strategy of a case).

<sup>21</sup> DENISE MEYERSON, UNDERSTANDING JURISPRUDENCE 1 (2007); see also Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 MICH. L. REV. 39, 43 (1950); see also M. D. A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 3 (8th ed. 2008).

<sup>22</sup> MEYERSON, *supra* note 21, at 7-8.

<sup>23</sup> Steven M. Wise, *How Common Law Judges Decide Cases*, NONHUMAN RIGHTS PROJECT (Apr. 11, 2011), <https://www.nonhumanrights.org/blog/how-common-law-judges-decide-cases/>.

<sup>24</sup> Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008) [hereinafter Schauer, *Vehicles in the Park*].

<sup>25</sup> H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) [hereinafter Hart, *Positivism*].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 614.

rule. Lon Fuller rejects Hart’s “idea of a language-determined core,”<sup>29</sup> insisting the proper construction of a legal rule can never be severed from its purpose.<sup>30</sup> He adduces the example in which “local patriots wanted to mount on a pedestal in the park a truck used in World War II...in perfect working order”<sup>31</sup> to demonstrate that a rule’s purpose is necessary to determine whether a particular instance falls in the rule’s core or penumbra. In response, Hart concedes that purpose informs the distinction between the rule’s core and its penumbra.<sup>32</sup> This aspect of the debate concerns the determinacy of legal rules and the relevance of purpose to their construction. However, at “a higher level of generality,”<sup>33</sup> Schauer claims that this discussion is “about legal formality in all of its (defensible) guises.”<sup>34</sup> Schauer’s formalism requires the rule to be applied even where it produces an unsatisfactory result.<sup>35</sup> He recognizes that this approach diverges from Fuller’s practice of displacing a rule when it procures an unreasonable result<sup>36</sup> and Hart’s concern for judicial flexibility to the application of rules.<sup>37</sup> In this way, Schauer adds his formalist viewpoint to the debate decades after it was first promulgated and, from this premise, more broadly disputes the satisfactoriness of Hart’s theory of legal indeterminacy. The debate which ensued between Schauer and Hart primarily concerned the nature of the judicial role and the adjudicative task.<sup>38</sup> This debate forms the jurisprudential framework in accordance with which the NhRP litigation is analyzed.

#### *b. Schauer’s position*

Most notably, Schauer expounds his formalist jurisprudence in his 1988 article titled “Formalism.”<sup>39</sup> As Schauer’s formalist style also permeates many of his other publications, adding detail to his original claims and contributing examples to substantiate them, the

article draws from a range of articles to synthesize his theory. The articles he synthesized uncover the centrality of “decision[-]making according to *rule*”<sup>40</sup> to formalism. Schauer emphasizes that as rules are composed with language, they contain literal meaning<sup>41</sup> and, at least to some extent, lend themselves to a contextual interpretation.<sup>42</sup> This meaning remains constant in the short term, notwithstanding that the meaning can adapt over time.<sup>43</sup> While the language of rules is not always determinate, Schauer emphasizes that it *can* point to certain outcomes and may therefore constrain judicial decision-makers.<sup>44</sup> In accordance with Schauer’s theory of “presumptive formalism,”<sup>45</sup> such outcomes may only be displaced if there are “especially exigent reasons” to do so.<sup>46</sup> Schauer rejects the relevance of purpose to the construction of legal rules, arguing that recourse to such purpose conflates rules with their reasons, undermining the very concept of a rule.<sup>47</sup> He asserts that a rule should be applied uniformly across a category, notwithstanding that its application to particular instances may be discordant with the rule’s purpose.<sup>48</sup> Accordingly, when applying precedent, a court is directed by “rules of relevance;” these reflect fixed categories subsisting within society and determine the applicability of precedent to a particular case.<sup>49</sup> Schauer emphasizes that as the decisions of the present affect the cases of the future, courts should take a conservative approach to the development of precedent.<sup>50</sup> Less obviously, his theory sanctions deference to the legislature.<sup>51</sup> The unifying thread that runs through Schauer’s formalism is the concept of “ruleness” within the legal system.<sup>52</sup>

#### *c. Hart’s position*

Hart also develops his jurisprudence through a number of sources. His seminal text, *The Concept of Law*,<sup>53</sup> first published in 1961,

<sup>29</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1111.

<sup>30</sup> Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 663 (1958).

<sup>31</sup> *Id.*; Schauer, *Vehicles in the Park*, *supra* note 24, at 1111.

<sup>32</sup> H. L. A. Hart, *Essays in Jurisprudence and Philosophy* 8, 106-07 (1983) [hereinafter Hart, *Essays*].

<sup>33</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1115.

<sup>34</sup> *Id.* at 1115-16; *see also* Symposium Foreword, *Fifty Years Later*, 83 N.Y.U. L. REV. 993, 998 (2008).

<sup>35</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1115-16, 1129.

<sup>36</sup> Fuller, *supra* note 30; Schauer, *Vehicles in the Park*, *supra* note 24, at 1127-28.

<sup>37</sup> H. L. A. HART, *THE CONCEPT OF LAW* 130 (2d ed. 1994) [hereinafter HART, *CONCEPT OF LAW*]; Schauer, *Vehicles in the Park*, *supra* note 24, at 1128.

<sup>38</sup> *See* Schauer, *Vehicles in the Park*, *supra* note 24, at 1130-31.

<sup>39</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter Schauer, *Formalism*].

<sup>40</sup> *Id.* at 510 (emphasis added).

<sup>41</sup> *Id.* at 528-30.

<sup>42</sup> *Id.* at 526-27; Schauer, *Vehicles in the Park*, *supra* note 24, at 1120; FREDERICK SCHAUER, *PLAYING BY THE RULES* 55-58 (1991) [hereinafter SCHAUER, *PLAYING BY THE RULES*].

<sup>43</sup> Schauer, *Formalism*, *supra* note 39, at 524.

<sup>44</sup> *Id.* at 510, 521-22, 524-29.

<sup>45</sup> *Id.* at 547.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 534, 537.

<sup>48</sup> *Id.* at 540.

<sup>49</sup> Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 583 (1987) [hereinafter Schauer, *Precedent*].

<sup>50</sup> *Id.* at 588-89.

<sup>51</sup> *See* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1939 (2004) [hereinafter Schauer, *Limited Domain*].

<sup>52</sup> Schauer, *Formalism*, *supra* note 39, at 538.

<sup>53</sup> HART, *CONCEPT OF LAW*, *supra* note 37.

explains ideas first raised by Hart in the context of his debate with Fuller. This article analyzes *The Concept of Law*, as well as other publications elucidating Hart's theory of legal indeterminacy. According to Hart, as rules are constructed of language, they become indeterminate at points because there is a "limit...to the guidance which general language can provide."<sup>54</sup> This limit imbues legal rules of legislation and precedent<sup>55</sup> with an "open texture."<sup>56</sup> Despite operating unquestionably over a range of cases, at some point rules encounter a fringe of uncertainty.<sup>57</sup> Certainty therefore demarcates the rule's "core"<sup>58</sup> from its "penumbra."<sup>59</sup> When reasoning in the latter, judges are required to decide whether or not a particular instance falls within the rule's ambit, as the answer is not unambiguously dictated by the rule.<sup>60</sup> Hart argues that in so deciding, a court should consider the "aims, purposes, and policies"<sup>61</sup> of the rule, as well as its function in the context of the broader legal system. He also observes that the rule's application to penumbral decisions serves to concretize its original purpose.<sup>62</sup> According to Hart, as the general language of a rule identifies only an "authoritative example,"<sup>63</sup> provided a case is sufficiently relevant and proximate to the example, a court may decide it falls within the ambit of the rule.<sup>64</sup> Similarly, courts apply precedent where the instant case is sufficiently and pertinently like the previous case.<sup>65</sup> In circumstances where the applicability of a rule is uncertain, Hart argues courts assume an "interstitial" legislative responsibility, sanctioning judicial involvement in the development of the law.<sup>66</sup>

<sup>54</sup> *Id.* at 126.

<sup>55</sup> *Id.* at 128.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Hart, *Positivism*, *supra* note 25, at 607; *see also* HART, *CONCEPT OF LAW*, *supra* note 37, at 126.

<sup>59</sup> Hart, *Positivism*, *supra* note 25, at 607.

<sup>60</sup> *See* H. L. A. Hart, *Scandinavian Realism*, CAMBRIDGE L. J. 233, 239-40 (1959) [hereinafter Hart, *Scandinavian Realism*]; HART, *CONCEPT OF LAW*, *supra* note 37, at 126; HART, *ESSAYS*, *supra* note 32, at 106 (note Hart's concession that purpose is relevant to differentiating the core from the penumbra).

<sup>61</sup> Hart, *Positivism*, *supra* note 25, at 614.

<sup>62</sup> HART, *CONCEPT OF LAW*, *supra* note 37, at 129.

<sup>63</sup> *Id.* at 127.

<sup>64</sup> *Id.*

<sup>65</sup> HART, *ESSAYS*, *supra* note 32, at 107.

<sup>66</sup> *Id.* at 106; *see also* HART, *CONCEPT OF LAW*, *supra* note 37, at 135-36.

### III. LAW AS CONSTRAINT: AN ACCOUNT OF THE JUDGMENTS ACCORDING TO FREDERICK SCHAUER'S FORMALISM

This part analyzes the judgments of the New York judiciary in the lawsuits initiated by the NhRP, characterizing much of the judgments as a manifestation of Schauer's formalism. The courts found the term "person" excluded chimpanzees and bound them to deny the petitioner's claims, embodying Schauer's argument that language can carry certain, acontextual meaning. The courts remained unpersuaded by the petitioner's appeal to the purpose of the writ to compel the inclusion of the chimpanzees within the definition of "person," reflecting Schauer's refusal to allow a rule's purpose to displace its language. In determining the availability of the writ of habeas corpus to the chimpanzees, the courts refuted the relevance of slavery precedents proffered by the petitioners, confining the writ to humans and those with the ability to bear rights and duties as humans do. This reasoning resembles Schauer's concern for the uniform application of rules to all members of a specified category in the interests of predictability. Finally, the courts emulated Schauer's ideal of rule-based constraint by their reluctance to award the petition in the absence of precedent, and deference to the legislature in the expansion of habeas corpus to nonhumans.

#### *a. The words of the statute are dispositive of the matter*

The New York judiciary deemed the term "person," as it appears in Article 70, to have an apparent, literal meaning.<sup>67</sup> Recognizing that "person" is not defined by the legislation, the Appellate Division consulted case law to substantiate its conclusion that the writ is unavailable to the petitioner chimpanzees.<sup>68</sup> According to the court, a survey of the common law compelled a finding that chimpanzees fall outside Article 70's ambit.<sup>69</sup> The court stated that "[p]etitioner does not cite any precedent—and there appears to be none—in state law, or under English common law, that an animal could be considered a 'person' for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity."<sup>70</sup> Finding the term "person" to bear a certain and widely accepted meaning exclusive of chimpanzees,<sup>71</sup> the Appellate Division reflected Schauer's claim that

<sup>67</sup> Schauer, *Formalism*, *supra* note 39, at 525.

<sup>68</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 251.

<sup>69</sup> *Id.* at 250.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 250-51; *see* Transcript of Oral Argument at 7, *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014) (No. 518336) [hereinafter Tommy Transcript 2014]; Tommy Transcript 2013, *supra* note 3, at 12; *see* Hercules Order, *supra* note 4, at 2.

terms such as “dog”—or in this case, “person”—are somewhat precise and usually uncontested.<sup>72</sup> Reliance on this high degree of unanimity to support the court’s definition of “person” reflected Schauer’s argument that the partial acontextuality of language<sup>73</sup> enables communities to “possess shared understandings”<sup>74</sup> of language and, by extension, rules.<sup>75</sup> This fact remains notwithstanding the fact that meaning may be enhanced by context.<sup>76</sup> The relevant community, being a legal one, does not detract from the universality of language within that subset of English speakers, which can understand “plain (legal) meanings.”<sup>77</sup> To the Appellate Division, the term “person” for the purpose of habeas corpus has a plain legal meaning, commonly accepted by the community in which it is used; this meaning includes only humans.<sup>78</sup>

Having established that the weight of case law is against the petitioner’s claim to personhood for the purpose of habeas corpus, the Appellate Division reasoned that the ability to bear rights and duties was a touchstone of legal personhood.<sup>79</sup> The court stated that “Black’s Law Dictionary defines the term ‘person’ as ‘[a] human being’ or... ‘[a] n entity (such as a corporation) that is recognized by law as having the *rights and duties* [of] a human being.’”<sup>80</sup> Further, the court stated that case law supported this formulation.<sup>81</sup> The court’s citation of a legal dictionary and consequent definition of “person” through the articulation of mandatory characteristics strongly resembles Schauer’s formalist method. Schauer challenges a critical premise of Hart’s “No

<sup>72</sup> Frederick Schauer, *Formalism: Legal, Constitutional, Judicial*, in *The Oxford Handbook of Law and Politics* 428, 430 (2008) [hereinafter Schauer, *Formalism: Legal*].

<sup>73</sup> Schauer, *Formalism*, *supra* note 39, at 527; see Schauer, *Vehicles in the Park*, *supra* note 24, at 1120; see SCHAUER, *PLAYING BY THE RULES*, *supra* note 42.

<sup>74</sup> Schauer, *Formalism*, *supra* note 39, at 526-27.

<sup>75</sup> *Id.* at 527-28.

<sup>76</sup> *Id.* at 527; see SCHAUER, *PLAYING BY THE RULES*, *supra* note 42, at 58.

<sup>77</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1123.

<sup>78</sup> *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 251; see *Nonhuman Rights Project v. Lavery*, 54 N.Y.S.3d at 395.

<sup>79</sup> *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 250-51.

<sup>80</sup> *Id.* at 250 (emphasis added); see Elizabeth Stein, *Legal Persons Capable of Rights or Duties, not Rights and Duties*, NONHUMAN RIGHTS PROJECT (Apr. 6, 2017), <https://www.nonhumanrights.org/blog/rights-or-duties/> (discussing how, in early 2017, the NhRP became aware of a possible error in the definition of “person” in Black’s Law Dictionary. The source from which the definition is drawn defines a person as capable of bearing rights *or* duties. The NhRP emailed the editor of the publication, who indicated the definition had been marked for correction for the next edition.); Lauren Choplin, *Black’s Law Dictionary to Correct Definition of Person in Response to Nonhuman Rights Project Request*, NONHUMAN RIGHTS PROJECT (Apr. 11, 2017), <https://www.nonhumanrights.org/media-center/04-11-17-media-release-blacks-law/>.

<sup>81</sup> *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 251.

Vehicles in the Park” illustration,<sup>82</sup> positing that “[i]f it cannot move, it might be said, it is not a vehicle[,]”<sup>83</sup> and adding by footnote, “[n]ot only might it be said, it has been said. The *Shorter Oxford English Dictionary* includes within its definition of ‘vehicle’ that the thing must be a ‘means of conveyance.’”<sup>84</sup> Thus, in a manner strikingly similar to Schauer,<sup>85</sup> the Appellate Division exhibited formalist reasoning by relying on a dictionary definition to determine the literal meaning of the rule in Article 70.<sup>86</sup>

In the second round of proceedings launched on behalf of Hercules and Leo, Judge Jaffe affirmed the fluidity of the concept of personhood did not derogate from the present certainty of the term’s definition; further, that phenomena can transition the status of property to personhood is a crucial argument advanced by the petitioners.<sup>87</sup> In particular, the petitioner analogized *Somerset v. Stewart*,<sup>88</sup> where a slave successfully applied to the court for a writ of habeas corpus, and in doing so, acquired the rights attached to legal personhood.<sup>89</sup> Judge Jaffe acknowledged legal personhood has expanded over time.<sup>90</sup> She observed that “[i]f rights were defined by who exercised them in the past, then received practices would serve as their own continued justification and new groups could not invoke rights once denied.”<sup>91</sup> However, Judge Jaffe held that the petitioner could not analogize “[t]he past mistreatment of humans”<sup>92</sup> to secure personhood for nonhumans. In this way, Judge Jaffe recognized the constancy of the term “person.” This manifests the formalist notion that, although “the rules of language reflect a range of political, social, and cultural factors that are hardly *a priori*...this artificiality and contingency does not deny the short term, or even intermediate-term, non[-]contingency of meaning.”<sup>93</sup> Judge Jaffe adhered to the plain meaning carried by the term “person” at the time of proceedings,<sup>94</sup> finding that the property status of chimpanzees

<sup>82</sup> Hart, *Positivism*, *supra* note 25, at 607-15.

<sup>83</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1116; see also Schauer, *Formalism*, *supra* note 39, at 533.

<sup>84</sup> Schauer, *Vehicles in the Park*, *supra* note 24, at 1116, n. 23.

<sup>85</sup> *Id.*; see Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 878 (1991).

<sup>86</sup> Schauer, *Formalism*, *supra* note 39, at 525.

<sup>87</sup> See Hercules Transcript 2015, *supra* note 2, at 41.

<sup>88</sup> *Somerset v. Stewart*, [1772]98 Eng. Rep. 499 (K.B.); see Wise, *supra* note 18, at 1-2.

<sup>89</sup> See Hercules Transcript 2015, *supra* note 2, at 54.

<sup>90</sup> *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d at 911-12.

<sup>91</sup> *Id.* at 912 (citing *Obergefell v. Hodges*, 135 U.S. 2584 (2015)).

<sup>92</sup> *Id.*

<sup>93</sup> Schauer, *Formalism*, *supra* note 39, at 524; see also Schauer, *Vehicles in the Park*, *supra* note 24, at 1121.

<sup>94</sup> See Schauer, *Vehicles in the Park*, *supra* note 24, at 1121.

precludes their characterization as persons for the purpose of habeas corpus.<sup>95</sup>

By determining the matter in accordance with the definition to which they ascribe the term “person” for the purpose of Article 70, the courts illustrate how the language of a rule can constrain judicial decision-making.<sup>96</sup> The Appellate Division elucidated the reasoning by which it concluded the term “person,” as it appears in Article 70, referred to humans and excluded chimpanzees.<sup>97</sup> Prior courts simply accepted this as the definition and found they were accordingly bound to deny the claim. In the first round of proceedings initiated on behalf of Tommy, Judge Sise queried the petitioner, stating “[s]o, what is it that you are asking the Court to do in terms of Article 70, make an exception for chimpanzees only?... You understand the question, right, the legal reasoning or the legal conundrum the Court is in based on your argument?”<sup>98</sup> Similarly, in the first action launched with respect to Hercules and Leo, Judge Asher affirmed in a single paragraph judgment that, as Article 70 “applies to persons, habeas corpus does not lie.”<sup>99</sup> Despite sympathizing with the petitioner’s arguments in the second action, Judge Jaffe acknowledged she was bound by precedent to deny the petition.<sup>100</sup> The courts’ formulation of the term “person” is decisive to their denial of relief and actualizes the formalist claim that rules can limit judicial choice where there is a “rigid requirement that the decision follow the statutory language.”<sup>101</sup>

The retention of these outcomes in the face of judicial concessions of their normative unsuitability to the petitioner observes formalism’s requirement that rules be adhered to even where their application produces undesirable results.<sup>102</sup> Despite rejecting the petitioner’s claims, several judges recognized the claims’ legitimacy. This demonstrates a formalist preparedness to apply “the most locally applicable” rule,<sup>103</sup> even if this results in a suboptimal outcome. Judge Sise, denying Tommy’s initial application for a writ of habeas corpus, acknowledged the merit behind the claim:

I will be available as the judge for any other lawsuit to right any wrongs that are done to this chimpanzee because I understand what you’re saying. You make a very strong argument. However, I do not agree

<sup>95</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 912.

<sup>96</sup> Schauer, *Formalism*, supra note 39, at 510.

<sup>97</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 251.

<sup>98</sup> Tommy Transcript 2013, supra note 3, at 17.

<sup>99</sup> Hercules Order, supra note 4, at 2.

<sup>100</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 918.

<sup>101</sup> Schauer, *Formalism*, supra note 39, at 521, 538.

<sup>102</sup> *Id.* at 531.

<sup>103</sup> *Id.* at 521; see also Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. L. REV. 645, 685 (1991) [hereinafter Schauer, *Rules*].

with the argument only insofar as Article 70 applies to chimpanzees.<sup>104</sup>

Although Judge Boniello implicitly recognized the petitioner’s argument as persuasive, he refused to accept it and concluded he was “not prepared to make this leap of faith.”<sup>105</sup> Further, in the second petition to the court on behalf of Hercules and Leo, Judge Jaffe remarked that “[e]fforts to extend legal rights to chimpanzees are... understandable; some day they may even succeed.”<sup>106</sup> By holding the rule prevailed over any divergent result which may be produced by the judges’ “all-things-considered”<sup>107</sup> assessment of the cases, the courts reflect the formalist practice of adhering to the plain meaning of the rule, in spite of “plausible arguments”<sup>108</sup> for deciding differently. This practice stems from a court’s understanding of its role.<sup>109</sup> Informing this is the formalist view that an undesirable outcome produced by a rule is “the price to be paid for refusing to empower judges... with the authority to modify the language of a rule in the service of what they think, perhaps mistakenly, is the best outcome.”<sup>110</sup> The New York judiciary therefore considered the term “person” as it appears in Article 70 to have a clear, determinate meaning, which operates to constrain courts and compel their denial of the petitioner’s claims.

*b. The rule’s purpose is irrelevant to the determination of its content*

The New York judiciary evinced a reluctance to engage with the petitioner’s submission that the grant of habeas corpus relief in these proceedings would be consistent with the writ’s purpose.<sup>111</sup> Throughout the proceedings, the petitioner argued the chimpanzees were entitled to relief under Article 70 because the purpose of habeas corpus is to protect autonomous beings.<sup>112</sup> In Tommy’s appeal, the following exchange took place between the court and the petitioner:

<sup>104</sup> Tommy Transcript 2013, supra note 3, at 26; see also Nonhuman Rights Project v. Lavery, 54 N.Y.S.3d at 397.

<sup>105</sup> Kiko Transcript 2013, supra note 5, at 15.

<sup>106</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 917.

<sup>107</sup> Schauer, *Formalism: Legal*, supra note 72, at 431; see Schauer, *Limited Domain*, supra note 51, at 1939; see also Schauer, *Formalism*, supra note 39, at 531.

<sup>108</sup> Schauer, *Formalism: Legal*, supra note 72, at 431.

<sup>109</sup> Schauer, *Limited Domain*, supra note 51, at 1939.

<sup>110</sup> Schauer, *Vehicles in the Park*, supra note 24, at 1129; see Schauer, *Formalism*, supra note 39, at 525; see Schauer, *Rules*, supra note 103, at 673; see also Frederick Schauer, *Do Cases Make Bad Law?*, U. CHI. L. REV. 883, 908 (2006) [hereinafter Schauer, *Bad Law*]; cf. Frederick Schauer, *The Practice and Problems of Plain Meaning*, 45 VAND. L. REV. 715, 719 (1992) [hereinafter Schauer, *The Practice*].

<sup>111</sup> See Schauer, *Formalism*, supra note 39, at 532-35.

<sup>112</sup> Hercules Transcript 2015, supra note 2, at 37.

WISE: So Tommy has the autonomy and self-determination that is sufficient for him to be a legal person, and he can understand that he does not want to be imprisoned, for his life in a cage, which he has been.

JUDGE MICHAEL LYNCH: Mr. Wise, if I may?

WISE: Yes, your Honor.

JUDGE MICHAEL LYNCH: You've used several examples of what constitutes a legal person.... We're talking about habeas corpus and the word 'person' in the concept of a habeas corpus application in the common law understanding of the word 'person.' I look at Black's Law Dictionary, and it defines 'person' to begin this way: 'In general usage, a human being. That is, a natural person.' Can you give any example anywhere, where in a habeas corpus context, the word 'person' has been attributed to a nonhuman being?<sup>113</sup>

The modes of reasoning applied by the petitioner and Judge Lynch tend towards distinct conclusions because, unlike language, purpose is not expressed by a "concrete set of words [such] that it retains its sensitivity to novel cases, to bizarre applications."<sup>114</sup> To illustrate this, Schauer refers to the "No Vehicles In The Park" example:<sup>115</sup> "commonly...specific rules embody less specific purposes, as when, canonically, the 'No Vehicles in the Park' rule is written in order to instantiate a more general purpose of achieving quiet and decorum in public parks."<sup>116</sup> Whereas the petitioner's appeal to the writ's purpose militates in its favor, Judge Lynch's formalist fidelity to the rule's words and their semantic meaning opposes any award of habeas corpus.<sup>117</sup>

In its judgment, the court refused to allow the rule to be displaced in the service of its purpose, finding that "[w]hile petitioner proffer[ed] various justifications for affording...Tommy the liberty rights protected by such writ has historically been connected with the imposition of

<sup>113</sup> Tommy Transcript 2014, *supra* note 71, at 7.

<sup>114</sup> Schauer, *Formalism*, *supra* note 39, at 532, 535; *see also* Schauer, *The Practice*, *supra* note 110, at 719-20; *see also* SCHAUER, PLAYING BY THE RULES, *supra* note 42, at 55; *see also* Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 781 (2010).

<sup>115</sup> Hart, *Positivism*, *supra* note 25, at 607-15.

<sup>116</sup> Frederick Schauer, *The Convergence of Law and Standards*, 2003 N.Z. L. REV. 303, 314-15 (2003) [hereinafter Schauer, *The Convergence*].

<sup>117</sup> *See* Tommy Transcript 2014, *supra* note 71, at 7.

societal obligations and duties" and "legal personhood has consistently been defined in terms of both rights and duties."<sup>118</sup> Maintaining that a rule's purpose cannot defeat its text,<sup>119</sup> as this would "collapse the distinction between a rule and a reason,"<sup>120</sup> the court exhibited constraint by the words of a rule that was characteristic of formalist decision-making.<sup>121</sup> This constraint substantiates Schauer's claim that "[b]y limiting access to the reasons behind the rule, rules truncate the array of considerations available to a decision[-]maker. Rules get in the way."<sup>122</sup> The reasoning of the Appellate Division bound Judge Jaffe,<sup>123</sup> who also refused to allow a rule's operation to be displaced by its purpose. Judge Jaffe recognized the writ of habeas corpus should have been interpreted "in harmony"<sup>124</sup> with its purpose and identified that the writ is "deeply rooted in our cherished ideas of individual autonomy and free choice."<sup>125</sup> However, Judge Jaffe found that autonomy alone does not give rise to an entitlement to rights.<sup>126</sup> Accepting the binding precedent of the Appellate Division to deny habeas corpus relief,<sup>127</sup> "the rule,"<sup>128</sup> as construed by the Appellate Division, "itself becomes a reason for"<sup>129</sup> Judge Jaffe's decision, reflecting formalist theory.

### *c. The rule extends to the category of "humans"*

Disclaiming the relevance of cases in which slaves were awarded writs of habeas corpus to the petitioner's claims, the New York judiciary exhibited a formalist approach to the application of precedent. Referencing *Somerset*<sup>130</sup> and *Lemmon v. People*,<sup>131</sup> the petitioner argued that, as slaves invoked habeas corpus to "challenge their imprisonment as things,"<sup>132</sup> the chimpanzees could employ the writ to contest their

<sup>118</sup> *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 250.

<sup>119</sup> Schauer, *Formalism*, *supra* note 39, at 534; *see also* Schauer, *Formalism: Legal*, *supra* note 72; *cf.* Schauer, *The Convergence*, *supra* note 116, at 315.

<sup>120</sup> Schauer, *Formalism*, *supra* note 39, at 534, 537.

<sup>121</sup> *Id.* at 522-30.

<sup>122</sup> *Id.* at 536-37; *see also* SCHAUER, PLAYING BY THE RULES, *supra* note 42, at 32.

<sup>123</sup> *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d at 918.

<sup>124</sup> *Id.* at 904.

<sup>125</sup> *Id.* at 903.

<sup>126</sup> *Id.* at 911.

<sup>127</sup> *Id.* at 917.

<sup>128</sup> Schauer, *Formalism*, *supra* note 39, at 537.

<sup>129</sup> *Id.*; *see also* SCHAUER, PLAYING BY THE RULES, *supra* note 42, at 76.

<sup>130</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>131</sup> *Lemmon v. People*, 20 N.Y. 562 (1860).

<sup>132</sup> Petitioner's Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy at 46-47, *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014) [hereinafter Tommy Memo 2013]; Hercules Memo 2013, *supra*

captivity. In Tommy's case, Judge Sise comprehensively dismissed the petitioner's attempt to analogize *Lemmon*<sup>133</sup> and *Somerset*,<sup>134</sup> stating the "[c]ourt's not even going to consider that as synonymous.... I'm just telling you, the Court will reject that argument, the argument that the cases involving human-beings who were slaves in the 1800s as synonymous with a chimpanzee. I reject it."<sup>135</sup> In a similar tone, Judge Peters refused to entertain the petitioner's invocation of *Somerset*<sup>136</sup> as precedent in the Appellate Division, warning, "I have to tell you I keep having a difficult time with your using slavery as an analogy to this situation, I just have to tell you that."<sup>137</sup> Denying the applicability of a case involving human slavery to the chimpanzees' captivity, the courts adhere to Schauer's formalist theory of precedent.<sup>138</sup> Schauer states that "[u]nder a rigid formalistic conception of precedent, rules of relevance track the natural and largely immutable patterns of the world around us, creating therefore no real choice among rules of relevance on the part of either the creator or the follower of a precedent."<sup>139</sup> To the courts, because humans and chimpanzees do not fall within a single "category of assimilation"<sup>140</sup> this causes an inexorable conclusion flowing from the "truncation of real world richness that comes from thinking about the world in large and rough groupings."<sup>141</sup> Exhibiting "significant resistance to any decision that would disregard [those] categor[ies],"<sup>142</sup> the courts rejected the applicability of *Somerset*<sup>143</sup> and *Lemmon*<sup>144</sup> to the chimpanzees' petitions for habeas corpus.

In the second filing of Hercules and Leo's claim, Judge Jaffe emphasized that the capacity of the term "person" in Article 70 to be modified over time did not preclude its fixity in the present.<sup>145</sup> Despite empathizing with the petitioner's progressive agenda,<sup>146</sup> Judge Jaffe held the historical extension of personhood to marginalized groups

note 14, at 46-47; Memorandum of Law in Support of Order to Show Cause and Writ of Habeas Corpus and Order Granting the Immediate Release of Kiko at 46-47, Nonhuman Rights Project *ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015) [hereinafter Kiko Memo 2013].

<sup>133</sup> *Lemmon*, 20 N.Y. 562.

<sup>134</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>135</sup> Tommy Transcript 2013, *supra* note 3, at 12.

<sup>136</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>137</sup> Tommy Transcript 2014, *supra* note 71, at 6.

<sup>138</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**

<sup>139</sup> *Id.* at 582-83.

<sup>140</sup> *Id.* at 585-86.

<sup>141</sup> *Id.* at 591.

<sup>142</sup> *Id.* at 585.

<sup>143</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>144</sup> *Lemmon*, 20 N.Y. 562.

<sup>145</sup> See Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 585-87.

<sup>146</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 917.

of humans did not "serve as a legal predicate or appropriate analogy for extending to nonhumans the status of legal personhood."<sup>147</sup> This reasoning embodied Schauer's observation that "rules of relevance are unquestionably contingent and subject to change. But if these rules of relevance come to legal decision[-]makers from the larger linguistic and social environment, we would be mistaken to call them contingent within the legal decision[-]making subculture."<sup>148</sup> Commenting on the appropriateness of extending the definition of "person" in the context of habeas corpus to nonhumans, Judge Jaffe affirmed that "the parameters of legal personhood have long been and will continue to be" debated, focusing on "the proper allocation of rights under the law."<sup>149</sup> Judge Jaffe rejected the petitioner's invocation of the transition from property to personhood<sup>150</sup> by the slaves in *Somerset*<sup>151</sup> and *Lemmon*<sup>152</sup> as a precedent for chimpanzees. This reflects formalist reasoning that not "all characterizations of a past event are always up for grabs."<sup>153</sup>

In addition to denying the relevance of human slavery precedents, the courts held humans and those possessing the ability to bear the rights and duties of humans<sup>154</sup> exhaust the category denoted by "person."<sup>155</sup> The courts circumscribed the term as it appears in Article 70 by reference to its historical application, reflecting the formalist notion that "rules force the future into the categories of the past."<sup>156</sup> In the second filing of Hercules and Leo's case, Judge Jaffe adopted the person-property dichotomy, explaining that "[p]ersons have rights, duties and obligations; things do not."<sup>157</sup> Judge Jaffe concluded that as property, animals are necessarily excluded from personhood,<sup>158</sup> exemplifying the constraining effect of categories<sup>159</sup> on the formalist judge. Similarly, the Appellate Division observed that "legal personhood has consistently been defined in terms of both rights *and duties*."<sup>160</sup> To the court,

<sup>147</sup> *Id.* at 912.

<sup>148</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 586.

<sup>149</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 912.

<sup>150</sup> Hercules Transcript 2015, *supra* note 2, at 41.

<sup>151</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>152</sup> *Lemmon*, 20 N.Y. 562.

<sup>153</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 587.

<sup>154</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 249-52; Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 913.

<sup>155</sup> See generally Schauer, *Formalism*, *supra* note 39, at 534, 539-40, 542; Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**; Schauer, *Exceptions*, *supra* note 85, at 878.

<sup>156</sup> Schauer, *Formalism*, *supra* note 39, at 542.

<sup>157</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 912.

<sup>158</sup> *Id.*

<sup>159</sup> See Schauer, *Formalism*, *supra* note 39, at 540; see also Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 587-88.

<sup>160</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 250-51 (emphasis added); see also Nonhuman Rights Project v. Lavery, 54 N.Y.S.3d at 396.

Tommy’s inability to possess legal duties made it “inappropriate”<sup>161</sup> to extend to him the liberty rights associated with the writ of habeas corpus. That humans are paradigmatic persons, whose characteristics represent the criteria for entry into the category,<sup>162</sup> is further established by the court’s disclaimer that “some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility.”<sup>163</sup> Just as the rule prohibiting vehicles from the park includes unproblematic vehicles,<sup>164</sup> a rule applying to “persons” includes humans who lack a capacity to bear the kind of duties that a right to liberty reciprocates.<sup>165</sup> Thus, the court’s decision to exclude chimpanzees from the category of person, while admitting all humans, may be reconciled as a “decision to treat all instances falling within some accessible category in the same way.”<sup>166</sup> This promotes the formalist virtue of predictability.<sup>167</sup>

*d. The impermissibility of expanding the writ through the common law*

The significance attributed by the New York judiciary to the absence of precedent in favor of the petitioner’s claim and its reluctance to expand the writ of habeas corpus to include chimpanzees exemplified precedential constraint.<sup>168</sup> In response to the petitioner’s claim that “person” as it appears in Article 70 includes chimpanzees,<sup>169</sup> the courts sought the production of precedent to support the petitioner’s interpretation.<sup>170</sup> Formalist “ruleness”<sup>171</sup> characterizes the courts’ approach to both legislation and precedent and reveals its pervasiveness; as Schauer recognizes, there is an “affinity between rule-based and

precedent-based decision making”<sup>172</sup> within judiciaries upholding the virtue of predictability. In addition to fostering reliance upon the constraint of precedent, the courts’ formalist style manifests in an unwillingness to disturb Article 70’s existing reach. In Kiko’s case, Judge Boniello’s unwillingness to be the first to recognize chimpanzees as persons for the purpose of habeas corpus illustrates the immobilizing effect of a lack of precedent.<sup>173</sup> This display of caution reflects Schauer’s claim that legal “interpretation ought to be modest, avoiding taking the fortuitous case as occasion for altering the nature of the rule.”<sup>174</sup> Schauer’s theory recognizes that judges may be constrained by an awareness that the “current decisionmaker of today is the previous decisionmaker of tomorrow.”<sup>175</sup> Schauer’s theory also warns the salient features of an instant case may yield a precedential decision which is “suboptimal” in the cases to follow.<sup>176</sup> The courts’ refusal to extend the writ to cure its under-inclusion reflects these formalist concerns.<sup>177</sup>

Throughout the proceedings, the New York judiciary deferred the question raised by the petitioner to the legislature, evincing a commitment to “decision[-]making by rule[,]”<sup>178</sup> resembling formalist theory. Rejecting the petitioner’s claims, the Appellate Division nonetheless identified it was “fully able to importune the legislature to extend further protections to chimpanzees.”<sup>179</sup> While recognizing the continued legitimacy of superior judicial law-making, Judge Jaffe similarly asserted that “the issue of a chimpanzee’s right to invoke the writ of habeas corpus is best decided, if not by the legislature, then by the Court of Appeals, given its role in setting state policy.”<sup>180</sup> In these decisions, the “courts refuse to make what *to them* appear to be wise all-things-considered changes in common or statutory law, believing that such changes are for a legislature and not for a legal system.”<sup>181</sup> The petitioner needing to secure such legislative change to be successful exhibits the courts’ “rigid adherence to the most locally applicable statute”<sup>182</sup> currently in force, typical of formalism.

<sup>161</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 251.

<sup>162</sup> *Id.* at 249-51.

<sup>163</sup> *Id.* at 251; *see also* Nonhuman Rights Project v. Lavery, 54 N.Y.S.3d at 396.

<sup>164</sup> Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 230 (2004).

<sup>165</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 249-51; Schauer, *Formalism*, *supra* note 39, at 540.

<sup>166</sup> Schauer, *Formalism*, *supra* note 39, at 539.

<sup>167</sup> *Id.* at 539-42, 547.

<sup>168</sup> *See* Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 582-83.

<sup>169</sup> *See, e.g.*, Tommy Memo 2013, *supra* note 132, at 44; Hercules Memo 2013, *supra* note 14, at 44; Kiko Memo 2013, *supra* note 132, at 44.

<sup>170</sup> Tommy Transcript 2013, *supra* note 3, at 104; Tommy Transcript 2014, *supra* note 71, at 7; *see also* Nonhuman Rights Project v. Lavery, 54 N.Y.S.3d at 395-96.

<sup>171</sup> SCHAUER, PLAYING BY THE RULES, *supra* note 42, at 182.

<sup>172</sup> *Id.*

<sup>173</sup> Kiko Transcript 2013, *supra* note 5, at 11, 15.

<sup>174</sup> SCHAUER, PLAYING BY THE RULES, *supra* note 42, at 227.

<sup>175</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 588.

<sup>176</sup> Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L. J. 765, 779 (2004) [hereinafter Schauer, *Failure of the Common Law*]; *see* Schauer, *Bad Law*, *supra* note 110, at 918.

<sup>177</sup> Schauer, *Rules*, *supra* note 103, at 658.

<sup>178</sup> Schauer, *Formalism*, *supra* note 39, at 510; *see also* Schauer, *Vehicles in the Park*, *supra* note 24, at 1134.

<sup>179</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 252; *see also* Nonhuman Rights Project v. Lavery, 54 N.Y.S.3d at 397.

<sup>180</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 917.

<sup>181</sup> Schauer, *Domain*, *supra* note 51, at 1939 (emphasis added).

<sup>182</sup> Schauer, *Formalism*, *supra* note 39, at 521.

#### IV. LAW AS OPEN-TEXTURED: A CRITIQUE OF THE JUDGMENTS ACCORDING TO H. L. A. HART’S THEORY OF LEGAL INDETERMINACY

This part analyzes the amenability of a court adopting Hart’s theory of legal indeterminacy to the arguments advanced by the petitioner in the NhRP litigation. A Hartian court would appreciate that, in addition to its core, the term “person” as it appears in Article 70 has a penumbra of meaning, which may encompass chimpanzees. Conscious of the relevance of non-legal influences to the disposition of cases in which a rule proves indeterminate, a Hartian court would be more receptive to the petitioner’s claim that recognition of the chimpanzees as legal persons coheres with the New York common law’s concern for autonomy. A court influenced by Hart’s theory may also be favorable to the petitioner’s argument that habeas corpus should be extended to chimpanzees, as they exhibit the kind of autonomy possessed by humans, which the writ’s purpose is to protect. Finally, as Hart endorses judicial choice where a legal rule proves indeterminate, a court adopting his jurisprudence may analogically extend the writ of habeas corpus to nonhuman chimpanzees.

##### *a. Legal rules have a core and a penumbra of meaning*

Although the New York judiciary recognized the term “person” was undefined by the relevant statute,<sup>183</sup> its narrow recourse to external definitions denied the term’s indeterminacy, a feature a Hartian court would advert.<sup>184</sup> Hart maintains that when reasoning in the penumbra, courts cannot merely rely upon “logical deduction,”<sup>185</sup> as this cannot “determine the interpretation of words or the scope of classifications.”<sup>186</sup> Similarly, the question of a rule’s applicability to a penumbral case cannot be formulaically resolved by “linguistic rules or conventions.”<sup>187</sup> Violating these proscriptions, the New York courts “mechanically” concluded a chimpanzee could not be considered a person.<sup>188</sup> Having established Black’s Law Dictionary and case law limit personhood to

<sup>183</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 249; Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 911.

<sup>184</sup> See HART, CONCEPT, *supra* note 37, at 126, 128; see also HART, ESSAYS, *supra* note 32, at 103-05.

<sup>185</sup> Hart, *Positivism*, *supra* note 25, at 607-08.

<sup>186</sup> HART, ESSAYS, *supra* note 32, at 104.

<sup>187</sup> *Id.* at 103.

<sup>188</sup> See Hart, *Positivism*, *supra* note 25, at 615; H. L. A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 956 (1957) [hereinafter Hart, *Analytical*]; H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652, 662 (2013) [hereinafter Hart, *Discretion*].

those with a reciprocal capacity for rights and duties,<sup>189</sup> the Appellate Division held the chimpanzees’ “incapability to bear any legal responsibilities and societal duties...renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.”<sup>190</sup> The Appellate Division and Judge Jaffe construed the term “person” according to the meaning ascribed to it in a different context.<sup>191</sup> While definitions are often harmless,<sup>192</sup> Hart claims their application to legal concepts can engender “distortion or mystery” where the complexity of law demands explanation and clarification.<sup>193</sup> The demarcation of a term’s scope by reference to its historical construction also prejudices how a court should determine a case’s features, which cannot be identified in advance.<sup>194</sup> To Hart, these methods unacceptably impose a “cramping framework...upon the inquiry into the character of these concepts”<sup>195</sup> and entrench “rigid classifications and divisions,”<sup>196</sup> fallaciously denying the undefined ambit of general rules.<sup>197</sup>

Conversely, the petitioner’s submission that Tommy, Kiko, Hercules, and Leo were entitled to a writ of habeas corpus was premised upon the indeterminacy of the term “person” as it appears in Article 70. Denying personhood as a natural or biological designation, the petitioner submitted that it was a legal construct conferred upon those who “count in law.”<sup>198</sup> The designation of “person” is a question of “public policy.”<sup>199</sup> As such, those who the courts deem “persons” in the context of habeas corpus may invoke Article 70.<sup>200</sup> Emphasizing the role of the judge in determining who qualifies as a “person,” the petitioner’s claim reflected Hart’s proposition that general rules compel “judicial choice”<sup>201</sup> as being “vague;”<sup>202</sup> they “cannot claim their own instances”<sup>203</sup> or “provide for

<sup>189</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 251.

<sup>190</sup> *Id.*

<sup>191</sup> See HART, ESSAYS, *supra* note 32, at 104.

<sup>192</sup> Hart, *Analytical*, *supra* note 188, at 960-61.

<sup>193</sup> *Id.*

<sup>194</sup> HART, ESSAYS, *supra* note 32, at 104.

<sup>195</sup> Hart, *Analytical*, *supra* note 188, at 960-61.

<sup>196</sup> HART, ESSAYS, *supra* note 32, at 104.

<sup>197</sup> See also HART, CONCEPT, *supra* note 37, at 130.

<sup>198</sup> Tommy Memo 2013, *supra* note 132, at 40-42; Hercules Memo 2013, *supra* note 14, at 40-42; Kiko Memo 2013, *supra* note 132, at 40-42.

<sup>199</sup> Transcript of Oral Argument at 4-5, Nonhuman Rights Project *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015) [hereinafter Kiko Transcript 2014].

<sup>200</sup> Tommy Transcript 2014, *supra* note 71, at 2.

<sup>201</sup> Hart, *Scandinavian Realism*, *supra* note 60, at 239.

<sup>202</sup> H. L. A. Hart, *Dias and Hughes on Jurisprudence*, 4 J. SOC’Y PUB. TCHRS. L. 143, 144 (1957-1958) [hereinafter Hart, *Dias*].

<sup>203</sup> HART, ESSAYS, *supra* note 32, at 106.

their own interpretation.”<sup>204</sup> Hart posits that this indeterminacy is a consequence of a general rule’s inability to comprehensively anticipate the instances to which it will apply.<sup>205</sup> Referring to the “struggles over the legal personhood of human fetuses, human slaves, Native Americans, women, [and] corporations,”<sup>206</sup> the petitioner emphasized that phenomena may acquire personhood notwithstanding that it was once denied. The petitioner relied on the limited ability of rules to exhaustively predetermine their scope to support its contention that it does not follow from the chimpanzees’ species that they “may never count as... legal person[s].”<sup>207</sup> Diverging from its formalist equivalents, a court adopting Hart’s jurisprudence may be persuaded by the petitioner’s claim that personhood has an “open texture,”<sup>208</sup> having been accorded to those valued by law from time to time, rather than to a settled class.

Rejecting the legal indeterminacy of personhood, the courts recognized only its “clear”<sup>209</sup> or “familiar”<sup>210</sup> incarnations, foreclosing their consideration of chimpanzees as persons for the purpose of Article 70. According to Hart, a general rule has a “core of settled meaning” and a “penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”<sup>211</sup> The instances in the penumbra will resemble the core cases in some ways.<sup>212</sup> The New York judiciary’s refusal to deem chimpanzees “penumbral”<sup>213</sup> persons flows from its circumscription of personhood for the purpose of habeas corpus to those who have historically been awarded the writ: human beings. In Kiko’s case, Judge Boniello’s focus upon the “plain case” of persons is exhibited by the following exchange:<sup>214</sup>

WISE: A legal person is not a human-being. A legal person is an entity of whatever kind—a river, a holy book, a corporation, a ship—that the legal system... holds... has interests that should be protected... We ask this court then to recognize that [Kiko] is a legal person. That he does have this fundamental right. That it is protected by a common law writ of habeas corpus.

<sup>204</sup> HART, CONCEPT, *supra* note 37, at 126.

<sup>205</sup> HART, ESSAYS, *supra* note 32, at 103.

<sup>206</sup> Tommy Memo 2013, *supra* note 132, at 42; Hercules Memo 2013, *supra* note 14, at 42; Kiko Memo 2013, *supra* note 132, at 42.

<sup>207</sup> Tommy Memo 2013, *supra* note 132, at 43; Hercules Memo 2013, *supra* note 14, at 43; Kiko Memo 2013, *supra* note 132, at 43.

<sup>208</sup> HART, CONCEPT, *supra* note 37, at 128.

<sup>209</sup> HART, ESSAYS, *supra* note 32, at 106.

<sup>210</sup> HART, CONCEPT, *supra* note 37, at 126.

<sup>211</sup> Hart, *Positivism*, *supra* note 25, at 607; *see id.*

<sup>212</sup> Hart, *Positivism*, *supra* note 25, at 607.

<sup>213</sup> *Id.* at 614.

<sup>214</sup> HART, CONCEPT, *supra* note 37, at 126.

JUDGE RALPH BONIELLO: Do you have any case that equates a chimpanzee with a human being?

WISE: We are not claiming, your Honor, that Kiko is a human being. It’s clear that he is a chimpanzee.<sup>215</sup>

While the Appellate Division delimited personhood more expansively, including corporations as well as natural persons,<sup>216</sup> its approach evinced a similar preparedness to recognize as persons for the purpose of habeas corpus only those to whom the rule indubitably applied.<sup>217</sup> Hart rebukes exclusive concern with “core”<sup>218</sup> cases because “the totality of possible circumstances” to which a rule may apply “are not confined to such clear cases.”<sup>219</sup> While a rule prohibiting vehicles in the park operates clearly in some instances, it will also meet unanticipated phenomena like “skates, bicycles [and] toy motor cars”<sup>220</sup>—in respect of which the rule’s application is uncertain. This refutes the New York judiciary’s confinement of personhood to established phenomena<sup>221</sup> by suggesting Article 70 is apt to encounter “borderline cases”<sup>222</sup> and that, accordingly, its constituent terms do not have “a single proper meaning.”<sup>223</sup>

On the contrary, the petitioner’s claim that Tommy, Kiko, Hercules, and Leo were persons under Article 70 relied upon the amenability of the term “person,” and, by extension, the rule,<sup>224</sup> to diverse applications. Throughout both oral and written argument, the petitioner rejected the synonymy of “person” and “human.”<sup>225</sup> A “legal person” may be “narrower... broader or qualitatively different than a ‘human being.’”<sup>226</sup> To illustrate the fluidity of personhood, the petitioner recalled that “a whole spectrum of legal things, and that includes rivers

<sup>215</sup> Kiko Transcript 2013, *supra* note 5, at 10-12; *see also* Tommy Transcript 2013, *supra* note 3, at 10-13.

<sup>216</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 251.

<sup>217</sup> *See* HART, ESSAYS, *supra* note 32, at 105; Tommy Memo 2013, *supra* note 132, at 7.

<sup>218</sup> Hart, *Positivism*, *supra* note 25, at 607.

<sup>219</sup> Hart, *Discretion*, *supra* note 188, at 662.

<sup>220</sup> *Id.*

<sup>221</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 249-51; Kiko Transcript 2014, *supra* note 199, at 7; Hercules Order, *supra* note 4, at 2.

<sup>222</sup> Hart, *Dias*, *supra* note 202, at 144; Hart, *Discretion*, *supra* note 188, at 662.

<sup>223</sup> Hart, *Dias*, *supra* note 202, at 146.

<sup>224</sup> For the centrality of the open texture of words to the open texture of rules, *see* HART, CONCEPT, *supra* note 37, at 128.

<sup>225</sup> Kiko Transcript 2013, *supra* note 5, at 10-11; Tommy Transcript 2013, *supra* note 3, at 20.

<sup>226</sup> Tommy Memo 2013, *supra* note 132, at 40-41; Hercules Memo 2013, *supra* note 14, at 41; Kiko Memo 2013, *supra* note 132, at 41.

and idols and corporations and black slaves”<sup>227</sup> have successfully argued that they are persons. Despite dismissing the claim,<sup>228</sup> in Hercules and Leo’s case, Judge Jaffe accepted these submissions,<sup>229</sup> observing the concept of personhood in the United States has developed over time.<sup>230</sup> This dicta represented the most favorable to the petitioner of all the NhRP litigation.<sup>231</sup> Acknowledging personhood is not limited to humans, Judge Jaffe referenced an Oregon court’s characterization of a horse who was at risk of injury as a “person” to facilitate a warrantless search of property under a statutory power.<sup>232</sup> Recognition that personhood does not exclusively denote humanity is consistent with Hart’s argument that it is “quite arbitrary” to “treating one of the range as a paradigm by reference to which other uses of the word are condemned as improper.”<sup>233</sup> Rather, that humans are the “plain case” to which “person” clearly applies does not preclude the application of the term to other phenomena;<sup>234</sup> although a car is clearly a vehicle regulated by the “No Vehicles in the Park” rule,<sup>235</sup> an airplane may also be excluded by the rule, though such a determination is “not clear.”<sup>236</sup> While Judge Jaffe dismissed the case, she remarked that this result was dictated by precedent<sup>237</sup> and represented the presently appropriate outcome.<sup>238</sup> Judge Jaffe’s awareness that in a different context the chimpanzees may be accorded legal personhood<sup>239</sup> reflects Hart’s theory of legal indeterminacy. Another court’s similar acknowledgement that Article 70 has a penumbra of meaning, which enables it to contemplate the unclear case,<sup>240</sup> may precipitate its conferral to chimpanzees.

*b. A rule’s purpose determines its penumbral cases*

Although the New York judiciary dismissed the relevance of Article 70’s purpose to its meaning, the petitioner claimed the legal

role of the writ of habeas corpus in protecting autonomy compelled its application to chimpanzees possessing this attribute. The New York common law “powerfully values autonomy”<sup>241</sup> and is “in favor of liberty.”<sup>242</sup> These legal tenets underpin the operation of habeas corpus, as the writ exists to safeguard autonomy.<sup>243</sup> Those demonstrating this quality are eligible to benefit from the liberty rights it affords.<sup>244</sup> On this basis, the petitioner pleaded:

[A]utonomous, possessed of self-determination and the ability to choose, and dozens of allied complex cognitive capacit[ies], [the chimpanzees are] entitled to common law personhood and the common law right to bodily liberty protected by the New York common law writ of habeas corpus.<sup>245</sup>

This appeal to persuade the court the writ should be applied to chimpanzees finds support in Hart’s affirmation that penumbral cases are properly determined in accordance with the rule’s “aims, purposes, and policies.”<sup>246</sup> Appreciating that germane non-legal principles<sup>247</sup> can inform indeterminate legal rules while remaining distinct from them,<sup>248</sup> Hart’s theory is amenable to the petitioner’s argument that personhood, an undefined concept, should be granted to those with “autonomy, self-determination and choice[.]”<sup>249</sup> as these are “powerful concerns of the courts of New York.”<sup>250</sup> Such cognizance of the relevance of a rule’s purpose also pervades Hart’s recommendation that courts focus on “the function that such words performed when used in the operation of a legal system.”<sup>251</sup> Acceptance of this approach would incline the court to construe the term “person” in Article 70 congruently with its concern

<sup>227</sup> Tommy Transcript 2013, *supra* note 3, at 13.

<sup>228</sup> Nonhuman Rights Project, Inc. v. Stanley, 16 N.Y.S.3d at 917-18.

<sup>229</sup> *Id.* at 911-12.

<sup>230</sup> *Id.*

<sup>231</sup> See CAO, *supra* note 2; see Holly Lynch, What do an Orangutan and a Corporation Have in Common: Whether the Copyright Protection Afforded to Corporations Should Extend to Animals, 41(1) OHIO N. U. L. REV. 267, 280 (2015).

<sup>232</sup> State v. Fessenden, 333 P.3d 278 (Or. 2014).

<sup>233</sup> Hart, *Dias*, *supra* note 202, at 146.

<sup>234</sup> HART, CONCEPT, *supra* note 37, at 126.

<sup>235</sup> Hart, *Positivism*, *supra* note 25, at 607-15.

<sup>236</sup> HART, CONCEPT, *supra* note 37, at 126.

<sup>237</sup> Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 917-18.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> HART, CONCEPT, *supra* note 37, at 607.

<sup>241</sup> Tommy Memo 2013, *supra* note 132, at 60; Hercules Memo 2013, *supra* note 14, at 60; Kiko Memo 2013, *supra* note 132, at 60.

<sup>242</sup> Tommy Memo 2013, *supra* note 132, at 58; Hercules Memo 2013, *supra* note 14, at 58; Kiko Memo 2013, *supra* note 132, at 58.

<sup>243</sup> Kiko Transcript 2013, *supra* note 5, at 3-4; Kiko Transcript 2014, *supra* note 199, at 5; Hercules Transcript 2015, *supra* note 2, at 37-38; Nonhuman Rights Project v. Stanley, 16 N.Y.S.3d at 903.

<sup>244</sup> Tommy Transcript 2013, *supra* note 3, at 21-22.

<sup>245</sup> Tommy Memo 2013, *supra* note 132, at 62; Hercules Memo 2013, *supra* note 14, at 62; Kiko Memo 2013, *supra* note 132, at 62; *see also* Tommy Transcript 2013, *supra* note 3, at 23.

<sup>246</sup> Hart, *Positivism*, *supra* note 25, at 614.

<sup>247</sup> HART, ESSAYS, *supra* note 32, at 7-8, 107; *see also* H. L. A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11(5) GA. L. REV. 969, 979-80 (1977) [hereinafter Hart, *American*].

<sup>248</sup> Hart, *Positivism*, *supra* note 25, at 612, 615.

<sup>249</sup> Tommy Transcript 2013, *supra* note 3, at 21-23.

<sup>250</sup> *Id.*

<sup>251</sup> Hart, *Analytical*, *supra* note 188, at 961.

for autonomous beings,<sup>252</sup> which may precipitate the rule's application to the petitioner chimpanzees.

Further, the petitioner submitted that although habeas corpus has historically been limited to human beings, Article 70's general aim would be concretized by its application to chimpanzees. In Tommy's first case, the petitioner indicated the purpose of habeas corpus has been "to assist...*up until now*"<sup>253</sup> imprisoned humans. Further, the writ of habeas corpus not being exclusively concerned with humans is central to the petitioner's case: "[w]e brought a writ of habeas corpus because a writ of habeas corpus is aimed at the denial of a legal person, not necessarily a human-being, but a legal person's right to bodily liberty."<sup>254</sup> According to the petitioner, because the writ of habeas corpus is concerned with the protection of autonomy regardless of species,<sup>255</sup> the designation of the chimpanzees as persons would not violate the purpose of the writ, but would promote it.<sup>256</sup> This argument finds support in Hart's proposition that the limited foresight of legislators produces in rules a "relative indeterminacy of aim."<sup>257</sup> Referring to the rule prohibiting vehicles in the park, Hart observes that, "until we have put the general aim of peace in the park in conjunction with those cases which we did not, or perhaps could not, initially envisage...our aim is...indeterminate."<sup>258</sup> Upon the presentation of an uncertain case,<sup>259</sup> the court's choice to apply or not to apply the rule "render[s] more determinate [its] initial aim" and augments the semantic clarity of the general rule.<sup>260</sup> Hart's view that a rule's indefinite purpose is refined by its penumbral instantiations,<sup>261</sup> thus buttressing the petitioner's claim that, as the purpose of the writ is to protect autonomy, its previous application to humans does not preclude its extension to chimpanzees.

*c. A category should not be demarcated by its paradigm*

By confining the category of "person" for the purpose of habeas corpus to the concept's "standard case"<sup>262</sup> of humans, the New York judiciary stymied the chimpanzees' claims to the writ. Having constituted

<sup>252</sup> *Id.*

<sup>253</sup> Hercules Transcript 2015, *supra* note 2 (emphasis added).

<sup>254</sup> Tommy Transcript 2013, *supra* note 3, at 10.

<sup>255</sup> Hercules Memo 2013, *supra* note 14, at 38.

<sup>256</sup> Kiko Transcript 2013, *supra* note 5, at 3-4.

<sup>257</sup> HART, CONCEPT, *supra* note 37, at 128.

<sup>258</sup> *Id.* at 129.

<sup>259</sup> *Id.*; see also Hart, *Discretion*, *supra* note 188, at 662-63.

<sup>260</sup> Hart, *Discretion*, *supra* note 188, at 663.

<sup>261</sup> See generally Hart, *Positivism*, *supra* note 25, at 607.

<sup>262</sup> *Id.* at 610-11.

a reciprocal capacity for rights and duties critical to personhood,<sup>263</sup> the Appellate Division denied Tommy's petition, stating that "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions."<sup>264</sup> The court reinforced this nexus of humanity and personhood by observing that corporations, as "[a]ssociations of human beings,"<sup>265</sup> may be classified as legal persons because of their capacity to bear human-like rights and duties.<sup>266</sup> This centralization of humans to the classification of "person" and concomitant expulsion of nonhuman phenomena "fastens on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule."<sup>267</sup> This centralization therefore attracts Hart's censure for falling into formalist error,<sup>268</sup> whereby the decision-maker disregards that the instant case has arisen in the penumbra.<sup>269</sup> Hart identifies conditioning ingress to a category upon a case's conformity with the paradigm is undesirable as it compels outcomes inimical to "social aims[;]"<sup>270</sup> "[t]he rigidity of our classifications will thus war with our aims in having or maintaining the rule."<sup>271</sup> Although the New York judiciary's approach receives formalism's approval, a Hartian court would be disinclined to arbitrarily require all persons be human simply because this represents the standard case.<sup>272</sup>

By contrast, the petitioner cited diverse instances where personhood had been conferred upon nonhuman entities to support its claim that the chimpanzees may also be classified as "persons" to secure writs of habeas corpus. In Tommy's case, the petitioner insisted that living and nonliving phenomena, such as rivers, idols, corporations, and slaves, have successfully acquired status as persons.<sup>273</sup> This observation yielded the conclusion that while "homo sapiens membership has been laudably designated a sufficient condition for legal personhood,"<sup>274</sup> "there are other sufficient conditions for personhood,"<sup>275</sup> including

<sup>263</sup> Nonhuman Rights Project v. Lavery, 998 N.Y.S.2d at 250-51.

<sup>264</sup> *Id.* at 251.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> HART, CONCEPT, *supra* note 37, at 129.

<sup>268</sup> *Id.*

<sup>269</sup> Hart, *Positivism*, *supra* note 25, at 610-11.

<sup>270</sup> HART, CONCEPT, *supra* note 37, at 130.

<sup>271</sup> *Id.*

<sup>272</sup> Hart, *Positivism*, *supra* note 25, at 610-11.

<sup>273</sup> Tommy Transcript 2013, *supra* note 3, at 13.

<sup>274</sup> Tommy Memo 2013, *supra* note 132, at 70; Hercules Memo 2013, *supra* note 14, at 70; Kiko Memo 2013, *supra* note 132, at 70; Tommy Transcript 2013, *supra* note 3, at 20.

<sup>275</sup> Tommy Transcript 2013, *supra* note 3, at 20.

autonomy. It is this shared attribute, according to the petitioner, that renders chimpanzees “similarly situated”<sup>276</sup> to humans for the purpose of habeas corpus. To deny the chimpanzees relief on the basis of their species alone is a violation of common law equality.<sup>277</sup> The petitioner’s argument that the law’s categories are unfixed and broader than the paradigm case accords with Hart’s view that general rules only “mark out an authoritative example.”<sup>278</sup> Where the application of the rule is uncertain, a decision-maker may choose “to add to a line of cases a new case because of resemblance which can reasonably be defended as both legally relevant and sufficiently close.”<sup>279</sup> A rule’s purpose may dictate the relevance and closeness of the resemblance between its standard application and its indeterminate.<sup>280</sup> Hart’s theory is thus amenable to the petitioner’s claim that, as habeas corpus exists to protect autonomy, possession of this attribute should be a sufficient condition for categorization as a person where the writ is sought.

Whereas the New York judiciary spurned the petitioner’s reliance on slavery precedents in the instant proceedings due to the discrepancy in species, a Hartian court would scrutinize the pertinence of the resemblance between the cases to determine their analogousness. The petitioner referred to *Somerset*,<sup>281</sup> *Lemmon*,<sup>282</sup> and a range of other cases where slaves successfully petitioned the court for writs of habeas corpus,<sup>283</sup> as authority for the proposition that individuals may be property when they “come into court,”<sup>284</sup> and persons when they come out. However, the New York judiciary comprehensively rejected the similarity between applications for habeas corpus by slaves and chimpanzees.<sup>285</sup> This obscures the “indeterminacies of a more complex kind”<sup>286</sup> which affects precedent. Hart posits that “there is no single method for determining the rule for which a given authoritative precedent is an authority,” nor is there an “authoritative or uniquely correct formulation” of such rules.<sup>287</sup> By refusing to apply a precedent on the basis of a single

consideration—species—the New York judiciary overlooked the way in which, as “cases for decision do not arise in a vacuum,” one factor alone will often not point to a clear outcome.<sup>288</sup> The petitioner, however, submitted the special distinction between humans and chimpanzees did not axiomatically preclude the latter’s reliance on slavery precedents.<sup>289</sup> The petitioner sustained its claim to the applicability of the precedents involving slaves without “comparing”<sup>290</sup> them to chimpanzees by invoking other similarities between human slaves and chimpanzees, including their property status<sup>291</sup> and autonomy.<sup>292</sup> The petitioner’s argument thus relied on the court’s adoption of Hart’s approach, which involves evaluating a “plurality of such considerations”<sup>293</sup> to determine “whether a present case sufficiently resembles a past case in relevant respects.”<sup>294</sup>

*d. The courts may expand the writ through the common law*

By contradistinction to the New York judiciary, which refused to extend habeas corpus to chimpanzees in the absence of affirmative precedent,<sup>295</sup> the petitioner argued its claim’s originality presented the judges with a choice.<sup>296</sup> In support of this, the petitioner astutely identified that “until the Nonhuman Rights Project began filing these suits, no one had ever asked”<sup>297</sup> for a writ of habeas corpus on behalf of an animal. Imploring the courts to consider the claims innovatively, the petitioner stated:

If Lord Mansfield had...said...a slave has never been the recipient of a writ of habeas corpus...there would be much more human slavery. I cite the Standing Bear case [where Native Americans applied for a writ of habeas corpus for the first time].... [a]nd the judge said: ‘Well, Standing Bear is going to get a writ of habeas corpus.’ So, the second time there had been a Native American who got a writ of habeas corpus, and the second time there had been a black slave who had received a writ of habeas corpus.<sup>298</sup>

<sup>276</sup> Tommy Memo 2013, *supra* note 132, at 69; Hercules Memo 2013, *supra* note 14, at 69; Kiko Memo 2013, *supra* note 132, at 69.

<sup>277</sup> Tommy Memo 2013, *supra* note 132, at 68-69; Hercules Memo 2013, *supra* note 14, at 68-69; Kiko Memo 2013, *supra* note 132, at 68-69.

<sup>278</sup> HART, CONCEPT, *supra* note 37, at 127.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Somerset*, 98 Eng. Rep. 499.

<sup>282</sup> *Lemmon*, 20 N.Y. 562.

<sup>283</sup> Tommy Memo 2013, *supra* note 132, at 46; Hercules Memo 2013, *supra* note 14, at 46; Kiko Memo 2013, *supra* note 132, at 46.

<sup>284</sup> Tommy Transcript 2013, *supra* note 3, at 12.

<sup>285</sup> *Id.*; Tommy Transcript 2014, *supra* note 71, at 6.

<sup>286</sup> HART, CONCEPT, *supra* note 37, at 134.

<sup>287</sup> *Id.*

<sup>288</sup> HART, ESSAYS, *supra* note 32, at 107.

<sup>289</sup> See Tommy Transcript 2013, *supra* note 3, at 12-13.

<sup>290</sup> Tommy Transcript 2014, *supra* note 71, at 6.

<sup>291</sup> Hercules Transcript 2015, *supra* note 2, at 41; Tommy Transcript 2013, *supra* note 3, at 11-13.

<sup>292</sup> Hercules Transcript 2015, *supra* note 2, at 39-40; Hercules Memo, *supra* note 14, at 8.

<sup>293</sup> HART, ESSAYS, *supra* note 32, at 107.

<sup>294</sup> *Id.*

<sup>295</sup> Tommy Transcript 2013, *supra* note 3, at 104; Tommy Transcript 2014, *supra* note 71, at 7.

<sup>296</sup> HART, CONCEPT, *supra* note 37, at 126-27.

<sup>297</sup> Hercules Transcript 2015, *supra* note 2, at 53-54.

<sup>298</sup> *Id.*

By suggesting unprecedented claims require the courts to take some action which is not yet prescribed by law, the petitioner’s claim reified Hart’s conceptualization of the judicial task where “no firm convention or general agreement dictates”<sup>299</sup> the applicability of a general rule. He writes that the law’s “open texture”<sup>300</sup> generates “uncertainties... as to the applicability of any rule... to a concrete case.”<sup>301</sup> In such circumstances, Hart argues that courts assume an “interstitial”<sup>302</sup> legislative function.<sup>303</sup> They must assume “responsibility”<sup>304</sup> for determining the applicability of a rule to a factual scenario, as “variants on the familiar... do not await us neatly labeled... nor is their legal classification written on them to be simply read off by the judge.”<sup>305</sup> This approach may be contrasted with that taken by the New York judiciary, which, despite acknowledging the novelty of the claims,<sup>306</sup> rejected them as if such a course was necessitated by law. In this way, the courts commit the formalist “vice”<sup>307</sup> of “disguis[ing] and minimiz[ing] the need for... choice, once the general rule has been laid down”<sup>308</sup> and claiming that the rule can “now only be altered by statute.”<sup>309</sup> Thus, while the petitioner’s supplication of the formalist New York judiciary to extend the writ of habeas corpus to chimpanzees failed, it may prove successful in a Hartian court which recognizes indeterminate rules enliven judicial choice.

The petitioner urged that this choice should be influenced by principles of public policy relevant to habeas corpus. To persuade Judge Jaffe the Appellate Division’s reasoning was not binding, the petitioner argued the court erred by failing to recognize *Byrn v. New York City Health and Hospital Corporation*<sup>310</sup>— where the issue before the court involved considerations of policy based upon common law values of liberty and equality.<sup>311</sup> Arguing that such values demand legal protection for autonomous chimpanzees, the petitioner’s method reflected Hart’s conception of judicial lawmaking: “proceeding by analogy so as to ensure that the new law... is in accordance with principles... which can

<sup>299</sup> See HART, CONCEPT, *supra* note 37, at 126-27.

<sup>300</sup> *Id.* at 135-36.

<sup>301</sup> *Id.*

<sup>302</sup> HART, ESSAYS, *supra* note 32, at 6.

<sup>303</sup> HART, CONCEPT, *supra* note 37, at 135-36.

<sup>304</sup> Hart, *Positivism*, *supra* note 25, at 607.

<sup>305</sup> *Id.*

<sup>306</sup> *Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d at 249.

<sup>307</sup> HART, CONCEPT, *supra* note 37, at 129.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 135.

<sup>310</sup> *Byrn v. New York City Health & Hosp. Corp.*, 31 N.Y.2d 194 (N.Y. 1972).

<sup>311</sup> *Hercules Memo*, *supra* note 14, at 64; *see also Kiko Transcript 2014*, *supra* note 199, at 4-5.

be recognized already as having a footing in existing law.”<sup>312</sup> However, Judge Jaffe rejected this argument, stating the *Byrn* court found the question of legal personhood “in most instances devolves on the legislature.”<sup>313</sup> As such, Judge Jaffe held the Appellate Division’s refusal to grant Tommy a common law writ of habeas corpus, and deference to the legislature as “the appropriate forum for obtaining additional protections,”<sup>314</sup> were consistent with the authority of *Byrn*. However, certain pieces of obiter dicta produced by Judge Jaffe’s decision are somewhat sympathetic to the petitioner’s assignment of responsibility to the courts to determine the scope of common law habeas corpus. Disclaiming the Supreme Court as the apposite venue for resolution of habeas corpus rights for chimpanzees, Her Honor remarked, “[e]ven were I not bound by the Third Department... the issue of a chimpanzee’s right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy.”<sup>315</sup> Such cognizance of the elision of the political and judicial domains coheres with de Tocqueville’s observation [quoted by Hart] that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>316</sup> This reasoning explains how a court exhibiting a Hartian appreciation of its political function and willingness to apply principles of public policy to cure a legal lacuna may accept the petitioner’s claim.

## V. THE NORMATIVE SUPERIORITY OF HART’S JURISPRUDENCE IN THE CONTEXT OF A CLAIM TO LEGAL PERSONHOOD

As the previous parts have demonstrated, a court’s approach to legal reasoning is informed by its conceptualization of the judicial role. The New York judiciary’s adoption of the formalist doctrine of judicial constraint is inimical to the success of the NhRP’s claim.<sup>317</sup> However, if it was to embrace Hart’s theory of legal indeterminacy and concomitant judicial responsibility, the NhRP might secure a favorable result.<sup>318</sup> While this juxtaposition of conflicting mainstream political theories<sup>319</sup> establishes the outcome of the case was not inexorable or attributable to a critical flaw in the NhRP’s case, it does not alone justify

<sup>312</sup> HART, ESSAYS, *supra* note 32, at 7.

<sup>313</sup> *Byrn*, 31 N.Y.2d at 201 (cited in *Hercules Transcript 2015*, *supra* note 2, at 30-31).

<sup>314</sup> *Hercules Transcript 2015*, *supra* note 2, at 31.

<sup>315</sup> *Id.*

<sup>316</sup> Hart, *American*, *supra* note 247, at 970.

<sup>317</sup> *See Part One.*

<sup>318</sup> *See Part Two.*

<sup>319</sup> MEYERSON, UNDERSTANDING, *supra* note 21, at 63, 73.

the superiority of Hart’s jurisprudence to that of Schauer’s. Accordingly, this part examines the literature on personhood to advance two arguments regarding the normative desirability of Hart’s theory in the context of a claim to common law habeas corpus by chimpanzees. First, whereas Schauer’s theory constructs a binary between indeterminate and determinate rules based on how they predominantly apply, Hart emphasizes that single rules may be clear in respect of some applications, though not others. Hart’s theory is therefore more amenable to proper consideration of the petitioner’s argument that the term “person,” despite applying unambiguously to some entities, is indeterminate with respect to a range of others, including chimpanzees. Second, while Schauer sanctions formalism’s eschewal of flexibility in the interests of stability, Hart posits that although legal systems must balance the competing needs of certainty and flexibility, scope for judicial choice is necessitated by the human inability to completely foresee the future. Such insight renders Hart’s jurisprudence receptive to the petitioner’s submissions that the bounds of personhood are not circumscribed by its historical application and the judiciary is responsible for determining whether an entity counts as a “person” for the purpose of habeas corpus. These virtues, which contrast with limitations of formalist theory, show a court reasoning in accordance with Hart’s jurisprudence would be better positioned to properly hear, consider, and determine the claims.

#### *a. Modes of decision-making*

The argument that Hart’s theory offers a more satisfactory prism through which the New York judiciary should determine the matters is made viable by both theorists’ recognition that a court need not adopt a uniform decisional approach to all cases. Schauer observes that “[i]f there is a case for formalism, it must be argued on normative grounds, just as, of course, the case for anti[-]formalism must also be argued on normative grounds.”<sup>320</sup> Associated with this is Schauer’s argument that legal systems should not “design institutions to fit one or another decisional model.”<sup>321</sup> He posits that instead, “[i]t may be better to think in terms of *decisional domains*, recognizing that certain institutions may contain several such decisional domains working in parallel.”<sup>322</sup> Hart’s theory similarly posits that distinct modes of reasoning should be applied “in ‘clear’ cases where no doubts are felt about the meaning and

applicability of a single legal rule, and . . . in cases where the indeterminacy of the relevant legal rules and precedents is acknowledged.”<sup>323</sup> Having described the “Nightmare of Legal Realism”<sup>324</sup> and the “noble dream”<sup>325</sup> of formalism, Hart declares that “[t]he truth, perhaps unexciting, is that sometimes judges do one and sometimes the other.”<sup>326</sup> To Hart, “[i]t is not of course a matter of indifference but of very great importance which they do and when and how they do it.”<sup>327</sup> Thus, the theorists concur that the mode of reasoning applied by the courts should be adapted to the case under scrutiny.

#### *b. Recognizing indeterminacy*

While Schauer acknowledges that rules can be indeterminate, he differentiates the kind of indeterminacy which is pervasive throughout a word’s applicatory range and that which is merely encountered at the fringes of a legal rule. Schauer concedes that there is an “unfortunate and increasingly prevalent form”<sup>328</sup> of formalism which treats “as definitionally inexorable that which involves nondefinitional, substantive choices.”<sup>329</sup> Schauer analyzes the case of *Lochner*,<sup>330</sup> where the Court held the term “liberty” necessarily denoted freedom of contract in the context of employment.<sup>331</sup> Charging the *Lochner* Court with false formalism,<sup>332</sup> Schauer notes the Court erroneously “describe[d] . . . choice as compulsion.”<sup>333</sup> He argues the word “liberty” is “*persuasively indeterminate*”<sup>334</sup> because, although not bereft of meaning,<sup>335</sup> most of its applications are “plausibly contestable”<sup>336</sup> and depend on complex “political, economic, moral, cultural, and institutional considerations.”<sup>337</sup> “Liberty,” according to Schauer, may therefore be contrasted with the word “dog,” as “throughout most of the word’s range of applications there is little doubt whether something is or is not a dog.”<sup>338</sup> Although Schauer

<sup>323</sup> HART, *ESSAYS*, *supra* note 32, at 107.

<sup>324</sup> Hart, *American*, *supra* note 247, at 972-78.

<sup>325</sup> *Id.* at 978-89.

<sup>326</sup> *Id.* at 989.

<sup>327</sup> *Id.*

<sup>328</sup> Schauer, *Rules*, *supra* note 103, at 664.

<sup>329</sup> Schauer, *Formalism*, *supra* note 39, at 513.

<sup>330</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>331</sup> Schauer, *Formalism*, *supra* note 39, at 511-12 (citing *Lochner*, 198 U.S. at 53, 56).

<sup>332</sup> See Schauer, *Formalism: Legal*, *supra* note 72, at 428.

<sup>333</sup> Schauer, *Formalism*, *supra* note 39, at 512.

<sup>334</sup> *Id.* at 514 (emphasis added).

<sup>335</sup> *Id.*; Schauer, *Formalism: Legal*, *supra* note 72, at 429.

<sup>336</sup> Schauer, *Formalism*, *supra* note 39, at 514.

<sup>337</sup> *Id.*

<sup>338</sup> Schauer, *Formalism: Legal*, *supra* note 72, at 429.

<sup>320</sup> Schauer, *Formalism: Legal*, *supra* note 72, at 433.

<sup>321</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 603-05; Schauer, *The Practice*, *supra* note 110, at 737.

<sup>322</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 603-05 (emphasis added); Schauer, *The Practice*, *supra* note 110, at 737; Schauer, *Formalism*, *supra* note 39, at 547-48.

cursorily concedes the word has “fuzzy edges,”<sup>339</sup> he differentiates between this kind of marginal uncertainty and the indeterminacy which almost comprehensively pervades the concept of “liberty.”<sup>340</sup> He states that:

[O]ne can say that an Australian Shepherd is a dog without having a view on the merits of Australian Shepherds, but to say that governmentally unconstrained contracting between employer and employee is an example of liberty is necessarily to take a position on a deeply contested political, moral and economic question.

His theory therefore suggests that indeterminacy is a significant feature of rules comprised of words which are predominantly ambiguous;<sup>341</sup> however, whether indeterminacy occurs at the “fringes”<sup>342</sup> of a legal rule, or in its “penumbra,” as he appropriates from Hart,<sup>343</sup> it affects the rule’s operation in a negligible way.<sup>344</sup> Schauer’s legal formalism thus dichotomizes determinate and indeterminate words by reference to their predominant application, overlooking how certain rules may attract both descriptions for substantial portions of their range.

The inhibitive effect of Schauer’s binary approach to indeterminacy on his ability to discern instances which fall within a rule’s penumbra is evident in his contribution to the debate over the rule prohibiting vehicles in the park. He refers to Fuller’s example of a statue of a truck that is erected in the park as a war memorial.<sup>345</sup> Despite suggesting that it may be a flawed example on definitional grounds,<sup>346</sup> he claims that the rule prohibiting vehicles in the park “clearly points to the exclusion of the statue from the park.”<sup>347</sup> Rather than acknowledging that the statue is an indeterminate instantiation of the term “vehicle,” Schauer deems the rule as certain in relation to the statue as it would be to most of the phenomena within its range.<sup>348</sup> This approach eschews consideration of non-legal factors such as purpose and policy, which are

relevant to the interpretation of indeterminate rules<sup>349</sup> and would militate against the inclusion of the statue within the ambit of the rule.<sup>350</sup>

Recognizing that “the problems of the penumbra [are] always with us,”<sup>351</sup> Hart does not distinguish between types of indeterminacy. He observes that the “problems of the penumbra”<sup>352</sup> arise “in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution.”<sup>353</sup> No matter how “precisely”<sup>354</sup> the rule is framed, it will prove indeterminate with respect to some applications. He argues that the term “vehicle” as it appears in the rule has a dual capacity for determinacy and indeterminacy:

[A]lthough a motor-car is certainly a “vehicle” for the purpose of a rule excluding vehicles from a park, there is no conclusive answer as far as linguistic conventions go to the question whether a toy motor-car or a sledge or a bicycle is included in this general term.<sup>355</sup>

Hart claims that the resolution of the question created by this indeterminacy is reached by reference to non-legal influences, and maybe “sound or rational without being logically conclusive.”<sup>356</sup> Unlike Schauer, who considers the rule to be as determinate in respect of a statue of a car as a car itself, Hart acknowledges that the “open-texture”<sup>357</sup> engenders uncertainty in respect of some applications, which cannot be settled by reference to the language of the rule alone.

The term “person” as it appears in various rules produces both determinate and indeterminate applications. Human beings are commonly associated with personhood.<sup>358</sup> Referred to as “natural persons,”<sup>359</sup> humans acquire the status of personhood by “virtue of being born, and not by legal decree.”<sup>360</sup> They serve as a “heuristic”<sup>361</sup> reference point by which the law analogically<sup>362</sup> extends personhood

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*; see Schauer, *Formalism*, *supra* note 39, at 516.

<sup>341</sup> See Schauer, *Formalism*, *supra* note 39, at 514; see Schauer, *Failure of the Common Law*, *supra* note 176, at 776.

<sup>342</sup> Schauer, *The Convergence*, *supra* note 116, at 308; Schauer, *Rules*, *supra* note 103, at 662.

<sup>343</sup> Schauer, *Formalism*, *supra* note 39, at 514; Schauer, *The Convergence*, *supra* note 116, at 308.

<sup>344</sup> See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 423 (1985); Schauer, *The Convergence*, *supra* note 116, at 308.

<sup>345</sup> See Schauer, *Formalism*, *supra* note 39, at 524.

<sup>346</sup> *Id.* at 533.

<sup>347</sup> *Id.* at 526.

<sup>348</sup> *Id.* at 533-34.

<sup>349</sup> *Id.* at 512-14.

<sup>350</sup> *Id.* at 526.

<sup>351</sup> Hart, *Positivism*, *supra* note 25, at 607-08.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> HART, *ESSAYS*, *supra* note 32, at 103.

<sup>355</sup> Hart, *Dias*, *supra* note 202, at 144; see also Schauer, *Vehicles in the Park*, *supra* note 24, at 1129.

<sup>356</sup> Hart, *Positivism*, *supra* note 25, at 608.

<sup>357</sup> HART, *CONCEPT*, *supra* note 37, at 127-28.

<sup>358</sup> Notes: *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746-47 (2001) [hereinafter *What We Talk About*]; see *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

<sup>359</sup> Alexis Dyschkant, *Legal Personhood: How We Are Getting It Wrong*, U. ILL. L. REV. 2075, 2078 (2015); Berg, *supra* note 12, 373.

<sup>360</sup> Dyschkant, *supra* note 359; Berg, *supra* note 12, at 373; Matambanadzo, *supra* note 12, at 52.

<sup>361</sup> Dyschkant, *supra* note 359, at 2079.

<sup>362</sup> *Id.* at 2077.

to nonhuman phenomena,<sup>363</sup> these being “juridical persons.”<sup>364</sup> The conferral of juridical personhood is the consequence of the law’s choice to extend the entity in question similar rights to those enjoyed by natural persons.<sup>365</sup> Although possession of rights and duties has frequently been considered the criteria for legal personhood,<sup>366</sup> jurists recognize that a multiplicity of legitimate discourses concerning the definition of legal personhood persists,<sup>367</sup> and that the concept remains unsettled<sup>368</sup> within the common law tradition.<sup>369</sup> This leaves the choice to confer juridical personhood largely open— “unlike the designation of natural person, there appear to be few, if any, legally established limitations on what kind of entity can be labeled a judicial person.”<sup>370</sup> Thus, while humans are necessarily natural persons, other entities have been considered judicial persons for certain purposes<sup>371</sup> where the law considers that they are worthy of this designation.<sup>372</sup> With respect to corporations, Harvard Law Review suggests the discrepant theories of personhood espoused by the United States Supreme Court may be a consequence of its “result oriented”<sup>373</sup> approach:

[I]t does not seem a coincidence that as the increasingly complex modern corporation has become increasingly dependent on Bill of Rights protections and the American economy has become increasingly dependent

<sup>363</sup> *Id.* at 2079.

<sup>364</sup> Berg, *supra* note 12, at 373.

<sup>365</sup> *Id.*

<sup>366</sup> *What We Talk About*, *supra* note 358, at 1745; Dyschkant, *supra* note 359, at 2076; *see generally* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* (1921).

<sup>367</sup> Matambanadzo, *supra* note 12, at 68; John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L. J.* 655, 660 (1926); Martin Wolff, *On the Nature of Legal Persons*, 54 *L. Q. REV.* 494, 496 (1938); *What We Talk About*, *supra* note 358, at 1745.

<sup>368</sup> Ngaire Naffine, *Who are Law’s Persons? From Cheshire Cats to Responsible Subjects*, 66 *MOD. L. REV.* 346, 356 (2003) [hereinafter Naffine, *Cheshire*]; NGAIRE NAFFINE, *LAW’S MEANING OF LIFE* 9-10 (2009); *What We Talk About*, *supra* note 358, at 1768.

<sup>369</sup> *See* Matambanadzo, *supra* note 12, at 64-65; *see* Naffine, *Cheshire*, *supra* note 368, at 347.

<sup>370</sup> Berg, *supra* note 12, at 380; Steven Tudor, *Some Implications for Legal Personhood of Extending Legal Rights to Nonhumans*, 35 *AUSTL. J. LEGAL PHIL.* 134, 138 (2010).

<sup>371</sup> Matambanadzo, *supra* note 12, at 64, 69; *see* *What We Talk About*, *supra* note 358, at 1747, 1752, 1755, 1761; *see* Berg, *supra* note 12, at 392.

<sup>372</sup> *What We Talk About*, *supra* note 358, at 1760; Matambanadzo, *supra* note 12, at 62-63; Abigail Hutchison, *The Whanganui River as a Legal Person*, 39 *ALTERNATIVE L. J.* 179, 182 (2014).

<sup>373</sup> *What We Talk About*, *supra* note 358, at 1754.

on corporations, courts have adjusted definitions of personhood to accommodate the modern corporation’s need for these protections.<sup>374</sup>

Therefore, it is conceivable that animals may acquire recognition as judicial persons.<sup>375</sup> A court reasoning in accordance with Hart’s theory would be more perceptive to the way in which the term “person” under Article 70 applies determinately to humans and has the potential to apply indeterminately to a large range of other phenomena. A court would thus be better equipped to engage with the arguments advanced by the petitioner regarding the uncertainty of the term “person” and the concomitant possibility of its extension to chimpanzees.

### *c. The virtues of law’s adaptability*

Although Schauer concedes that formalism impedes the law’s ability to adapt to the vicissitudes of human society, he maintains this serves beneficially to stabilize the legal system. In spite of its rigidity and inability to adapt to the complexities of social life, Schauer considers formalism to be normatively redeemed by its “ruleness”<sup>376</sup> and associated promotion of “the value variously expressed as predictability and certainty.”<sup>377</sup> He posits that “[w]e achieve stability... by relinquishing some part of our ability to improve on yesterday.”<sup>378</sup> With reference to the rule prohibiting vehicles in the park, Schauer argues vesting courts with jurisdiction to consult the purpose of the rule to determine its applicability “undermines the confidence that *all* vehicles be prohibited.”<sup>379</sup> To prevent this, formalism mandates the same treatment for all cases within a category, engendering predictability.<sup>380</sup> While “truncating the decision[-]making authority”<sup>381</sup> may produce suboptimal decisions,<sup>382</sup> it also reduces the possibility of unsatisfactory results which is attributable to the fact that “not all decision-makers are

<sup>374</sup> *Id.* ; *see also* George Seymour, *Animals and the Law: Towards a Guardianship Model*, 29 *ALTERNATIVE L. J.* 183, 184 (2004).

<sup>375</sup> *See* Dyschkant, *supra* note 359, at 2108; David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Nonhuman Animals*, 25 *S. AFR. J. HUM. RTS.* 38, 68 (2009); Denise Meyerson, *Persons and their Rights in Law and Morality*, 35 *ALTERNATIVE L. J.* 122, 125, 179 (2010).

<sup>376</sup> Schauer, *Formalism*, *supra* note 39, at 540.

<sup>377</sup> *Id.* at 539.

<sup>378</sup> *Id.* at 542.

<sup>379</sup> *Id.* at 540 (emphasis added).

<sup>380</sup> *Id.* at 539.

<sup>381</sup> *Id.* at 542.

<sup>382</sup> *Id.* at 541; Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 590, 597.

ideal.”<sup>383</sup> To Schauer, formalism denies decision-makers “jurisdiction to determine the best result on the basis of all germane factors,”<sup>384</sup> and as a consequence, “the part of the system inhabited by those decision[-] makers becomes more stable.”<sup>385</sup> This denial of jurisdiction also has political implications;<sup>386</sup> formalism responds conservatively to questions of legitimacy surrounding “power and its allocation.”<sup>387</sup> Nonetheless, Schauer recognizes that the “decisional domain”<sup>388</sup> dictates the permissibility of compromising stability to enhance the optimality of the decision. Justice Brandeis observes that:

[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.... The other side, of course, is that sometimes it is more important that things be settled correctly than that they be settled for the sake of settlement.<sup>389</sup>

Thus, despite exhibiting an overwhelming preference for formalist constraint,<sup>390</sup> Schauer concedes that some decisional domains prioritize flexibility over stability and predictability,<sup>391</sup> notwithstanding the risks compromise entails.<sup>392</sup>

On the other hand, Hart presses that “human inability to anticipate the future”<sup>393</sup> requires judges to exercise choice in determining cases. Hart acknowledges legal “systems...compromise between [the] two social needs”<sup>394</sup> for certainty and flexibility. In certain contexts, courts emphasize the vagueness of legal rules,<sup>395</sup> whereas in others, “it may be that too much is sacrificed to certainty.”<sup>396</sup> Legal systems commit the latter by constructing the value of certainty as supreme. Legal systems fail “to recognize the indeterminacy of legal rule,”<sup>397</sup> diminishing flexibility and stifling their capacity to accommodate to unforeseen phenomena. Hart goes on to state that:

<sup>383</sup> Schauer, *Formalism: Legal*, *supra* note 72, at 433; Schauer, *Formalism*, *supra* note 39, at 541.

<sup>384</sup> Schauer, *Formalism*, *supra* note 39, at 542.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 543.

<sup>388</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 602; *see also* Schauer, *Formalism: Legal*, *supra* note 72, at 434-45.

<sup>389</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 598.

<sup>390</sup> *See* Schauer, *The Practice*, *supra* note 110, at 730.

<sup>391</sup> Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 600, 602-03.

<sup>392</sup> Schauer, *Formalism: Legal*, *supra* note 72, at 434; *cf.* Schauer, *Precedent*, *supra* note **Error! Bookmark not defined.**, at 590-91; *see* Schauer, *Bad Law*, *supra* note 110, at 908-11; *cf.* Schauer, *The Practice*, *supra* note 110, at 730.

<sup>393</sup> HART, CONCEPT, *supra* note 37, at 130.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> HART, ESSAYS, *supra* note 32, at 104-05.

[T]he vice of such methods of applying rules is that their adoption prejudices what is to be done in ranges of different cases whose composition cannot be exhaustively known beforehand: rigid classification and divisions are set up which ignore differences and similarities of social and moral importance.<sup>398</sup>

Instead, Hart claims that since “we are men, not gods,”<sup>399</sup> courts should embrace the choice generated by the nuance of rules.<sup>400</sup> He profoundly observes that human beings are beset by the “two connected handicaps[:]”<sup>401</sup> the inability both to anticipate the full range of factual possibilities and to purposely legislate to provide for these.<sup>402</sup> Society is not characterized by “a finite number of features” which are universally recognized,<sup>403</sup> and “[h]uman invention and natural processes continually throw up...variants on the familiar.”<sup>404</sup> As such, rules cannot comprehensively and pre-emptively define their ambit. In many instances, the “classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were *dumb*.”<sup>405</sup> Despite this, inelastic forms of legal reasoning persist within legal systems,<sup>406</sup> giving rise to “more occasions when a judge can treat himself as confronted with a rule whose meaning has been predetermined.”<sup>407</sup> Hart denounces the universal appropriateness of this approach, affirming that “our world”<sup>408</sup> is not a “world of mechanical jurisprudence.”<sup>409</sup>

The precise manner in which the term “person” will be interpreted for the life of a legal rule cannot be exhaustively known in advance. Unlike natural personhood,<sup>410</sup> juridical personhood is not mandated by biology; rather, it is conferred upon nonhuman entities where the law

<sup>398</sup> *Id.* at 104.

<sup>399</sup> HART, CONCEPT, *supra* note 37, at 130, 128; Hart, *Discretion*, *supra* note 188, at 661.

<sup>400</sup> HART, CONCEPT, *supra* note 37, at 128.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> Hart, *Positivism*, *supra* note 25, at 607.

<sup>405</sup> *Id.* (emphasis added).

<sup>406</sup> HART, ESSAYS, *supra* note 32, at 104-05.

<sup>407</sup> *Id.*

<sup>408</sup> Hart, *Discretion*, *supra* note 188, at 662.

<sup>409</sup> HART, CONCEPT, *supra* note 37, at 128; Hart, *Discretion*, *supra* note 188, at 662.

<sup>410</sup> Berg, *supra* note 12, at 373.

decides to do so.<sup>411</sup> It is this choice which engenders the possibility that personhood may be extended to groups once denied it:

[P]erhaps the greatest political act of law is the making of a legal person.... Until the American Civil War, in many respects, slaves were not “persons” but were rather a form of property. Well into the twentieth century, women could not run for certain public offices open only to “persons” because the courts declared that they did not count as persons for this statutory purpose.<sup>412</sup>

The experience of slaves and women refutes any conceptualization of the category of “person” as closed.<sup>413</sup> As rules relating to “persons” may embrace phenomena which was not contemplated at the time they were promulgated,<sup>414</sup> they give rise to “borderline cases that challenge courts to make statements about legal personhood...and create interpretative difficulties.”<sup>415</sup> The involvement of legislatures in the conferral of personhood<sup>416</sup> in no way diminishes the central role of courts in determining the characterization of phenomena as persons for the purpose of particular rules.<sup>417</sup> For example, common law judiciaries have answered questions surrounding legal protections for fetuses<sup>418</sup> and the liberty rights of corporations.<sup>419</sup> That the law recurrently faces challenges such as these<sup>420</sup> “shows us that the legal contours of personhood are open to new interpretations and possibilities,”<sup>421</sup> establishing the prospect that

<sup>411</sup> *Id.*; see Paul Vinogradoff, *Juridical Persons*, COLUM. L. REV. 594, 604 (1924); see W. M. Geldart, *Legal Personality*, 27 L. Q. REV. 90, 92 (1911).

<sup>412</sup> Naffine, *Cheshire*, *supra* note 368, at 347.

<sup>413</sup> NAFFINE, MEANING, *supra* note 368, at 9-10; Seymour, *supra* note 374, at 184-86; Hutchison, *supra* note 372, at 180; see also Matambanadzo, *supra* note 12, at 80-81.

<sup>414</sup> See Berg, *supra* note 12, at 386.

<sup>415</sup> *What We Talk About*, *supra* note 358, at 1746.

<sup>416</sup> See, e.g., Matambanadzo, *supra* note 12, at 55, 57; *What We Talk About*, *supra* note 358, at 1755.

<sup>417</sup> See Matambanadzo, *supra* note 12, at 53; *What We Talk About*, *supra* note 358, at 1759.

<sup>418</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. British Pregnancy Advisory Serv. Trs.* [1979] 2 Eng. Rep. 987 (Q.B. 276); *Tremblay v. Daigle*, [1989] 62 D.L.R. 634, 660 (Can.); *State v. Beale*, 376 S.E.2d 1 (N.C. 1989); cf. *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984); *Winnipeg Child and Family Servs.*, [1997] 3 S.C.R. 925 (Can.).

<sup>419</sup> See *Citizens United v. Fed. Election Comm’n*, 130 U.S. 876 (2010); but cf. *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>420</sup> See Matambanadzo, *supra* note 12, at 48, 53; see Berg, *supra* note 12, at 369-70.

<sup>421</sup> Matambanadzo, *supra* note 12, at 63, 69-70; J. R. Trahan, *The Distinction*

the term “person” may be construed to encompass animals.<sup>422</sup> Adoption of Hart’s jurisprudence would instill a court with an appreciation that the writ of habeas corpus cannot prospectively delineate the precise scope of phenomena to which it applies, compelling it to choose whether or not the claim should succeed. As this would instigate rigorous consideration of the merits of the claim and the provision of a reasoned decision, Hart’s jurisprudence represents the superior theory with which a court should examine the question of extending the habeas corpus rights of persons to chimpanzees.

## VI. CONCLUSION

As Steven Wise states:

[U]pon encountering this great legal wall, one is initially awed by its thickness, its height, and its history of success at all levels of law in maintaining the legal apartheid between humans and every other animal. But its foundations have rotted, for they are unprincipled and arbitrary, unfair and unjust.<sup>423</sup>

The goal of the NhRP is to challenge the law’s entrenched premise that nonhuman animals cannot possess rights.<sup>424</sup> To achieve this, the NhRP pursues the recognition of some animals as legal persons.<sup>425</sup> The litigation it has been involved in since 2013 to secure writs of habeas corpus for Tommy, Kiko, Hercules, and Leo illuminates the significance of a court’s jurisprudence to the viability of the NhRP’s claim. The study of jurisprudence is not merely academic<sup>426</sup>—it facilitates evaluation of the assumptions, ideals, and values which underpin the tangibly consequential rules, principles, and practices within the legal system.<sup>427</sup> By undertaking a jurisprudential analysis of the litigation, this article scrutinizes the rational premises which incline in favor of and against the

*Between Persons and Things: A Historical Perspective*, 1 J. CIV. L. STUD. 9, 20 (2008).

<sup>422</sup> NAFFINE, MEANING, *supra* note 368, at 12-13; see Matambanadzo, *supra* note 12, at 61-62; Berg, *supra* note 12, at 404; see Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L. J. 247, 330 (2008); see *What We Talk About*, *supra* note 358, at 1768.

<sup>423</sup> Steven M. Wise, *Dismantling the Barriers to Legal Rights for Nonhuman Animals*, 7 ANIMAL L. 9, 13 (2001).

<sup>424</sup> See Wise, *supra* note 18.

<sup>425</sup> *Id.* at 8.

<sup>426</sup> Suri Ratnapala, *Jurisprudence 2* (2d ed. 2013).

<sup>427</sup> See MEYERSON, UNDERSTANDING, *supra* note 21, at 7-8.

NhRP's arguments. This article also assesses which are most apposite to a decision concerning personhood. The article's first analytical claim is the New York judiciary's approach to the litigation may be characterized as a manifestation of Schauer's legal formalism. The second analytical claim is a court adhering to Hart's theory of legal indeterminacy would be more disposed to accept the arguments presented by the NhRP. Further, the article's critically evaluative claim argues Hart's theory represents the superior one by which a court should determine a case concerning legal personhood for a nonhuman. Collectively, these claims establish the article's thesis: although the formalist New York judiciary rejected the claims, they may succeed in a court reflecting Hart's theory of legal indeterminacy, with this representing the preferable jurisprudence by which a court should determine a claim to legal personhood for chimpanzees.

The findings of the article may stimulate further investigation into the conditions required to secure common law writs of habeas corpus for chimpanzees. The research pinpoints four aspects of the courts' reasoning which affected their amenability to the claims advanced by the NhRP: 1) the determinacy of legal words; 2) the relevance of purpose to legal rules; 3) the breadth of categories; and 4) the permissibility of judicial lawmaking. Additional research may be conducted to identify jurisdictions whose courts approach these matters in a manner favorable to the claims of the NhRP. Alternatively, the research may precipitate inquiry into other theories' characterizations of the judicial task and how these are manifested across common law jurisdictions. Whatever the contribution it makes, it is hoped this article assists efforts to dismantle the legal wall between personhood and property that distinguishes humans from all other animals.

## HENDRY COUNTY'S BEST KEPT SECRET: POSSIBLE LEGAL CHALLENGES TO NON-HUMAN PRIMATE BREEDING FACILITIES

BARBARA PEREZ<sup>1\*</sup>

### I. INTRODUCTION

Hendry County is "nestled between the south shores of Lake Okeechobee and the pristine wetlands of the northern Everglades."<sup>2</sup> It sits on the edge of the Caloosahatchee River, and is surrounded by farmland and sugarcane fields.<sup>3</sup> Hendry County has a population of approximately 39,000 people.<sup>4</sup> The citizens enjoy the quiet, rural lifestyle and its proximity to major cities like Miami and West Palm Beach. Hendry County's rural lifestyle and agricultural scene is perfect for a business that needs to be far from prying eyes and ears.<sup>5</sup> In 1998, the executive officer of Primate Products determined Hendry County was the ideal location to build a large, non-human primate breeding facility.<sup>6</sup> The location "satisfied many of [Primate Products'] needs: it was largely agricultural[,]...it was out of sight[,]..." and it was relatively close to the Miami International Airport.<sup>7</sup> This was not just any operation, it was a 640-acre plot of land that would house close to 1,000 monkeys native to Vietnam, China, and Mauritius.<sup>8</sup>

The facility, Panther Tracks Learning Center,<sup>9</sup> imports and breeds a mix of rhesus and cynomolgus macaques, which are then sold

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<sup>2</sup> *Experience the True Nature of Southern Florida*, DISCOVER HENDRY COUNTY, <http://www.discoverhendrycounty.com> (last visited Nov. 6, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Quick Facts Hendry County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hendrycountyflorida/PST045216> (last visited Nov. 6, 2017).

<sup>5</sup> Felix Gillette, *How Monkeys Became Big Business in Florida: The breeders are proud. The activists are mad. The neighbors are confused. And the monkeys still have good aim.*, BLOOMBERG BUS. WK. (Oct. 14, 2015), <https://www.bloomberg.com/features/2015-florida-monkey-farm/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Panther Tracks Learning Center*, PRIMATE PRODS. [hereinafter *Panther Tracks Learning Center*], <http://www.primataproducts.com/panther-tracks-learning-center-ptlc/> (last visited Nov. 6, 2017).

to companies and universities for medical research.<sup>10</sup> These companies claim the use of monkeys is essential in developing cures for illnesses such as polio and typhus, and are also essential to the study of incurable diseases such as Alzheimer's and AIDS.<sup>11</sup>

Fifteen years later, in the summer of 2013, neighbors in LaBelle<sup>12</sup> heard rumors that a company by the name of SoFlo Ag, LLC<sup>13</sup> had bought approximately thirty-four acres of land and was about to begin construction on a non-human primate breeding facility.<sup>14</sup> The property's southern border is immediately adjacent to a residential neighborhood.<sup>15</sup> One of the neighbors who lived about a mile from the planned facility emailed the County Commissioners demanding information.<sup>16</sup> However, she never received a response. Little did the neighbors know, this was not the first monkey breeding facility in Hendry County—in fact, this was the third<sup>17</sup> one of its kind.<sup>18</sup>

“There are more [non-human primate] breeding facilities in Hendry County than any other community in the United States.”<sup>19</sup> Currently, the four facilities house approximately 10,000 monkeys,<sup>20</sup>

<sup>10</sup> *Live Animal Division*, PRIMATE PRODS., <http://www.primateproducts.com/live-animal-division-lad/> (last visited Nov. 6, 2017).

<sup>11</sup> Sci. Comm. on Health, Env'tl. & Emerging Risks, Final Opinion on the Need for Non-human Primates in Biomedical Research, Production and Testing of Products and Devices 12, 45, 49 (May 18, 2017), [http://ec.europa.eu/environment/chemicals/lab\\_animals/pdf/Scheer\\_may2017.pdf](http://ec.europa.eu/environment/chemicals/lab_animals/pdf/Scheer_may2017.pdf).

<sup>12</sup> LaBelle is the county seat of Hendry County, Florida. *Welcome to the City of LaBelle*, CITY OF LABELLE <https://www.citylabelle.com/> (last visited Nov. 18, 2017).

<sup>13</sup> SoFlo Ag, LLC filed articles of incorporation with the Florida Secretary of State. It listed its principal office as a United Parcel Service (UPS) mailbox at 4846 Sun City Center Blvd., #287, Sun City Center, FL, 33573. SoFlo Ag listed P2B2, LLC as its sole manager. P2B2, LLC, also registered with the Florida Secretary of State, used the same address listed for SoFlo Ag and listed XII, LLC as its manager. XII, LLC is not registered. Complaint for Injunctive Relief and Declaratory Judgment at 7, *Stephens v. Hendry Cty.*, 2014-CA-633 (Fla. Cir. Ct. Nov. 6, 2014).

<sup>14</sup> Gillette, *supra* note 4.

<sup>15</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 1.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> A fourth non-human primate breeding facility was authorized during the lawsuit. Gillette, *supra* note 4.

<sup>18</sup> *Where are Florida's Money Farms Shipping Monkeys?*, ANIMAL RIGHTS FOUND. OF FLA. (Dec. 17, 2014), <http://arff.org/blog/where-are-floridas-monkey-farms-shipping-monkeys-2> (discussing three non-human primate breeding facilities in Hendry County: Primate Products, Worldwide Primates, and the Mannheimer Foundation).

<sup>19</sup> *Hendry County's Controversial Monkey Breeding Industry*, ANIMAL RIGHTS FOUND. OF FLA., [www.arff.org/hendry](http://www.arff.org/hendry) (last visited Nov. 6, 2017).

<sup>20</sup> John Howell, *Everglades, Hendry Monkeys: Maybe too close for comfort*, THE DAILY FRAY (June 12, 2015), <http://thedailyfray.com/blog/hendrys-monkeys-everglades-have-enough-its-plate/>.

or about one monkey for every four Hendry County residents. The companies went unnoticed for fifteen years because the County officials did not provide any public hearings or notice to the residents.<sup>21</sup> The County reasoned that the facilities were in agriculturally-zoned districts and the monkeys fit into the category of domestic livestock usually bred on agricultural farms.<sup>22</sup>

In 2014, the Animal Legal Defense Fund filed suit against Hendry County for an alleged violation of the Sunshine Law, which requires a municipality to provide notice or hold a public meeting when acting in its “decision-making” capacity.<sup>23</sup> However, these facilities were approved behind closed doors.<sup>24</sup> Hendry County does not have an ordinance that addresses wild and exotic animal possession. Instead, the County held a meeting where it concluded the definition of “animal husbandry”<sup>25</sup> also included the breeding of non-human primates. With this action, the County categorized the facilities as General Agriculture, avoiding the need to provide any information to the public.

Part II of this paper addresses the history of using non-human primates in medical research and the history of monkey breeding facilities in Florida. Part III explores existing regulations of these facilities in Florida and Puerto Rico. Part IV proposes amending the current Hendry County ordinance to regulate future non-human primate breeding facilities as industrial or commercial facilities, rather than agricultural facilities. A proposal is also made for a nuisance claim to be brought against existing facilities.<sup>26</sup>

<sup>21</sup> Animal Rights Found. of Fla., *supra* note 18.

<sup>22</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 6-7.

<sup>23</sup> “All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.” FLA. STAT. § 286.011(1) (2017).

<sup>24</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 10.

<sup>25</sup> “Animal husbandry” is defined as: “the science of breeding, feeding, and tending domestic animals, esp. farm animals.” *Animal Husbandry*, WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001).

<sup>26</sup> The purpose of this article is not to discuss the ethical arguments of using non-human primates in medical research. Rather, the purpose of this article is to ensure the companies and facilities operating these types of facilities are regulated under the correct category and that the citizens have a right of recourse through possible claims of nuisance.

## II. NON-HUMAN PRIMATE BREEDING FACILITIES

The topic of using animals in medical research has long been controversial. On one side of the debate are those who believe humans can live longer and contract fewer illnesses thanks to the benefits derived from animal experimentation.<sup>27</sup> On the other side are individuals who hold deep convictions that all animal experimentation is an abuse of another species for selfish human gain.<sup>28</sup>

### *a. Using Non-Human Primates in Medical Research*

In the late 1800s, two major discoveries led to broad acceptance of animal experimentation.<sup>29</sup> These discoveries were the bacterium for tuberculosis and the discovery of a diphtheria antitoxin that rapidly reduced the infant mortality rate from forty percent to ten percent in those afflicted.<sup>30</sup> In 1988, the American Medical Association's Council on Scientific Affairs published a list of medical advances it claimed were possible through research using animals.<sup>31</sup> These advances included studies of anesthesia, autoimmune deficiency syndrome (AIDS) and autoimmune diseases, behavioral science, cardiovascular disease, cholera, diabetes, gastrointestinal surgery, genetics, hemophilia, hepatitis, infant health, infection, malaria, muscular dystrophy, nutrition, ophthalmology, organ transplantation, Parkinson's disease, prevention of rabies, radiobiology, reproductive biology, and treatment of spinal injuries, toxoplasmosis, yellow fever, and virology.<sup>32</sup>

At the other end of the spectrum are those who believe animals should not be abused for selfish and personal gains in humans.<sup>33</sup> In 1824, the Society for the Prevention of Cruelty to Animals (SPCA) was established.<sup>34</sup> Its members are committed to principles of kindness towards animals, educating the public about animal cruelty, and lobbying parliamentarians for the enactment of animal anti-cruelty legislation.<sup>35</sup> Opponents of medical research also argue that animal-based research protocols do not yield the best scientific results for humans experiencing

the same conditions.<sup>36</sup> These opponents explain that these experiments can mislead researchers because each species has significant physiologic and metabolic differences.<sup>37</sup> These differences can contribute to illnesses or death by failing to predict the toxic effects of drugs in humans.<sup>38</sup>

Proponents of the use of non-human primates in medical research argue that the "primates are so similar to people genetically (up to 98 percent) that [primates] show, unlike any other animal, how diseases work in the human body."<sup>39</sup> Monkeys are more predictive than smaller species as to how a disease acts or how a treatment will work in humans.<sup>40</sup> "Primate research has led to medical devices, treatments, advancements and cures that have saved and improved millions of lives."<sup>41</sup> For example, non-human primate research has contributed to the following discoveries: the polio vaccine, insulin for diabetes, coronary bypass surgery, hip replacements, kidney dialysis and transplants, organ transplants, organ rejection medications, medications for psychiatric illnesses, blood transfusions, chemotherapy, the hepatitis B vaccine, HIV/AIDS medications, lung transplants for children with cystic fibrosis, and treatments for anthrax, Parkinson's disease, and prostate cancer.<sup>42</sup>

Each year, thousands of primates are captured from the wild and transported to the United States.<sup>43</sup> The animals are placed in small crates and are often subjected to restricted food and water intake.<sup>44</sup> Studies have shown the primates' physiological systems sometimes takes months to return to baseline levels.<sup>45</sup> According to the United States Department of Agriculture (USDA), approximately 70,000<sup>46</sup> non-human primates are used for research in the United States every year.<sup>47</sup>

<sup>36</sup> Sonia S. Waisman, Pamela D. Frasch, & Bruce A. Wagman, *Animal Law Cases & Materials* 507 (5th ed. 2014).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Critical Role of Nonhuman Primates (NHPs) in Scientific and Medical Research*, UNIV. OF CALI. DAVIS, CALI. NAT'L PRIMATE RESEARCH CTR. (Aug. 24, 2016), <https://www.cnprc.ucdavis.edu/critical-role-of-nonhuman-primates-nhps-in-scientific-and-medical-research/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> P. E. Honess et al., *A Study of Behavioural Responses of Non-Human Primates to Air Transport and Re-Housing*, *LAB. ANIMALS* 38, 119 (2004).

<sup>46</sup> *See Non-Human Primates*, ANIMAL WELFARE INST., <https://awionline.org/content/non-human-primates> (last visited Nov. 10, 2017) (explaining that this figure does not include the number of primates that are not presently assigned to research and are instead part of a laboratory's breeding colony).

<sup>47</sup> Kathleen M. Conlee & Andrew N. Rowan, *The Case for Phasing Out Experiments on Primates*, THE HASTINGS CTR., <http://animalresearch.thehastingscenter.com>.

<sup>27</sup> Monamy Vaughan, *Animal Experimentation: A Guide to the Issues* 13 (2d ed. 2009).

<sup>28</sup> *Id.* at 15.

<sup>29</sup> *Id.* at 13; *see* SUSAN HUNNICUTT, *ANIMAL EXPERIMENTATION* 11-18 (Susan Hunnicutt ed., 2013).

<sup>30</sup> VAUGHAN, *supra* note 26.

<sup>31</sup> Comm. on the Use of Lab. Animals in Biomedical & Behavioral Research, *Use of Lab. Animals in Biomedical & Behavioral Research* 27 (1988).

<sup>32</sup> *Id.* at 27-37.

<sup>33</sup> VAUGHAN, *supra* note 26, at 15; HUNNICUTT, *supra* note 28, at 19.

<sup>34</sup> *Our History*, SPCA INT'L, <https://www.spcai.org/about-spcai/our-history/> (last visited Nov. 10, 2017).

<sup>35</sup> *Id.*

Macaques and rhesus primates<sup>48</sup> are two of the six types of primates most commonly used in biomedical research.<sup>49</sup> Studies have found that most macaques exhibit unpredictable behavior and aggression as they mature.<sup>50</sup> To defend themselves and establish dominance, macaques are known to cause serious injuries via biting.<sup>51</sup> In the late 1980s, occupational safety guidelines were published based on evidence that macaque species were inherently dangerous to humans due to the risk for B-virus transmission, as well as the likelihood of serious physical injury from bite wounds.<sup>52</sup> The B-virus infection is transmitted among free-roaming or group-housed animals.<sup>53</sup> The virus infection in monkeys is characterized by lifelong infection with intermittent reactivation, and shedding of the virus in saliva or genital secretions.<sup>54</sup>

*b. The History of Non-Human Primate Breeding Facilities in Florida*

*i. Monkeys Wreak Havoc in Florida Keys*

Charles River Laboratories, a biomedical company based in Wilmington, Massachusetts, is one of the leading providers of laboratory animals used in medical research.<sup>55</sup> To date, animal sales still account for approximately sixty-two percent of its revenue.<sup>56</sup> In 1973, Charles River Laboratories stocked two isolated islands in the Florida Keys with about 1,600 rhesus monkeys.<sup>57</sup> The company's plan was to let the monkeys breed unimpeded, and then occasionally harvest a portion for laboratories for biomedical research.<sup>58</sup> The monkeys were sold to laboratories at premium prices, ranging from \$1,500 to \$4,500 each.<sup>59</sup>

org/report/the-case-for-phasing-out-experiments-on-primates/#refmark-3 (last visited Nov. 6, 2017).

<sup>48</sup> See Deborah Blum, *The Monkey Wars* 35, 45, 250-51 (1994); Rod & Ken Preston-Mafham, *Primates of the World* 69 (1999).

<sup>49</sup> Stephanie R. Ostrowski et al., *B-Virus From Pet Macaque Monkeys: An Emerging Threat in the United States?*, 4 *EMERGING INFECTIOUS DISEASES* 117 (1998).

<sup>50</sup> *Id.* at 118.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 119.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 117.

<sup>55</sup> *Who We Are*, C. RIVER, <http://www.criver.com/about-us/who/overview> (last visited Nov. 11, 2017).

<sup>56</sup> *Id.*

<sup>57</sup> Joy Williams, *The Florida Keys: A History & Guide* 114-15 (10th ed. 2003).

<sup>58</sup> *Strangers in Paradise: Impact and Management of Nonindigenous Species in Florida* 163 (Daniel Simberloff et al. eds., 1997).

<sup>59</sup> C. RIVER, *supra* note 54.

The researchers believed the islands' remote location and the water surrounding the islands would serve as a barrier to prevent the primates from escaping the islands.<sup>60</sup> However, some primates did escape.<sup>61</sup> The monkeys destroyed the island by stripping the leaves from thousands of federally protected mangroves.<sup>62</sup> The feces-infested waters flourished with algae and the shoreline eroded, taking with it habitat for roseate spoonbills and white ibis.<sup>63</sup>

In 1992, Charles River Laboratories entered into an agreement with the Board of Trustees of the Internal Improvement Trust Fund where it agreed to restore the vast damage to mangroves and other vegetation caused by the monkeys.<sup>64</sup> The agreement required Charles River Laboratories to install chain-link fences to exclude monkeys from the shoreline and certain areas of the islands.<sup>65</sup> The agreement also required Charles River Laboratories to monitor and meet water quality standards, obtain all necessary governmental permits for its structures on the islands, and phase out free-ranging monkeys by prescribed deadlines.<sup>66</sup> It took more than fifteen years to remove the primates from the islands.<sup>67</sup>

*ii. Hendry County's History with Non-Human Primate Breeding Facilities*

Paul Houghton, the owner and chief executive of Primate Products, was looking for a place to build a large facility where he could breed monkeys for medical research.<sup>68</sup> The Florida Keys were out of the question because of the previous disaster the monkeys had caused. After some research, Mr. Houghton found the perfect spot in southwestern Florida—the tropical savanna climate of Hendry County.<sup>69</sup>

<sup>60</sup> *Charles River Labs. v. Fla. Game & Fresh Water Fish Comm'n*, No. 96-2017, 1997 WL 1052489, at \*1, \*7 (Fla. Div. Admin. Hearings 1997).

<sup>61</sup> *Id.*

<sup>62</sup> Michael Warren, *Monkey Business is Giving Company a Bad Reputation: Environment: Monkeys are destroying islands in the Florida Keys. Residents want them moved, but their owner says the herd is vital to medical research*, L.A. TIMES, Nov. 16, 1990, [http://articles.latimes.com/1990-11-16/news/vw-4910\\_1\\_monkey-business](http://articles.latimes.com/1990-11-16/news/vw-4910_1_monkey-business).

<sup>63</sup> Kim Todd, *Tinkering with Eden: A Natural History of Exotic Species in America* 192 (2002).

<sup>64</sup> *Charles River Labs.*, 1997 WL 1052489, at \*7.

<sup>65</sup> *Charles River Laboratories, Inc. Lease Revocation*, MY FLA. (Apr. 15, 1997), <http://www.myflorida.com/myflorida/cabinet/agenda97/0429/dep0429.html>.

<sup>66</sup> *Id.*

<sup>67</sup> June Keith, *June Keith's Key West & The Florida Keys: A Guide to the Coral Islands* 287 (5th ed. 2014).

<sup>68</sup> Gillette, *supra* note 4.

<sup>69</sup> *Id.*

Mr. Houghton met with County representatives, and in 2000, he opened the 640-acre site, which housed approximately 1,200 primates.<sup>70</sup>

According to Primate Products' website, the breeding facilities serve domestic and international lab researchers, and they also offer hands-on education and training in applied behaviorism techniques.<sup>71</sup> Applied behaviorism techniques include the "willing worker"<sup>72</sup> concept, pole-and-collar handling, and enrichment strategies.<sup>73</sup> Primate Products conducts educational sessions, including "Primadaption"<sup>74</sup> workshops. These workshops provide "a unique learning experience in a campus-like setting for professionals involved in the study, care, training, and regulation of primates."<sup>75</sup> Workshops can last up to three full days and students receive Continuing Education Units (CEUs) that can be used towards their American Association for Laboratory Animals (AALAS) certification.<sup>76</sup> Panther Tracks also performs other tasks for the research industry, including: supplying primate biological products such as serum and tissue; selling and testing restraint devices and other products; and providing primate boarding, operant conditioning, and health screening services.<sup>77</sup>

These facilities participate in the breeding, research, testing, teaching, and experimentation of non-human primates, while also participating and publishing studies about the primates in scientific journals.<sup>78</sup> In the March 2012 issue of *Human Reproduction*, an article indicated Panther Tracks Learning Center had housed three female macaques, surgically removed their ovarian tissue, prepared the tissue,

<sup>70</sup> *Id.*

<sup>71</sup> *Panther Tracks Learning Center*, PRIMATE PRODS., <http://www.primatereproducts.com/panther-tracks-learning-center-ptlc/> (last visited Feb. 24, 2018).

<sup>72</sup> See *The Pole and Collar Handling System, Where it All Began*, PRIMATE PRODS., <https://www.primatereproducts.com/blog/2015/01/26/the-pole-and-collar-handling-system-where-it-all-began/?s=willing+worker+concept> (last visited Nov. 11, 2017) [hereinafter *Pole and Collar*] (stating that the Willing Worker concept is a method to train animals to willingly cooperate with handling and procedures required for medical research).

<sup>73</sup> *Id.*

<sup>74</sup> See *Primadaption Workshops*, PRIMATE PRODS., <http://www.primatereproducts.com/blog/2015/01/27/primadaption-workshops-in-2015/> (last visited Nov. 12, 2017) (stating that Primadaption workshops are trainings based on the idea that training and enrichment for captive non-human primates are not always compatible with the resources available at many facilities and, therefore, it is necessary to tweak those methods to achieve the desired result within the set means. Registration for the workshops cost \$1,600 per student. Students earn 24 CEUs for AALAS Certification Registry after completion of the workshop.).

<sup>75</sup> *Id.*

<sup>76</sup> Pole and Collar, *supra* note 71.

<sup>77</sup> Complaint at 1, 2, Fla. *ex rel.* Tommie v. Panther Tracks, 2016-CA-252 (Fla. Cir. Ct. May 9, 2017) (No. 40636838).

<sup>78</sup> *Id.* at 16.

and shipped the tissue for further research.<sup>79</sup> In 2014, an employee-conducted study detailed a highly-pathogenic, hemorrhagic *E. coli* outbreak at the facilities that had a nine percent fatality rate among primates.<sup>80</sup>

In the summer of 2013, a rural neighborhood in LaBelle, Florida began hearing rumors that someone had purchased a plot of land with the intention of building a facility to breed monkeys.<sup>81</sup> The neighbors learned this would be the third monkey breeding facility in Hendry County. In 2014, the neighbors filed suit against Hendry County, alleging the County violated the Sunshine Law when it approved a facility that would confine, quarantine, and breed thousands of wild and imported non-human primates in a rural residential neighborhood.<sup>82</sup> The neighbors further alleged the County failed to provide notice and hold public meetings regarding its decision to approve the primate facility.<sup>83</sup> The neighbors were concerned that, unlike domestic livestock, the non-human primates were known carriers of a wide array of serious infectious diseases, and that there was potential for the monkeys to escape and cause injury.<sup>84</sup>

In 2017, Samuel Tommie, a member of the Seminole Tribe of Florida, filed suit against Primate Products in Hendry County.<sup>85</sup> Mr. Tommie alleged Primate Products' activities posed a nuisance both to him and the community surrounding the facilities.<sup>86</sup> Mr. Tommie claimed the presence of thousands of non-human primates threatened the community's health, safety, and welfare.<sup>87</sup> Macaques, Mr. Tommie claimed, are common carriers of Plasmodium parasites that may cause malaria in primates and humans.<sup>88</sup> The primates are often held in open-air cages and exposed to mosquitoes, which can bite the infected macaques and then bite humans, thereby transmitting the disease.<sup>89</sup> Mr. Tommie's other concern was the hundreds of thousands of pounds of primate feces

<sup>79</sup> Hornick et al., *Isolated Primate Primordial Follicles Require a Rigid Physical Environment to Survive and Grow in Vitro*, 27 HUMAN REPROD. 1801, 1801 (2012).

<sup>80</sup> K. Kolappaswamy et al., *Outbreak of pathogenic Escherichia coli in an outdoor-housed non-human primate colony*, 43 J. MED. PRIMATOL 121, 122 (2014).

<sup>81</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 9.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.*

<sup>85</sup> Complaint at 1, *Tommie*, 2016-CA-252 (No. 40636838).

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.*

generated by these facilities.<sup>90</sup> He alleged the waste, wastewater, and potential runoff from thousands of primates created a risk for infectious waste to enter the environment.<sup>91</sup>

One of Mr. Tommie's greatest concerns was the possibility of the monkeys escaping the facilities and finding refuge in the wilderness, an area where he regularly meditated and engaged in other cultural practices.<sup>92</sup> Florida primates escaped in the past, and as a result, many areas now contain invasive, non-native primate populations.<sup>93</sup> For example, in 1992, as a result of the devastation of Hurricane Andrew, approximately 1,500 primates escaped from the Mannheimer Foundation,<sup>94</sup> resulting in chaos as police and residents had to shoot many of the monkeys.<sup>95</sup>

### III. GOVERNING LEGAL FRAMEWORK

The Animal Welfare Act is the only federal law in the United States that regulates animal dealers, research facilities, and exhibitors.<sup>96</sup> However, there are other agencies,<sup>97</sup> such as Florida's Fish and Wildlife Conservation Commission, that regulate captive wildlife. Hendry County has no law or ordinance that regulates wild or exotic animals, nor the research of non-human primates. Although Puerto Rico falls under the authority of the Animal Welfare Act, the Puerto Rico Supreme Court temporarily halted the construction of a non-human primate research facility.<sup>98</sup>

<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 9-10.

<sup>93</sup> *See generally* Eugene F. Provenzo Jr. & Asterie Baker Provenzo, In the Eye of Hurricane Andrew (2002).

<sup>94</sup> The Mannheimer Foundation is one of the four non-human primate breeding facilities in Hendry County.

<sup>95</sup> Complaint at 9-10, *Tommie*, 2016-CA-252 (No. 40636838).

<sup>96</sup> *See* 7 U.S.C. §§ 2131-2159 (2012) (explaining that although Congress found it important to protect animals used for experimentation, exhibits, or pets, the Animal Welfare Act expressly excludes farm animals).

<sup>97</sup> The Public Health Service (PHS) issues the Policy on Humane Care and Use of Laboratory Animals, which regulates the care and use of all vertebrate animals used in research. The Policy also gives mice, rats, and birds the same protections that other vertebrate animals receive under the AWA. The recommendations in the Policy statement have the force of law under the Health Research Extension Act of 1985. Moreover, the Institute of Laboratory Animal Resources of the National Research Council, National Academy of Sciences writes the ILAR Guide for the Care and Use of Laboratory Animals. Lastly, the Food and Drug Administration has regulations that address animal care issues and require detailed records of all the aspects of study. *Fact Sheet: Primates in Biomedical Research*, CALIF. BIOMEDICAL RESEARCH ASS'N, [https://gleek.ecs.baylor.edu/static/pdf/California\\_Biomedical\\_Research\\_Association.pdf](https://gleek.ecs.baylor.edu/static/pdf/California_Biomedical_Research_Association.pdf) (last visited Jan. 11, 2018).

<sup>98</sup> *See* 7 U.S.C. § 2132(d).

#### a. Existing Regulations for Wild and Exotic Animals

In 1996, Congress enacted the Laboratory Animal Welfare Act, which was later changed to the Animal Welfare Act.<sup>99</sup> The purpose of the Act was "to ensure that certain animals intended for use in research facilities are provided humane care and treatment."<sup>100</sup> The Act established minimum standards for the care, housing, sale, and transport of dogs, cats, primates, rabbits, hamsters, guinea pigs, and other animals held on the premises of animal dealers or laboratories.<sup>101</sup> The USDA,<sup>102</sup> the governmental entity that enforces the Animal Welfare Act, requires that for non-human primates, a physical environment adequate to promote their psychological well-being be provided.<sup>103</sup>

Florida's Fish and Wildlife Conservation Commission regulates captive wildlife.<sup>104</sup> The regulations provide the categories of exotic animals that are both permitted and prohibited, and separates the animals into three classes: Class I, II, and III.<sup>105</sup> Class II wildlife includes, but is not limited to, the following animals: howler, guereza, vervet monkeys, macaques, langurs, servals, European and Canadian lynx, bobcats, caracals, ocelots, wolves, coyotes, jackals, wolverines, honey badgers, binturongs, dwarf crocodiles, caiman alligators, ostriches, giraffes, and tapirs.<sup>106</sup>

#### b. Hendry County's Current Regulations

In 1991, the Hendry County Board of County Commissioners adopted Ordinance Number 91-05, which established a comprehensive zoning plan and zoning regulations for Hendry County.<sup>107</sup> Chapter 1-53 of the Hendry County Land Development Code establishes a zoning map and defines various types of zoning districts.<sup>108</sup> This chapter regulates the use of land for agricultural purposes within Hendry County by establishing several districts for agricultural use.<sup>109</sup> The Code

<sup>99</sup> *See* 7 U.S.C. §§ 2131-2159.

<sup>100</sup> *Id.*

<sup>101</sup> Katrina L. Screnghost, *Cultivating Compassionate Law: Unlocking the Laboratory Door and Shining Light on the Inadequacies & Contradictions of the Animal Welfare Act*, 33 W. NEW ENG. L. REV. 855, 856 (2011).

<sup>102</sup> *Animal Welfare Act*, USDA NAT'L AGRIC. LIBRARY, <https://www.nal.usda.gov/awic/animal-welfare-act> (last visited Nov. 11, 2017).

<sup>103</sup> *Id.*

<sup>104</sup> *Captive Wildlife Licenses & Permits*, FLA. FISH & WILDLIFE COMM'N, <http://myfwc.com/license/captive-wildlife/n> (last visited Nov. 11, 2017).

<sup>105</sup> *Id.*

<sup>106</sup> FLA. ADMIN. CODE ANN. r. § 68A-6.002 (2009).

<sup>107</sup> Hendry County, Fla. Ordinance § 91-05.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

also regulates agricultural land use and development for the future by providing policies designed to preserve and protect the land through the year 2040.<sup>110</sup>

Part of Panther Tracks' property is designated as an Agriculture/Conservation (A-1) zoning district, and another part of its property is designated as a General Agricultural (A-2) zoning district by the Code.<sup>111</sup> The land is also designated as Agriculture/Conservation Future Land Use Category and Agriculture Future Land Use Category on the Future Land Use Map in the Hendry County Comprehensive Plan.<sup>112</sup> In the Code, both zoning districts A-1 and A-2 allow for the practice of "agriculture" as a permissible use by right.<sup>113</sup>

In contrast to other counties' ordinances which specifically regulate wild and exotic animals,<sup>114</sup> Hendry County's ordinances define "exotic animal" as: "an animal of any non-domestic species that is not indigenous to Florida."<sup>115</sup> The ordinance also defines "livestock animals" as:

<sup>110</sup> *Id.*

<sup>111</sup> Letter from Hendry County Building Licensing & Code Enforcement to The Mannheimer Foundation, Inc. (Apr. 7, 2015) [hereinafter Mannheimer Foundation Letter], <https://www.documentcloud.org/documents/1952816-mannheimer-foundation-code-enforcement-notice.html>; Thomas J. Rowell, *Trial Ends in Favor of Hendry County Paving the Way for Primate Breeding Facilities*, PRIMATE PRODS. (Jul. 12, 2016), <http://www.primatoproducts.com/blog/category/news/>.

<sup>112</sup> Mannheimer Foundation Letter, *supra* note 110; Rowell, *supra* note 110.

<sup>113</sup> Hendry County, Fla. Ordinance § 91-05.

<sup>114</sup> For example, the ordinances of Sumter County, Florida include a definition of "dangerous animals." The definition states that "any animal with a propensity, tendency or disposition to attack, cause injury to, or otherwise endanger the health, and safety of human beings or other domesticated animals...is a dangerous animal." SUMTER COUNTY, FLA. ORDINANCE § 4-4. Similarly, Okeechobee County, Florida provides for a special exception in its ordinance. The ordinance states that a special exception is a:

[U]se that would not be appropriate generally or without restriction through a zoning division, district or county at large, but if controlled as to number, area, location, or relation to neighborhoods, would promote the health, safety, welfare, order, comfort, convenience, appearance, prosperity, or the general welfare of the county and its residents.

One of the special exceptions allowed is for the "breeding or raising of exotic animals." The ordinance states the special exceptions are permissible by the Board of Adjustments and Appeals after public notice. OKEECHOBEE COUNTY, FLA. ORDINANCE § 11.04.01-11.04.02.

<sup>115</sup> Hendry County, Fla. Code § 1-5-3 (2017).

Any animal, other than a domestic animal as defined herein, which is normally raised for harness, riding, food, milk, eggs, or wool for local consumption or sold to others, or those animals bred for those purposes and may include but are not limited to cows, horses, mules, goats or chicken or other animal commonly referred to as livestock.<sup>116</sup>

Additionally, the ordinance contains provisions for domestic livestock under the General Agriculture (A-2) zoning category:<sup>117</sup>

Agriculture means the use of land for agricultural purposes, including farming, dairying, pasturage, apiculture (beekeeping), horticulture (plants), floriculture (flowers), silviculture (trees), orchards, groves, viticulture (grapes), animal and poultry husbandry, specialty farms, confined feeding operations and the necessary accessory uses for packing, processing, treating or storing the produce; provided, however, that the operation of any such accessory uses shall be secondary to that of the normal agricultural activities.<sup>118</sup>

The Hendry County Comprehensive Plan provides that "lands classified as Agriculture/Conservation [A-1]" are wetland areas and that, due to the ecologically delicate nature of those areas, "[n]o industrial development (including agriculture related or extraction related) shall be permitted within a wetland."<sup>119</sup> In addition, "[n]on-residential development shall be limited to ensure that wetlands are preserved and that activities that impair the natural function of the wetland are prohibited."<sup>120</sup>

Although agriculture is a permitted use in Agriculture/Conservation (A-1) districts, agricultural processing is specifically prohibited, and is only permitted by the approval of a special exception in General Agriculture (A-2) districts.<sup>121</sup> "Agricultural processing" is defined as "an industrial use specifically associated with producing, harvesting, processing or marketing of agricultural products."<sup>122</sup> The

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Code also provides that “all uses that do not strictly conform to their designated zoning districts are prohibited, but that the landowner, Board of County Commissioners, or local Planning Agency may request a variance or special exception must be considered at a public hearing after due public notice.”<sup>123</sup>

Neither the Code nor Hendry County’s Comprehensive Plan provides a definition for “animal husbandry.” This lack of definition was in controversy in the lawsuit against Hendry County.<sup>124</sup> The plaintiffs urged the court to apply the common dictionary definition in order to determine its clear and plain meaning.<sup>125</sup> According to Webster’s Dictionary, “animal husbandry” is “the care and production of domestic animals.”<sup>126</sup> On the other hand, Hendry County argued the meaning of “animal husbandry” should be defined by its historical application to prior site development plans of a similar nature, and by legislative intent.<sup>127</sup>

In analyzing the definition of “animal husbandry,” the court looked to three “historical mileposts.”<sup>128</sup> The first was the application of the term in agricultural zoning in Hendry County.<sup>129</sup> The court noted that, in the early 2000s, Hendry County staff approved two non-human primate facilities that were similar to the one at issue in the suit.<sup>130</sup> Those facilities were the Mannheimer Foundation and the original Panther Tracks.<sup>131</sup> The court reasoned that the two authorizations served as precedent and indication of Hendry County’s intent as to the placement of non-human primate breeding facilities.<sup>132</sup> The second milepost was the decision of the Director of Building Zoning and the County Attorney in April of 2000, when they determined that A-2 zoning allowed the raising of monkeys.<sup>133</sup> The third milepost, which the court found most persuasive, was the fact that Hendry County advertised meetings of its Board of County Commissioners to discuss the location of non-human primate breeding facilities.<sup>134</sup> On multiple occasions, the Board voted not

to reverse decisions concluding that breeding facilities were allowable uses.<sup>135</sup> The court reasoned that these factors highlighted the legislative intent of Hendry County to allow non-human primate breeding facilities in agricultural zoning districts.<sup>136</sup>

*c. Case Study of Non-Human Primate Breeding Facilities in Puerto Rico*

Puerto Rico’s history with breeding non-human primates for medical research dates back to 1936.<sup>137</sup> The School of Tropical Medicine of the University of Puerto Rico, jointly with Harvard University and Columbia University, established several medical research facilities.<sup>138</sup> The principal objective of the facilities was to ensure a controlled and regular supply of monkeys for institutions on the mainland.<sup>139</sup> At the time of establishment, each rhesus sold for an average of eight dollars to twenty-five dollars.<sup>140</sup>

In the late 1990s, farm activism and public health concerns brought attention to the free-ranging monkey population in Puerto Rico.<sup>141</sup> Farmers from Lajas reported losses to their crops due to the free-ranging monkeys.<sup>142</sup> The United Front for the Defense of the Lajas Valley “took up the issue of crop damage as part of its push to establish the Lajas Valley as a protected agricultural area.”<sup>143</sup> In 1999, in an attempt to control and eliminate the monkey population, a “wildlife plan established the authority to manage invasive species through a variety of non-lethal and lethal means, including proscribed [sic] hunting.”<sup>144</sup> The authorities also initiated a trap-for-export program, where monkeys were exported to Florida and Baghdad, Iraq.<sup>145</sup> Several animal welfare organizations called for humane population control when the government was openly shooting trapped monkeys to prevent their spread across Puerto Rico.<sup>146</sup>

<sup>123</sup> *Id.*

<sup>124</sup> Amy Bennett Williams, *Trial Begins for Hendry County’s Monkey Farms and Whether Sunshine Law Was Violated*, NAPLES NEWS (June 27, 2016), <https://www.naplesnews.com/story/news/crime/2016/06/27/trial-begins-for-hendry-countys-monkey-farms-and-whether-sunshine-law-was-violated/86458644/>.

<sup>125</sup> Complaint at 2, *Tommie*, 2016-CA-252 (No. 40636838).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Order Denying Plaintiff’s Prayer for Relief at 4, *Stephens*, 2014-CA-633.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 5.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See George W. Bachman, Univ. of P.R., Sch. of Tropical Med., Report of the Director 6 (1938).

<sup>138</sup> Gazir Sued, *Tiranía Antropocéntrica Historia de la crueldad, matanzas y experimentaciones con primates no-humanos en Puerto Rico* 59 (2012).

<sup>139</sup> Richard Rawlings, *Forty Years of Rhesus Research*, 82 NEW SCIENTIST 108, 108 (1979).

<sup>140</sup> SUED, *supra* note 137, at 42.

<sup>141</sup> Neel Ahuja, *Notes on Medicine, Culture, and the History of Imported Monkeys in Puerto Rico*, in CENTERING ANIMALS IN LATIN AMERICAN HISTORY 180, 193 (Martha Few & Zeb Tortorici eds., 2013).

<sup>142</sup> *Id.* at 193.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 194.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

In 2008, Bioculture, a Mauritius-based breeder of standard pathogen-free research monkeys, initiated the permit process to establish a private breeding operation in Guayama, Puerto Rico.<sup>147</sup> The operations were projected to house approximately 4,000 monkeys, and were to be integrated into a global network of biomedical primate distribution.<sup>148</sup> The permits were granted and construction began in early 2009.<sup>149</sup> The neighbors in Guayama filed a complaint with the Review Board of Permits and Land Use, requesting the permits to be revoked and the construction to be halted.<sup>150</sup> Local residents and People for the Ethical Treatment of Animals (PETA) filed a lawsuit, arguing the use of the primate breeding facilities would be industrial in nature, and that the facilities were not in compliance with the permissible uses in the zoning standards.<sup>151</sup> In addition, they argued that an Environmental Impact Statement (EIS), required under the National Environmental Policy Act (NEPA), was necessary due to the significant risk the project presented to the environment.<sup>152</sup>

The complaint was later amended to assert that: (1) the plaintiffs faced an inescapable danger to their safety and were at risk of contracting several serious health problems; (2) the habitat would be affected due to the negative effect on the biodiversity of the area; (3) there would be potential crop damage, given that one of the plaintiffs was a farmer and his 139-rope farm was adjacent to the Bioculture facility; (4) the project threatened the fauna and flora of the area; (5) there were risks of infectious diseases associated with primates; (6) the project, being industrial, would cause noise generated by thousands of caged monkeys; and (7) Bioculture's operation was greater than 100,000 square feet, which was incompatible with the district and posed a significant health risk due to the feces produced by thousands of confined monkeys.<sup>153</sup>

A lower court in Puerto Rico temporarily halted construction of the facility.<sup>154</sup> The court's decision was based on the fact that monkey breeding was not an agricultural activity, so the proposed use of the Bioculture project was not in line with the permitted uses for a district classified as General Rural.<sup>155</sup> The court based its decision on evidence presented by an expert witness who evaluated the construction permits

presented by Bioculture and determined them to be industrial.<sup>156</sup> The expert witness stated that the monkeys were not being used as food, a goal of agriculture.<sup>157</sup> He further asserted that the context in which the monkeys were bred did not fall under an agricultural activity.<sup>158</sup> The Supreme Court of Puerto Rico denied certiorari, which upheld the lower court's decision to temporarily halt construction of the facility until the appropriate administrative body could determine the legality of the construction.<sup>159</sup> The Court, in denying certiorari, determined the plaintiffs had met their statutory requirements to sustain the provisional injunction.<sup>160</sup>

#### IV. PROPOSAL FOR REGULATING CURRENT AND FUTURE NON-HUMAN PRIMATE BREEDING FACILITIES

There are more non-human primate breeding facilities in Hendry County than in any other community in the United States.<sup>161</sup> The facilities currently conduct business in an agricultural zoning district.<sup>162</sup> Under the agricultural zoning districts, the County does not need to provide notice to its residents about new facilities that may open, nor does it provide any recourse to concerned residents who may be affected from the facilities currently in operation.<sup>163</sup> This part of the article proposes two solutions to address prospective and existing non-human primate breeding facilities: (1) an amendment to the Hendry County Land Development Plan and Ordinance to include the non-human primate breeding facilities under the industrial<sup>164</sup> or commercial zoning category, and (2) a proposal to allow residents to bring a nuisance challenge to enjoin current non-human primate breeding operations.

<sup>147</sup> Brito v. Bioculture P.R., Inc., 183 P.R. Dec. 720, 722 (2011).

<sup>148</sup> Ahuja, *supra* note 140, at 197.

<sup>149</sup> Brito, 183 P.R. Dec. at 722.

<sup>150</sup> *Id.* at 733-34.

<sup>151</sup> *Id.* at 734.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 735.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 739.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 739-40.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Animal Rights Found. of Fla., *supra* note 18.

<sup>162</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 5.

<sup>163</sup> *Id.*

<sup>164</sup> In 2006, a large non-human primate breeding facility in New Jersey had plans to open a new facility in an area that was zoned for agricultural uses. After opponents voiced concern, the company changed the site to an industrial use. Chris Markham, *Covance Changing Sites for Planned Laboratories*, E. VALLEY TRIB., Oct. 4, 2016, [http://www.eastvalleytribune.com/local/covance-changing-sites-for-planned-laboratory/article\\_1eb2302a-ebfc-5f35-ac62-d6bc9e8ddd71.html](http://www.eastvalleytribune.com/local/covance-changing-sites-for-planned-laboratory/article_1eb2302a-ebfc-5f35-ac62-d6bc9e8ddd71.html).

*a. Amending Hendry County's Land Development Plan and Code*

Municipalities generally enact zoning ordinances that incorporate a map of the various districts and specify the permitted uses within each district.<sup>165</sup> “Variances and special use permits enable the municipality to delegate to an administrative body the power to make adjustments that do not alter the basic legislative decisions.”<sup>166</sup> Municipalities are often required to conduct public hearings on proposed amendments to a zoning ordinance.<sup>167</sup> There are two processes to make zoning amendments.<sup>168</sup> First, a textual amendment can modify the text of an ordinance.<sup>169</sup> The legislature can add or subtract words from the existing ordinance in order to articulate the desired amendment.<sup>170</sup> This form of amendment can modify the restrictions applicable in a particular zoning district, or in all zoning districts.<sup>171</sup> Second, a map amendment can alter a particular district.<sup>172</sup> Unlike a textual amendment, which modifies the restrictions applicable in any zoning district, the second form alters the map to change a district where a particular parcel of land is located.<sup>173</sup>

Unlike other counties’ ordinances addressing wild and exotic animals, Hendry County’s ordinances only contain provisions for domestic livestock under the General Agriculture zoning category.<sup>174</sup> The Hendry County Land Development Code establishes a zoning map and defines various types of zoning districts, including agricultural and industrial districts.<sup>175</sup> Apart from breeding non-human primates for medical research, the facilities engage in other activities that are inconsistent with agricultural uses.<sup>176</sup> These activities include conducting invasive surgical procedures on primates, research data collection, education, training, and selling products and devices to the research industry.<sup>177</sup>

The Supreme Court of Puerto Rico denied certiorari, but upheld a decision by a lower court that found that temporarily halted construction of a non-human primate breeding facility pending administrative

<sup>165</sup> Stewart E. Sterk & Eduardo M. Peñalver, *Land Use Regulation* 57-58 (2011).

<sup>166</sup> *Id.* at 58.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Sumter County, Fla. Ordinance, *supra* note 113.

<sup>175</sup> Hendry County, Fla. Code, *supra* note 114.

<sup>176</sup> *Tommie*, 2016-CA-252 (No. 40636838).

<sup>177</sup> Panther Tracks Learning Center, *supra* note 8.

review.<sup>178</sup> The lower court heard from an expert witness who stated that one of the goals of agriculture was to use the animals for food.<sup>179</sup> Here, like in Puerto Rico, the non-human primates are being bred for research purposes, not agricultural purposes.

Hendry County should amend its Land Development Plan and Code to regulate these facilities as industrial or commercial, rather than agricultural. The non-human primate facilities in Hendry County engage in other activities, separate and apart from breeding primates, that are inconsistent with the permissible uses in A-1 and A-2 zoning districts of the Hendry County Code and Land Development Plan, and are also inconsistent with how courts around the country have interpreted the term “agricultural.”<sup>180</sup>

For example, a California court referred to an oft-cited Webster’s Dictionary definition, stating that “agriculture” is defined as “the art or science of cultivating the ground; the art or science of the production of plants and animals useful to man or beast; it includes gardening or horticulture, fruit growing, and storage and marketing.”<sup>181</sup> In Illinois, a court concluded the words “agricultural purpose” have been generally interpreted to carry a comprehensive meaning involving the art or science of cultivating the ground.<sup>182</sup> Similarly, an Indiana court stated a fundamental distinction existed between agricultural uses and commercial or industrial uses of property, and that not all activities with an agricultural nexus are themselves agricultural.<sup>183</sup> Finally, the United States Supreme Court stated that:

[W]hether a particular type of activity is agricultural is determined not by the necessity of the activity to agriculture nor the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in a particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.<sup>184</sup>

Generally, the term “livestock” is used synonymously with the term “farm animal,” and both usually refer to animals raised as agricultural commodities.<sup>185</sup> Livestock are domesticated animals and are considered naturally harmless and docile through many years of

<sup>178</sup> *Brito v. Bioculture P.R., Inc.*, 183 P.R. Dec. 720, 723 (2011).

<sup>179</sup> *Id.*

<sup>180</sup> *See Hagenburger v. Los Angeles*, 124 P.2d 345, 347 (1942); *Cty. of Grundy v. Soil Enrichment Materials Corp.*, 292 N.E.2d 755, 760 (1973); *Day v. Ryan*, 560 N.E.2d 77, 81 (Ind. App. 1990); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949).

<sup>181</sup> *Hagenburger*, 124 P.2d at 347.

<sup>182</sup> *Cty. of Grundy*, 292 N.E.2d at 760.

<sup>183</sup> *Day*, 560 N.E.2d at 81.

<sup>184</sup> *Farmers Reservoir & Irrigation Co.*, 337 U.S. at 761.

<sup>185</sup> *See generally* Pamela D. Frasch, *Animal Law in a Nutshell* (2d ed. 2016).

contact with people.<sup>186</sup> When classifying farm animals, courts may look at the relationship to the land and whether the alleged farm is producing common farm products.<sup>187</sup> Here, non-human primate breeding facilities do not fit the agricultural classification.

*b. Nuisance Challenges to Enjoin Current Operations*

A nuisance challenge may be brought against existing non-human primate breeding facilities to enjoin their use.<sup>188</sup> Under nuisance law, the gravity of the injury to the plaintiff is weighed against the utility of the defendant's conduct to arrive at a judgment as to whether a nuisance has taken place.<sup>189</sup> Regardless of the type of nuisance, the interference with the property must be substantial and continuous.<sup>190</sup>

A question that often arises in nuisance claims is whether a business that is operated in a lawful manner may be enjoined as a nuisance. The Supreme Court of Arizona held that even though a cattle feedlot was operating in a lawful manner, the feedlot was both a private and public nuisance because of its potential to be dangerous to public health.<sup>191</sup> A Georgia court noted that compliance with zoning restrictions did not conclusively establish that a use was not a private nuisance.<sup>192</sup>

Nuisance cases involve activity that is "offensive, physically, to the senses and by such offensiveness makes life uncomfortable.... [i.e.,] noise, odor, smoke, dust, or even flies."<sup>193</sup> Third parties often sue animal owners or caretakers under nuisance theories because the animal is interfering with their right to quiet enjoyment or is posing a health or safety threat.<sup>194</sup> There are two categories of nuisances—public nuisance and private nuisance.<sup>195</sup>

<sup>186</sup> *Id.* at 16-17.

<sup>187</sup> *Id.* at 17.

<sup>188</sup> Zoning and common law nuisance claims have been used to combat climate change related issues. Lindsay Walton & Kristen King Jaiven, *Regulating Concentrated Animal Feeding Operations for the Well-Being of Farm Animals, Consumers, and the Environment*, in *WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW* 112 (Randall S. Abate ed., 2015). Some counties have ordinances that regulate nuisance animals. In Sumter County, the ordinance provides that a public nuisance means any animal that "makes excessive noises that cause unreasonable annoyance, disturbance, or discomfort to the neighbors." SUMTER COUNTY, FLA. ORDINANCE § 4-7.

<sup>189</sup> See generally Rebecca J. Huss, No Pets Allowed: Housing Issues and Companion Animals, 11 *ANIMAL L.* 115 (2005).

<sup>190</sup> *Id.*

<sup>191</sup> *Spur Indus. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 184 (1972).

<sup>192</sup> *Life for God's Stray Animals, Inc. v. New N. Rockdale Cty. Homeowners Ass'n*, 322 S.E.2d 239, 242 (Ga. 1984).

<sup>193</sup> *In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997).

<sup>194</sup> Chris Erchull, A Hen in the Parlor: Municipal Control and Enforcement of Residential Chicken Coops, 6 *J. ANIMAL & ENVTL. L.* 6, 63 (2014).

<sup>195</sup> Restatement (Second) of Torts § 821B (Am. Law Inst. 1979).

i. Public Nuisance

The Restatement Second of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."<sup>196</sup> The Restatement also states that:

[C]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) whether the conduct involves a substantial interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, to the actor's knowledge, has a substantial detrimental effect upon the public right.<sup>197</sup>

Public nuisance claims often arise in cases where potentially dangerous wild or exotic animals are housed, or in industrial farms with hundreds or thousands of animals.<sup>198</sup> These large operations generate substantial amounts of waste that must be effectively managed.<sup>199</sup> If the waste is not properly managed, serious and potentially harmful air and water pollution may result, substantially impacting the surrounding communities.<sup>200</sup>

Local, state, and federal agencies are often involved in public nuisance claims. In an Ohio nuisance case, the county's public health department, police department, fire department, the state's wildlife division of its Department of Natural Resources, and the USDA all inspected a property after receiving complaints about odors emanating from the property.<sup>201</sup> The landowner kept lions, tigers, leopards, bears, foxes, pigeons, dogs, and an alligator on the premises.<sup>202</sup> The court held that the landowners failed to abate the nuisance and ordered that all of the animals be removed.<sup>203</sup> Even though governmental agencies cannot prohibit an occupation, they can limit or regulate the type of operation by requiring permits.<sup>204</sup> Other courts have upheld ordinances that banned certain animals because the ordinances had a rational relationship to a governmental interest in protecting public health.<sup>205</sup>

<sup>196</sup> *Id.*; FLA. STAT. § 823.05 (2017).

<sup>197</sup> RESTATEMENT, *supra* note 194.

<sup>198</sup> Erchull, *supra* note 193.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Summit Cty. Bd of Health v. Pearson*, 809 N.E.2d 80, 81 (Ohio Ct. App. 2004).

<sup>202</sup> *Id.* at 82.

<sup>203</sup> *Id.* at 85.

<sup>204</sup> *Ex parte Jones*, 133 P.2d 418, 421 (Cal. Ct. App. 1943).

<sup>205</sup> *Greater Chi. Combine & Ctr., Inc. v. City of Chi.*, 431 F.3d 1065, 1065 (7th Cir. 2005).

ii. Non-human primate breeding facilities can represent both a public and private nuisance.

The presence of these facilities creates a substantial interference with public health, safety, comfort, and convenience. The primates bred in these facilities are imported from “hot zones,” regions known for containing infectious diseases capable of transmission to humans.<sup>206</sup> “Eighty to [ninety] percent of all macaque monkeys are infected with Herpes B-virus or Simian B, a virus that is harmless to monkeys[,] but fatal to [seventy] percent of humans who contract it.”<sup>207</sup> “Monkeys shed the virus intermittently in saliva or genital secretions, which generally occurs when the monkey is ill, under stress, or during breeding season.”<sup>208</sup> “At any given time, about two percent of infected macaque monkeys are shedding the virus.”<sup>209</sup> “A person who is bitten, scratched, sneezed on, or spit on by a shedding macaque runs the risk of contracting the disease.”<sup>210</sup>

In 2014, an employee of Primate Products, one of the four facilities operating in Hendry County, co-authored a study that detailed a highly-pathogenic, hemorrhagic E. coli outbreak among primates at the facilities, which had a nine percent fatality rate.<sup>211</sup> The report stated that during a two month period, an outbreak of diarrhea occurred in Primate Products’ outdoor colony.<sup>212</sup> There was an initial population of 109 primates and twenty-nine percent of those were struck by the outbreak.<sup>213</sup> Pathogenic E. coli has been identified as an etiologic agent in humans, causing acute diarrhea or even death.<sup>214</sup>

Non-human primate breeding facilities house thousands of primates that are susceptible and known to carry the B virus and pathogenic E. coli.<sup>215</sup> Studies have shown the non-human primates used in these types of facilities, like the macaques and rhesus monkeys, exhibit unpredictable and aggressive behavior as they mature.<sup>216</sup> The primates are usually housed in open-air cages and are therefore exposed to mosquitoes.<sup>217</sup> The mosquitoes can bite the infected primates which can

<sup>206</sup> *Id.*

<sup>207</sup> Importation of Exotic Species: Hearing Before the Committee on Env’t and Pub. Works, 108th Cong. 89 (2003).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Kolappaswamy, *supra* note 79, at 122.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 123.

<sup>214</sup> *Id.* at 122.

<sup>215</sup> Ostrowski, *supra* note 48.

<sup>216</sup> *Id.*

<sup>217</sup> Amy B. Williams, *Hendry County didn’t break Sunshine Law in monkey*

then bite humans, thereby transmitting the disease.<sup>218</sup> The monkeys also generate hundreds of thousands of pounds of feces.<sup>219</sup> The waste’s runoff potential creates a risk for infectious waste to enter the environment.<sup>220</sup>

In addition to public health, the non-human primate breeding facilities also interfere with public safety. One of the greatest concerns is possible escapes. In 1992, Hurricane Andrew, a Category 5 hurricane, struck and wreaked havoc in South Miami.<sup>221</sup> During the hurricane, hundreds of monkeys escaped the Mannheimer Foundation, a monkey breeding facility.<sup>222</sup> One of the escaped macaques bit a person.<sup>223</sup> The court held the breeder was strictly liable<sup>224</sup> for damages because macaques are “wild” animals, and conveyed that the “monkeys are a mildly aggressive breed known for carrying the Herpes ‘B’ virus.”<sup>225</sup> In 2014, twenty-six monkeys escaped a breeding facility in South Carolina.<sup>226</sup> Around the same time, in the same facility, a monkey escaped while in the process of being transported; the monkey was never found.<sup>227</sup>

The primates in Hendry County constitute a public nuisance. The four facilities together house on average 10,000 primates.<sup>228</sup> These

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*farm suit, Florida appeals court rules*, NEWS-PRESS (Oct. 11, 2017), <https://www.news-press.com/story/news/2017/10/11/hendry-didnt-break-sunshine-law-monkey-farm-suit-florida-appeals-court-rules/754049001/>.

<sup>218</sup> Murray B. Gardner & Paul A. Luciw, *Macaque models of human infectious disease*, 49(2) J. INST. OF LAB. ANIMAL RES. 228, 228-230 (Jan. 1, 2008).

<sup>219</sup> Complaint at 6, *Tommie*, 2016-CA-252 (No. 40636838).

<sup>220</sup> Roy Soumitra et al., *Adenoviruses in Fecal Samples from Asymptomatic Rhesus Macaques, United States*, 18(7) EMERGING INFECTIOUS DISEASES 1081, 1081-88 (2012); Melissa Matthews, *Wild Monkey Poop in Florida Could Spread Killer Herpes Strain, Officials Warn*, NEWSWEEK (Jan. 11, 2018), <http://www.newsweek.com/wild-monkey-poop-florida-could-spread-killer-herpes-strain-officials-warn-778115>.

<sup>221</sup> See PROVENZO & PROVENZO, *supra* note 92.

<sup>222</sup> *Report: Police Killing Escaped Monkeys*, ORLANDO SENTINEL, Aug. 31, 1992, [http://articles.orlandosentinel.com/1992-08-31/news/9208310270\\_1\\_monkeys-rubin-gulley](http://articles.orlandosentinel.com/1992-08-31/news/9208310270_1_monkeys-rubin-gulley).

<sup>223</sup> *Scorza v. Martinez*, 683 So.2d 1115, 1116 (Fla. Dist. Ct. App. 1996).

<sup>224</sup> *Id.* at 1117; see Gary M. Kaleita & Peter Simmons, *Lions, Tigers, and Bears, Oh My! Owner and HOA Liability for Wild Animal Attacks*, 91 FLA. BAR J. 24 (Nov. 2017) (arguing that HOA’s may be liable for attacks by wild animals if the HOA had actual and constructive notice of the ongoing presence and behavior and failed to take reasonable action).

<sup>225</sup> *Scorza*, 683 So.2d at 1116.

<sup>226</sup> Stephem Fastenau, *Yemassee monkey facility targeted by federal investigation after reports of dead, injured animals*, BEAUFORT GAZETTE, Dec. 31, 2015, <http://www.islandpacket.com/news/local/community/beaufort-news/article52469800.html>.

<sup>227</sup> *Id.*

<sup>228</sup> *Hendry County didn’t break Sunshine Law in monkey farm suit, Florida appeals court rules*, NEWS PRESS, Oct. 11, 2017, <https://www.news-press.com/story/news/2017/10/11/hendry-didnt-break-sunshine-law-monkey-farm-suit-florida-appeals-court-rules/754049001/>.

primates generate large amounts of waste that can harm the surrounding communities, they may exhibit aggressive and unpredictable behavior, and pose a risk to humans due to the potential for virus and disease transmission.<sup>229</sup> This conduct involves a substantial interference with the public health, peace, and comfort of those neighboring these facilities.

### iii. Private Nuisance

The law of private nuisance empowers an owner to challenge a neighbor's activities where the neighbor substantially and unreasonably interferes with the use and enjoyment of the owner's property.<sup>230</sup> There are different ways in which the interest in the use or enjoyment of land can be manifested—it may consist of a disturbance of the comfort or convenience of the occupant, as by unpleasant odors, smoke or dust or gas, loud noises, among others; or conditions on adjoining land which impairs the plaintiff's mental tranquility by the fear or offensive nature of their mere presence, such as vicious animals.<sup>231</sup> Anyone whose use and enjoyment of any interest, possessory or non-possessory, in the land is affected can maintain an action at law.<sup>232</sup>

Non-human primate breeding facilities are also a private nuisance to individuals surrounding them. For example, Mr. Tommie stated in his complaint that he had spent over thirty years visiting the wilderness area that was adjacent to the breeding facilities.<sup>233</sup> He often meditated and harvested herbs for use in his cultural practice.<sup>234</sup> The possibility of primates escaping the facilities and finding refuge in the wilderness would substantially interfere with Mr. Tommie's use and enjoyment of the land.<sup>235</sup>

Concentrated animal feeding operations (CAFOs)<sup>236</sup> are farms in which animals are raised in confinement and have more than 1,000 animal units.<sup>237</sup> These operations are often the subject of nuisance claims<sup>238</sup> because of the noise and odors the animals produce.<sup>239</sup> Non-

<sup>229</sup> *Scorza*, 683 So.2d at 1116.

<sup>230</sup> RESTATEMENT, *supra* note 194, § 822.

<sup>231</sup> PROSSER AND KEETON ON TORTS, 620-21 (W. Page Keeton et al., eds., 1984); *see id.*

<sup>232</sup> RESTATEMENT, *supra* note 194, § 822.

<sup>233</sup> Complaint for Injunctive Relief and Declaratory Judgment, *supra* note 12, at 15.

<sup>234</sup> *Id.* at 7.

<sup>235</sup> *Id.* at 12.

<sup>236</sup> Under the Clean Water Act, CAFOs must obtain permits from the EPA to operate. 33 U.S.C. § 1342 (2012).

<sup>237</sup> *Walton & Jaiven*, *supra* note 187, at 110.

<sup>238</sup> *See generally* *Hanes v. Cont'l Grain Co.*, 58 S.W.3d 1, 2 (Mo. Ct. App. 2001) (holding that the plaintiffs were entitled to damages for the loss of enjoyment of their properties caused by the stench of manure and swarms of flies).

<sup>239</sup> Richard H. Middleton, Jr. & Charles F. Speer, *A Big Stink*, 47 TRIAL 26

human primate breeding facilities are not CAFOs, but they are similar in the sense that they house, breed, and confine thousands of non-human primates. The noise, smell, and waste created by thousands of caged monkeys can constitute both a private and public nuisance because it is a threat to public health and it is a substantial interference with the use and enjoyment of the property.

## V. DEFENSES TO NUISANCE CHALLENGES

Many states have passed laws to discourage nuisance claims.<sup>240</sup> These laws are commonly known as “Right to Farm” laws.<sup>241</sup> The purpose of these laws is to discourage nuisance claims by creating a statutory presumption that if the operation is causing a nuisance, it is outweighed by the public value in having working farms in the community.<sup>242</sup> In 1979, the Florida Right to Farm Act was enacted to prevent burdensome lawsuits against farmers that were intended to cease or curtail farm operations and discourage investments in farm improvements.<sup>243</sup> The Florida Right to Farm Act states in part:

[T]he Legislature finds that agricultural production is a major contributor to the economy of the state; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The Legislature further finds that agricultural activities conducted on farm land in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance and that these suits encourage and even force the premature removal of the farm from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits.<sup>244</sup>

(2011). Some states have enacted regulations and laws that bar these nuisance claims, known as Right to Farm Acts. *See generally* EMILY DOSKOW & LINA GUILLEN, NEIGHBOR LAW: FENCES, TREES, BOUNDARIES & NOISE (2017).

<sup>240</sup> DOSKOW & GUILLEN, *supra* note 238, at 231.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> FLA. STAT. § 823.14(2) (2017).

<sup>244</sup> *Id.*

If a property holds an agricultural classification and is subject to state or regional regulation, it must also be a “bona fide farm operation” in order to claim protection from local regulation under the Right to Farm Act.<sup>245</sup> Legislative definitions and intent establish what a “bona fide farm operation” is to be eligible for the Right to Farm Act exemption.<sup>246</sup> For purposes of the Act, a “farm” is defined as the “land, buildings, support structures, machinery, and other appurtenances used in the production of farm or aquaculture products.”<sup>247</sup>

“Farm operation” is defined as:

[A]ll conditions or activities by the owner, lessee, agent independent contractor, and supplier which occur on a farm in connection with the production of farm products and includes, but is not limited to, the marketing of produce at roadside stands or farm markets; the operation of machinery and irrigation pumps; the generation of noise, odors, dust, and fumes; ground or aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.<sup>248</sup>

In its Motion to Dismiss Plaintiff’s Amended Complaint, Primate Products raised the Florida Right to Farm Act as grounds for dismissal.<sup>249</sup> Primate Products argued the Act expressly prohibited nuisance causes of action against farm operations in Florida.<sup>250</sup> It further alleged that “[f]arm products mean[t] any . . . animal . . . useful to humans and includes, but it is not limited to, any product derived therefrom.”<sup>251</sup> The Florida Right to Farm Act discourages nuisance claims, but the purpose of the Act is to protect agricultural lands and agricultural production.<sup>252</sup> Therefore, when the Act refers to “animals,” it is referring to animals that are subject to the agricultural category. Non-human primates are not the type of animals in the agricultural category. They are not livestock, nor are they animals that are raised for food consumption. The Florida Right to Farm Act would therefore not apply to a nuisance claim against a non-human primate breeding facility.

<sup>245</sup> *Id.* § 823.14(6).

<sup>246</sup> *Id.* § 823.14(3)(b).

<sup>247</sup> *Id.* § 823.14(3)(a).

<sup>248</sup> *Id.* § 823.14(3)(b).

<sup>249</sup> Motion to Dismiss Plaintiff’s Amended Complaint at 3, *Tommie*, 2016-CA-252 (No. 40636838).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> FLA. STAT. § 823.14(2) (2017).

Another defense that defendants can raise against nuisance claims is the “coming to the nuisance” doctrine. Under this doctrine, if a plaintiff voluntarily elects to live in a particular zoning district (*i.e.*, industrial, agricultural), he cannot complain of noise, noxious odors, or any other unpleasant factors that may arise from the normal operation of businesses in the area merely because they may interfere with personal enjoyment and satisfaction.<sup>253</sup> Courts use a reasonableness test to determine whether the claim constitutes a nuisance.<sup>254</sup> The Supreme Court has stated that:

All property is owned and used subject to the laws of the land. Under our system of government property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others. Those who own real estate may use it as desired so long as the rights of others are not thereby invaded. And there is no such invasion when the use is authorized by law and is reasonable with reference to the rights of others.<sup>255</sup>

The reasonableness of the use of property is often determined from the facts and special circumstances of each case.<sup>256</sup> Modern courts often refuse to apply the “coming to the nuisance doctrine,” especially in the context of residential owners confronted with problems emanating from industrial or commercial sources.<sup>257</sup>

<sup>253</sup> *Lee v. Fla. Pub. Utils. Co.*, 145 So.2d 299, 301 (Fla. Dist. Ct. App. 1962) (concluding that it was for the jury to decide whether defendant’s use of its property was unreasonable, and whether such use resulted in injury or damage to plaintiffs for which they were entitled to compensation). Here, the Plaintiffs’ action was for the recovery of damages suffered as a result of a private nuisance. Plaintiffs lived in an industrial area, and defendant operated a plant close to plaintiffs’ property. Defendant installed electrical generating units operated by diesel fuel, and these units were operated on a 24-hour basis. Fumes were emitted from the units, and the noise was intense. The trial court directed a verdict in defendant’s favor, and plaintiffs appealed. On appeal, the court held that the evidence adduced by plaintiffs was sufficient to create a jury question as to whether defendant’s use of its property was reasonable under the circumstances.

<sup>254</sup> *Id.*

<sup>255</sup> *Cason v. Fla. Power Co.*, 76 So. 535, 536 (1917).

<sup>256</sup> *Lee*, 145 So.2d at 302.

<sup>257</sup> *Spur Indus. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 184-85 (1972) (holding that the developer who placed a retirement community near cattle feedlots had to shut down).

## VI. CONCLUSION

Hendry County has more non-human primate breeding facilities than any other community in the United States. These facilities are not only breeding primates, they are engaging in activities that do not fall under the permissible agricultural uses. These facilities are conducting workshops and trainings, providing tissue and serum for research, and selling restraint devices. Amending the Hendry County Land Development Plan and Code to include future non-human primate breeding facilities under the industrial or commercial zoning will bring clarity to otherwise vague regulations.

History has demonstrated that monkeys not only cause a great deal of chaos, they are also a threat to the health, safety, and welfare of the community. Primates are a private and public nuisance because they exhibit unpredictable and aggressive behavior, and are capable of transmitting diseases to humans. Therefore, it is important to ensure that these facilities are regulated properly and are held accountable for the impacts of their operations. Additionally, those neighboring these facilities need to have recourse against the nuisances these facilities create.

One of our goals as humans is to be healthy and safe. We seek to prevent and cure health problems, sickness, and diseases that reduce the quality and duration of our lives. At the same time, some would prefer animals not be used to achieve those outcomes, especially if pain or harm is caused. Until medical research companies find alternatives to using animals for research, non-human primate breeding facilities will continue to be controversial.

## LEGAL FRAMEWORK OF BULLFIGHTING AND SOCIETAL CONTEXT IN COLOMBIA

ANGIE VEGA<sup>1\*</sup>

### I. INTRODUCTION

Bullfighting is defined by the Royal Spanish Academy as “the art of fighting bulls.”<sup>2</sup> The sport has its origins in Rome, where the first bullfight in history took place around 2000 years ago. Bullfighting as we know it today was born in Spain in the fifteenth century. Bulls were initially forced to fight against humans as a form of entertainment in ancient Rome. In Spain, bulls were used in hunting shows and then harvested for food. Later in the seventeenth century, the Spanish elites also used bulls to prepare for war. Over the years, elites passed this practice on to the lower classes of society.<sup>3</sup> In Colombia, bullfighting arrived with the Spanish colonization. Since then, bullfighting has been one of the most important and traditional celebrations in the country, with a majority of the population having been to a bullfight at least once. Currently, due to its high cost, bullfighting in Colombia is primarily attended by the wealthy.

Today, bullfighting is permitted in countries such as Spain, France, Mexico, Colombia, Ecuador, and Venezuela. Many consider it an art form and an important part of culture. According to those in the industry, bullfighting has become a very sophisticated practice, demanding great skill and courage. Over time, bullfighting has evolved and many unique weapons have been developed to injure the bull, making sure it is debilitated just enough to be killed in the last phase of the *corrida*, “the third of the death.”<sup>4</sup>

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<sup>2</sup> Real Academia Española, <http://www.rae.es/consultas-linguisticas> (last visited Mar. 1, 2018).

<sup>3</sup> RIUS, TOROS SI, TOREROS NO (Grijalbo ed., 1st ed. 1990).

<sup>4</sup> *Breve historia de la Tauromaquia. ¿Cultura? o ¿Muerte?*, TARINGA, <https://www.taringa.net/posts/info/10588900/Breve-historia-de-la-Tauromaquia-Cultura-o-Muerte.html> (last visited Mar. 6, 2018).

Two of the high courts of the Colombian Judicial Branch, the State Council and the Constitutional Court, have stated it is Congress' duty to decide the future of bullfighting. The Constitutional Court, in its decision C-041 of 2017, declared unconstitutional the exceptions to the Statute of Animal Protection (SAP), Ley 84 of 1989, where bullfighting was permitted by law. The Constitutional Court ordered the legislative branch to decide within two years whether bullfighting would continue to be protected by law.

Bullfighting is one of the seven activities that are outside of the scope of the Statute of Animal Protection. Article 7 of SAP, Ley 84 of 1989, established exceptions to the duty to protect animals from unnecessary pain and suffering. As a result, bullfighting, along with six other activities discussed later in this paper, are legal in Colombia. Bullfighting is deeply rooted in Colombian society, but it has lost popularity in recent years thanks to pressure from various animal activist groups that are gaining attention from the government and society. Both proponents and critics of bullfighting see this as an important time in the legal evolution of bullfighting.

In 2017, Bill 271 was filed and accepted by Congress. This bill seeks to eliminate bullfighting in Colombia. Varying polls show the citizens' positions on the matter. For example, Caracol Radio, a well-known Colombian radio station, conducted a poll in 2009 regarding whether people in Colombia approved or disapproved of bullfighting. Of the five hundred citizens polled, 78% disapproved of bullfighting, 19% approved of bullfighting, and 2.6% were indifferent to the topic. All poll participants were from major cities in Colombia that have bullfighting seasons.<sup>5</sup> Corporacion Arcoiris, in its weekly poll, asked:

After five years, the capital of Colombia witnesses bullfighting again with the reopening of Plaza Santamaria. In your opinion, this is (multiple choice): Shameful (60%), Inhumane (34%), Culture/Art (6%), National Pride (0%).<sup>6</sup>

El Pais, a well-respected Colombian newspaper, conducted two polls with approximately 35,500 participants. When participants were asked if they believed bullfighting would disappear, 60.16% answered yes, and 39.84% answered no. When participants were asked if they believed bullfighting should be prohibited, 58.1% answered yes, and 41.9% answered no.<sup>7</sup>

<sup>5</sup> *El 78% de los colombianos desaprueba las corridas de toros, revela sondeo de Caracol Radio*, CARACOL RADIO (Dec. 2, 2009), [http://caracol.com.co/radio/2009/02/12/entretenimiento/1234451040\\_762496.html](http://caracol.com.co/radio/2009/02/12/entretenimiento/1234451040_762496.html).

<sup>6</sup> *Weekly poll. Resultado de Encuesta: Volvieron las corridas de toros a la Santa María*, CORPORACIÓN NUEVO ARCOIRIS (Jan. 2017), <http://www.arcoiris.com.co>.

<sup>7</sup> *Se deben prohibir los toros?*, ENCUESTA (Sept. 15, 2017), [https://elpais.com/elpais/2017/09/12/opinion/1505236781\\_251865.html](https://elpais.com/elpais/2017/09/12/opinion/1505236781_251865.html).

First, this paper explores the roots of bullfighting. Second, this paper examines the evolution of the bullfighting culture in Colombia, specifically analyzing the legal measures used to abolish the practice, and the legal measures used to support it. Third, this paper explains the interaction between the legislative and the judicial branch, and how this interaction created an environment of uncertainty with regard to bullfighting. Finally, this paper explains the isolated case of Bogota, the capital of Colombia, and how it has affected the rest of the country.

## II. ORIGINS OF BULLFIGHTING

The first bullfights in history took place in the Roman Colosseum. The Romans brought animals of the *Urus* species, a large bull with sharp horns, which has since become extinct. The breed was commonly known by Spaniards as angry bulls, or "toros bravos," from the Iberian Peninsula. These bulls fought against Roman prisoners for entertainment. Roman circuses featuring bullfighting were intended to keep the people entertained with barbaric and bloody shows.

Prisoners fighting in the Colosseum did not have much success fighting against lions. Roman leaders, concerned that onlookers would be displeased, began to bring "angry bulls," instead of lions, to fight against the prisoners. The bulls provided a more entertaining show because fighters generally remained alive longer and had more of a chance to fight back. Bulls all but guaranteed a slow death, giving the Romans the kind of entertainment they desired. Roman circuses disappeared with the fall of the Roman Empire.<sup>8</sup>

While bullfighting in Rome was a form of entertainment, in Spain, the Spaniards hunted bulls for nourishment, rather than for show. Around the year 1400, the Spaniards created a show out of bull hunting, much like Englishmen did with fox hunting, and Germans and Italians did with deer. In Spain, once bulls were captured, they were placed in large corrals to be chased down and killed.<sup>9</sup>

In the eighteenth century, the Spanish noble class embraced bullfighting when the Arabs were expelled from Spain. Soldiers practiced and prepared for war by killing bulls while skillfully maneuvering on horseback. The noble class had servants to assist in practice by distracting bulls with a cape when the riders fell from their horses. These practice scenarios were very similar to bullfights as they are known today.<sup>10</sup> The practice became so popular that the nobility built special enclosures just for the sport.

<sup>8</sup> See generally RIUS, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

In 1701, the newly-anointed King of Spain prohibited bullfighting, believing that the sport did not meet the standards of the nobility. King Felipe left the practice in the hands of servants who then partook in the sport. This was an important moment in the history of bullfighting—it went from being considered a noble sport to becoming a vile, plebeian spectacle the aristocracy attended for entertainment.

### III. BULLFIGHTING IN THE COLOMBIAN CULTURE

Bullfighting in Colombia traces its roots back to colonization. Spanish bulls brought to South America exhibited a famous character and distinct features. Those unique genetic features were passed on to the “toro de lidia,” which is the breed used in bullfighting today.<sup>11</sup> Bullfighting served as a distraction for the Spanish nobility, but also became popular with the lower classes.

#### *a. Colonization and the Arrival of Bullfighting to The New Land*

In Colombia, written records exist of at least six bullfights in the first half of the sixteenth century. During colonization, bullfights took place to celebrate the arrival of the Crown and a royal audience. In the first half of the sixteenth century, cities and villages had councils which were responsible for organizing and promoting bullfights. Members of the councils selected townsfolk that were tasked to sponsor the construction of bullrings with balconies in the “Plaza Mayor.” At that time, permanent bullfighting stadiums did not exist. The wooden balconies were to provide safety and comfort for the wealthy. The craftsmen were tasked to build bullrings in the main square or “plaza principal,” putting up a wooden fence to protect the public. However, this enclosure was no guarantee of safety, as cattle would occasionally run over the fence and scare people away. The celebration would conclude at night, with the torched bull spectacle or “espectaculo del toro encandelillado.” The torched bull spectacle entailed wrapping up a bull’s horns in oil-soaked rags that were then lit on fire. The pain would agitate the animal, and it would chase down any drunken viewers that dared to enter the ring.<sup>12</sup>

At the end of the sixteenth century, complying with Pope Pius V’s order to forbid bullfights and other similar sports with wild animals, the Colombian ecclesiastical authorities were forced to prohibit bullfighting. However, this order was not wholly complied with—the mandate did

not apply to areas outside the capital of Bogota. Bullfighting was reestablished in Colombia a hundred years later by the President of the Audience, Don Diego de Cordoba, subject to a condition that it could not be celebrated at night or during worship. Bullfighting continued throughout the eighteenth century.

#### *b. The Viceroy and Expansion of Bullfighting*

Bullfighting popularity in Colombia increased significantly in 1739 under the power of Viceroy Jose Solis. After his election, the councils mandated five days of bullfights to honor the Viceroy. Carlos III, the King of Spain at that time, banned bullfights because he considered them to be barbaric and of the lower class. After this prohibition, other sports such as “coleo,” (a sport consisting of two horsemen chasing down a bull, and grabbing him by the tail to turn him over), were born. Viceroy Pedro Messia de la Cerda, Jose Solis’ successor, was a big proponent of bullfighting, but never promoted this activity from his office out of respect for Carlos III. The Viceroy had bullfights for his own enjoyment at his country house with friends and members of the elite. During this time, while bullfighting was prohibited in Bogota, citizens from different colonies practiced it without restriction.<sup>13</sup> After the death of Carlos III in 1788, bullfighting began to be publicly practiced again.<sup>14</sup>

#### *c. Arrival of the “Professional” Bullfighters*

The first group of professional Spanish bullfighters arrived from Spain in 1890. Bogota residents witnessed for the first time how bullfights were performed in Spain. This historical context is a main reason why many consider bullfighting an important part of Colombian culture—it remained a common practice throughout the country ever since the declaration of independence from Spain. Key historical events all concluded with a bullfight. For example, the Declaration of Independence celebration on July 20, 1810 included a bullfight and a Catholic mass. Moreover, the installation of the first republican congress; the election of the first elected president, Antonio Nariño; and the Liberation of Bogota in 1826 are other events that were followed by bullfights. In 1819, following the revolution against Spain, bullfighting was legitimized as a custom.<sup>15</sup>

<sup>11</sup> Feria taurina/Historia Toreo, El Pais (2002).

<sup>12</sup> Pablo Rodriguez Jimenez, *La Fiesta de los Toros en Colombia Entre los Siglos XVI-XIX*, TAUROLOGIA (Mar. 3, 2018), [https://www.taurologia.com/imagenes/fotosdeldia/1672\\_ensayo\\_la\\_fiesta\\_de\\_toros\\_en\\_colombia.pdf](https://www.taurologia.com/imagenes/fotosdeldia/1672_ensayo_la_fiesta_de_toros_en_colombia.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

*d. The First Bullrings in Colombia*

In the nineteenth century, individual owners—who were sometimes bullfighters—were responsible for construction of bullrings and advertising bullfights. Indeed, these men became celebrities that were worshipped by members of the local privileged class. In the twentieth century, businessmen took over advertising and the construction of the plazas. The businessmen built strong buildings with remarkable architectural designs, many of which remain standing to this day.<sup>16</sup>

*e. Present Day Bullfighting*

Bullfights still occur in certain cities throughout Colombia. However, the Constitution has limited the requirements under which bullfighting can be celebrated. Now, only cities that have historically and traditionally celebrated bullfighting seasons can continue to do so, as it is their constitutional right (this topic will be discussed further later in the paper). Bullfighting is a controversial and deeply divisive topic in Colombia. The country's residents are passionate about bullfighting, regardless of which side they align with, which is partly why these interests are so hard to reconcile. The future of bullfighting in Colombia is currently in the hands of Congress. In January of 2017, the mayor of Bogota, Enrique Peñalosa, ordered the reopening of the most important bullfighting stadium, Plaza Santamaria. Numerous animal rights groups convened public protest, pressuring the politicians and the courts to rule on this matter. Mayor Peñalosa stated that it was his duty to comply with the mandate of the Constitutional Court.

Currently, bullfighting is not prohibited under any law. In fact, it is specifically exempted from SAP. Animal rights groups are demanding that bullfighting be declared illegal by the Colombian legal system. Recent decisions threaten to change the legal status of bullfighting. In 2017, the Constitutional Court declared bullfighting unconstitutional, holding that this practice was unnecessary and cruel. However, the Court held that it was the Congress' duty to legislate on bullfighting and that, in case it did not do so, the Court would declare bullfighting, coleo, corralejas, and cockfighting illegal because these practices are abusive and cruel to animals. Congress has until 2019 to legislate on these practices.

At the same time, Bogota State Council ordered Bogota to call for a referendum on bullfighting so that residents of Bogota could weigh in on whether they wanted the bullfights to continue in the city. The referendum was approved, and Bogota residents are now waiting for the date on which they will have the opportunity to express their opinions.

<sup>16</sup> *Id.*

**IV. ARGUMENTS SUPPORTING AND OPPOSING BULLFIGHTING**

There are many arguments over the pros and cons of bullfighting in Colombia. These debates range from arguments over animal cruelty, tradition of the practice, culture, and bullfighting as a form of art. The following are prevalent issues in the debate on bullfighting.

*a. Animal Cruelty*

Bullfighting supporters argue that the suffering of the animal is not the main purpose of bullfighting. Bullfighting is a ritual where the matador and the bull fight for their lives; therefore, the bull is killed with dignity. Bullfighting is what the “toro de lidia” breed was created for. Without bullfighting, this breed would likely disappear, as it is bred specifically for combat. Without the practice, years of tradition and effort for the evolution of the species would be for naught. Bullfighting supporters maintain that certain animal species, including the bull, exist for serving humans.

On the other hand, bullfighting opponents argue that bullfighting is a cruel activity where the bulls are victims. Bullfighting is a practice where the bull and the matador are held to differing conditions. For example, during the bullfight, bulls are stabbed several times to induce bleeding and, as a result, their lungs are flooded with blood, making it difficult for them to breathe. Other common injuries include muscle tearing and skull fractures. Critics urge that if bullfighting took place in an open field, the bull's instinct would be to run away and escape. The “fighting bull” is not naturally aggressive—it would merely seek to defend itself.

*b. Tradition*

Tradition has long been a strong argument for bullfighting supporters. Supporters seem to believe that because it is tradition, bullfighting is untouchable. The legal analysis goes to whether this long-standing tradition is justifiable by the morals of the modern Colombian society. Supporters claim that bullfighting is a cultural activity with deep roots in Hispanic traditions, going back almost four hundred years to the time of colonization.<sup>17</sup>

Bullfighting opponents argue that culture and tradition do not exist in perpetuity. A practice that is considered part of a culture is

<sup>17</sup> Carlos Contreras, *La “Cuasi” Penalización de los Espectáculos con Animales por Parte de la Corte Constitucional* (Feb. 15, 2017), <https://www.ambitojuridico.com/ambiental-y-agropecuario/la-cuasi-penalizacion-de-los-espectaculos-con-animales-por-parte-de-la>.

not necessarily good or fair. Some traditions and customs are valid, specifically those that do not impair the rights of third parties; however, not all traditions and customs are just. In this case, bulls that are tortured and killed for entertainment is not a valid tradition. Culture and tradition are subject to revision by society. As society evolves, it judges what practices are accepted under its new moral values and guidelines.<sup>18</sup>

### *c. Bullfighting Supporters as a Minority*

Bullfighting supporters see themselves as a minority. Supporters claim there is a violation of their rights when they are denied the right to attend bullfighting events. Further, they argue that some areas receiving special constitutional protection permitting bullfighting is a violation of the Constitution.

Opponents argue that the duty of protection of constitutional rights of minorities applies only where those minorities have been excluded and are vulnerable to abuses. The taurine guild is indeed a minority, but a privileged one that has social, economic, and political power. Therefore, the constitutional protection does not apply to this group. Moreover, the Constitution does not protect bullfighting or any other activity that requires the use of animals.<sup>19</sup>

### *d. Extinction of Fighting Bulls*

Bullfighting supporters argue that the “fighting bull” breed has a genetic classification that is different from the rest of the cattle species. This is the result of a genetic evolution over hundreds of years. Without bullfighting, this breed would likely diminish since this breed demands financial investment and time. These bulls are raised in large pastures for more than four years and they are fed with high-quality food. To maintain this breed would be unprofitable, as cattle for human consumption are raised in very different conditions at a significantly faster rate before they are slaughtered.<sup>20</sup>

Bullfighting opponents contend the extinction of the “toro de lidia” breed is an anthropocentric view, and the torture of a species cannot be the justification for its perpetuity. Animals should not be raised to be tortured and killed for entertainment.<sup>21</sup>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> W Radio Colombia, *Fiesta Brava en Bogotá: ¿Sí o no? Debate con Vicky Dávila*, YOUTUBE (May 23, 2017), <https://www.youtube.com/watch?v=t3R5SvbjPYE&t=204s>.

<sup>21</sup> *Id.*

### *e. Animal Consumption*

Bullfighting supporters claim that opponents do not truly care about the animal’s well-being. Supporters point to the irony in condemning bullfighting but not condemning the suffering of animals used for consumption. To this premise, bullfighting opponents respond that bullfighting and other activities that involve animals for entertainment are especially cruel, as it promotes the torture and death of the animal. Bullfighting is not a priority for Colombian society; bullfighting events are a luxury to which only a small sector is privileged enough to attend. Animals destined for human consumption do suffer, but their death is not a public spectacle. Opponents contend that bullfighting and the conditions of animals for human consumption are separate issues that require individual reform.

### *f. Employment*

Bullfighting supporters maintain that bullfighting generates significant employment opportunities for people of various economic statuses and education. The prohibition of bullfighting would leave hundreds of people without a job, and it would lead to substantial negative impact on the Colombian economy. Others contend bullfighting is not necessary as an employment generator. Prohibition advocates maintain that there are many ways to make a living without harming animals. They argue bullfighting is an unjust practice that must be prohibited regardless of those that gain profit from it.

The Colombian government has an obligation to give unemployment assistance. Bill 271 of 2017 proposes that the government and the departments work together to create a plan of employment substitution for those that can prove they are affected by the prohibition of bullfighting. If so proven, they are guaranteed options of employment integration. Bullfighting opponents further argue that bullfighting is seasonal. The bullfighting colosseum is only used during the taurine season and sporadically for “novilladas” in Bogota, along with city festivals. Opponents argue that the colosseum can be utilized for other non-bullfighting activities, like sporting events and concerts, which can then be monetized to provide for upkeep and staff salaries.

### *g. Bullfighting as a Form of Art*

Supporters of bullfighting claim that it is an expression of art. They argue that the interaction of the matador’s skills and his graceful movements, along with the ferociousness of the bull, is an exciting and inspiring moment. The ritual between the matador and the bull have

been the inspiration for other expressions of art such as literature, dance, poetry, music, and painting. They argue that prohibiting bullfighting would be a loss for culture in society.

Opponents argue there is no beauty in cruelty and bullfighting is not worth its cost. Bullfighting's moral price is too much to ignore in modern society; critics argue that this is an outdated discussion. Animal rights advocates argue that modern society generally rejects everything that undermines dignity and promotes disrespect for the different forms of life.

#### *h. Bullfighting and Economy*

Proponents argue bullfighting is a lucrative business that has a significant impact on the economy. Bullfighting generates millions of pesos per season.<sup>22</sup> Financial gains are likely a reason why Congress and the Court are reluctant to prohibit the practice. The taurine guild lobby in favor of bullfighting because they have great financial interest in the sport continuing to prosper. The taurine season in the main Colombian cities involves many different sectors of the Colombian economy. Bullfighting takes a major logistical effort for the industry to operate efficiently. Bullfighting generates more than 16,000 jobs per season in Bogota. Among the various sectors, bullfighting generates jobs for cattle raising, bullfighters, doctors, and veterinarians.<sup>23</sup>

Raising bulls is one of the most lucrative jobs within the industry. The price for a single bull could reach up to five million Colombian pesos, and an average of six bulls are used per bullfight. Foreign bullfighters are paid up to \$150,000 dollars per bullfight, and local bullfighters are paid about \$20,000. Bogota receives approximately \$300,000 dollars per bullfight for leasing property to the organizers. Managers must pay a gambling tax, a public event tax, and additional taxes up to 35% for the participation of foreign bullfighters.<sup>24</sup>

The most important colosseums in Colombia are in Bogota, Manizales, Cali, and Medellin. Bogota and Medellin have bullfighting seasons, while Cali and Manizales have bullfights daily during the city's annual festivals.<sup>25</sup> Each city's colosseum holds around 15,000 people. Tickets for bullfights vary between \$45 and \$250 U.S. dollars. Profits are

<sup>22</sup> Carlos Contreras, *¿Y qué pasó con el Coleo, las Corralejas y las Riñas de Gallos?* (May 26, 2017), <https://www.ambitojuridico.com/noticias/columnista-online/civil-y-familia/y-que-paso-con-el-coleo-las-corralejas-y-las-rinas-de>.

<sup>23</sup> Juan Manuel Ramírez, *Industria Taurina, Motor de Empleo en Colombia*, PORTAFOLIO (Jan. 13, 2012), <http://www.portafolio.co/economia/finanzas/industria-taurina-motor-colombia-107622>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

used to pay bullfighting participants, as well as costs for transportation of the animals. In addition, many businesses benefit from bullfighting. Advertising through radio television and media promote the event in various cities. Restaurants and hotels around the colosseums fill up before and after the bullfights. Bullfighting attracts tourists from all over the world, with the economic impact resembling large-scale sporting events. With so much profit, bullfighting supporters have a strong argument to present to the government and society that bullfighting is beneficial for the economy of the country.

Animal rights groups present alternative activities that could replace bullfighting in public colosseums to reclaim profits and employment. For example, concerts, sporting events, and other cultural events could replace bullfighting. Admittedly, the economic argument plays a strong role against the outlawing of bullfighting.

## **V. SOCIAL ANALYSIS OF BULLFIGHTING**

Bullfighting is a much-debated topic in Colombia. There is a significant, but decreasing, number of people that still support this practice. As this activity has been able to survive in the country after four hundred years, supporters of this practice maintain it cannot be prohibited because it is an important component of the culture. On the other hand, opponents demand the abolishment of this practice, arguing it is inhumane to animals. The country is certainly very polarized in this matter.

Bullfighting used to be a common practice accepted by most Colombian citizens. Although the number of people opposed to animal cruelty seems to be increasing rapidly, there are still many who are apathetic to the situation. This group does not necessarily support bullfighting, but it does indeed accept it as part of Colombian culture.

The bullfighting controversy escalated when the former Bogota mayor, Gustavo Petro, unilaterally ordered the closing of Plaza Santamaria in 2012—the most important bullring in Colombia. Five years later, in January of 2017, two lawsuits against the Capital District and citizen protests, including hunger strikes, caused the Plaza Santamaria to reopen under the new administration of Enrique Peñalosa. Peñalosa ordered the reopening of the colosseum, which complied with the decision of the Constitutional Court ordering for the renewal of the leasing contract for the Plaza Santamaria, and to respect the freedom of artistic and cultural expression of the minorities. The power struggle in Bogota shows how the cultural conflict over bullfighting is complicated by local versus national politics.

## VI. LEGISLATIVE ANALYSIS OF BULLFIGHTING

Colombia has become more progressive with its animal protection laws. In fact, several laws have been passed that establish duties toward animals and penalties for abuse. These laws reflect the position that animals are sentient creatures. However, several of these laws specifically exempt bullfighting from their authority. In addition, Colombia has laws that specifically regulate activities associated with bullfighting, particularly the National Taurine Statute or Ley 916 of 2004, and Ley 1272 of 2009, which declared “*corralejas*”<sup>26</sup> a cultural heritage of the nation. To complicate matters, in 2017, the Constitutional Court held bullfighting and all the other exceptions to SAP to be unconstitutional. However, it postponed the effects of the decision, allowing Congress two years to legislate on the matter. The country seems at odds, finding bullfighting cruel on a national level, but a tradition that must be protected in certain local districts.

### *a. Protecting Animals*

Colombia has gained ground in advancing animal protection in the past few years. The development in the recognition of animal protection as a constitutional value comes primarily from the judicial branch. The high courts, deciding on constitutionality claims, have been creating a normative body where the recognition of animals as sentient beings has gained importance, as there are just a few laws that regulate the matter. Despite this, Congress has been reluctant to legislate against bullfighting, even passing laws that deem *corralejas* a cultural tradition in both 2004 and 2009. This apparent conflict creates an environment of legislative uncertainty as to the practice of bullfighting.

There are two major bodies of law in animal protection. The first one is SAP, or Ley 84 of 1989. This statute established that “all the animals in the national territory enjoy special protection against suffering and pain caused directly or indirectly by humans.”<sup>27</sup> The main purpose of this law is to punish and eradicate animal cruelty. The statute established the general duties of humans towards animals. Among these duties, there is the duty to provide animals with enough food, water, and medicine to guarantee their well-being; the duty to provide animals with appropriate space so they can move adequately; and the duty to provide appropriate shelter. The statute established the sanctions for those that cause harm to an animal, ascribing jail time and subsequent fines. Ley 84 also regulates the slaughter of animals for non-consumption,

<sup>26</sup> *Corralejas* is a traditional bullfighting festivity celebrated every year in the Caribbean Coast of Colombia, where the public participates in the bullfight.

<sup>27</sup> Statute of Animal Protection, Ley 84 of 1989.

laboratory and research animals, animal transportation, and hunting and fishing. Unfortunately, not all activities involving animals are subject to the statute’s protections. There are seven exceptions established in Article 7 of SAP, including: 1) bullfights; 2) *rejoneo*;<sup>28</sup> 3) *coleo*;<sup>29</sup> 4) *novilladas*;<sup>30</sup> 5) *corralejas*;<sup>31</sup> 6) *becerradas*;<sup>32</sup> and 7) *tientas*.<sup>33</sup>

The second animal protection statute is Ley 1774 of 2016. This law was a great step forward in the recognition of animal legal protection. The law modified Article 665 of the Civil Code that categorized animals as “assets” and instead recognized animals as “sentient beings” subject to special protection against suffering and pain. Even though animals are still considered property, they are now part of a different category that affords them special protection. The statute also created criminal and judicial procedures to assert its animal protection goals. Ley 1774 of 2016 states that the principle of animal protection “is based on respect, solidarity, compassion, ethics, justice, care, prevention of suffering, eradication of captivity and abandonment, and any other form of abuse, mistreatment, violence and cruel treatment.” Ley 1774 also regulates principles such as animal well-being and social solidarity, where “the government, society and its members have the duty to assist and protect animals with diligent actions in situations that put in danger the life, health or physical integrity of animals.”<sup>34</sup>

This law also modified SAP, which had typified only twenty-five acts of cruelty against animals. Ley 1774 of 2016 went beyond those twenty-five acts and added that any act that is harmful to animals, but does not cause their death or severe injury, will be subject to fines. Fines for animal cruelty in comparison to Ley 84 were significantly increased. Now, penalties for animal cruelty can range from seven to fifty minimum wages.<sup>35</sup>

<sup>28</sup> A variation of bullfighting where the bullfighter executes the bull while riding on horseback.

<sup>29</sup> A sport similar to *rejoneo*, where cattle are pursued by men on horseback, who grab the animal by the tail and turn it over while going at high speed.

<sup>30</sup> Another variation of bullfighting where young beginners, or “*novilleros*” who have not yet gained the title of “*matador*,” participate in the bullfight.

<sup>31</sup> A type of bullfight in the Caribbean coast of Colombia where the public is allowed to engage with the bull in the bullring.

<sup>32</sup> Similar to a bullfight, but instead of a grown bull, a calf is used.

<sup>33</sup> Both female and male bulls are tested at age two to see if they are suitable for breeding, bullfighting, or meat for consumption. Males are judged based on their aggression towards horses, as they are not allowed to confront a human on the ground until the day they enter a bullfighting ring. Females are often tested by a bullfighter and capes to determine their courage and suitability for breeding. Male bulls who pass the *tienta* will return to their pastures, and females who pass will be used to bear offspring. Those who do not pass are slaughtered.

<sup>34</sup> L. 1774, enero 6, 2016, Diario Oficial [D.O.] (Colom.).

<sup>35</sup> A minimum wage is the lowest monthly amount of pay that an employer

The Criminal Code was modified as well, adding Title XI-A, titled “Of the Crimes Against Animals.” The change allowed for animal negligence and abuse to be punishable in the legal system. The judicial system and law enforcement authorities now have the power to enforce this statute. The law provides municipal criminal judges the power to hear these cases, and law enforcement now has the power to investigate violations. Finally, the law allows the preventive confiscation of animals that have been abused or neglected, and requires animal cruelty claims to be addressed by authorities within twenty-four hours after a claim is filed.

The main purpose of Ley 84 of 1989 and Ley 1774 of 2016 was to guarantee the legal protection of animals; however, the legal system has its limitations. There is still a group of cruel and inhumane animal activities that are exempted.<sup>36</sup> The law exempts those who practice these activities, and they are not subject to penalties for animal abuse. Although Ley 1774 of 2016 was an enormous step in the journey for the recognition of animal rights, it still maintained the exceptions established in Article 7 of SAP, Ley 84 of 1989.

#### *b. Laws Protecting Bullfighting*

Not only do the exceptions to animal protection laws exempt bullfighting, but Colombia has laws that specifically enshrine the activity as a cultural tradition. Congress has also passed several statutes that regulate activities where animals participate, specifically bullfighting and corralejas, in complete disregard for the principle of animal protection. The most significant of these laws is Ley 916 of 2004, or the “National Taurine Statute (NTS),” which applies to the entire country, and regulates bullfighting, its preparation, requirements, organization, and other activities inherent to bullfighting. This statute’s goal was to guarantee the rights and interests of the public and those who participate in these activities. However, there is no law or regulation concerning the treatment of bulls and horses during or after the bullfights.

NTS addresses topics like the characteristics of the bullring, the name of different areas in the ring, and their purpose. The statute has an extensive glossary explaining the different methods utilized during the different phases of the bullfight, procedures used to weaken and kill the bull, the names of the weapons and how and when to use them, and the moves of the animal and the bullfighters. The statute also addresses requirements for bullfights, like every bullring stadium must provide

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is required to pay an employee. The minimum wage is established annually, and once approved, it applies to the entire country. The minimum wage established for 2017 was COP \$737,717 (USD \$251).

<sup>36</sup> As discussed previously, these activities are: bullfighting, rejoneo, coleo, novilladas, corralejas, becerradas, and tientas.

medical assistance for the participants, with at least four specialized doctors in every bullfight. While on-site medical care is required for the human participants, no veterinarian is required to be present during a bullfight.

In addition to NTS, there are other laws that indirectly promote bullfighting in the country. Ley 1272 of 2009 declared that “la fiesta corralejas” is a cultural heritage of the nation. Fiestas Corralejas are traditional celebrations that take place every January in many towns along the Caribbean coast of Colombia, with specific types of bullfighting at the center of these local celebrations. These bullfights differ from the traditional style by allowing the public to actively participate. These regional bullfights are similar to those that took place before professional bullfighters from Spain arrived during colonization. In these events, the public has direct interaction with the bull. The public provokes the bull, which becomes enraged and then charges the spectators. These bullfights typically end with the bull being beaten to death by the attendees. Members of the public are often injured due to their drunkenness and careless interaction with the bulls during the celebrations.<sup>37</sup>

There is controversy in the argument that “corralejas” are considered a major tradition on the northern coast of Colombia. These festivals are customs that were inherited from the Spanish culture and have been around for centuries. Corralejas attendees are generally part of the lower economic strata who have grown used to celebrating the local tradition. This argument is partly the reason why Congress declared corralejas a national heritage, which means these celebrations are recognized at the legislative level to have an important cultural significance that highly contributes to the historical heritage of Colombia.

## **VII. COURT DECISIONS IMPACTING BULLFIGHTING**

Animal advocates argue that the legislative policies on bullfighting are outdated. In fact, several claims have challenged the antiquated statutes before the Constitutional Court. As it stands today, the judicial decisions regarding bullfighting are more extensive than the statutory law. The most relevant determinations on the matter have been adopted through judicial decisions, especially during the past few years. The following is a compilation of the most relevant court decisions that regulate this topic. In 2017, the Constitutional Court held bullfighting unconstitutional. However, the practice is still permitted, as the Court deferred the effects of its decision and urged Congress to legislate on whether bullfighting would be regulated or outright prohibited. This section highlights the chronology of cases litigating bullfighting issues.

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<sup>37</sup> *Fiestas Tradicionales de Corraleja*, ECURED (last visited Feb. 27, 2018), [https://www.ecured.cu/Fiestas\\_tradicionales\\_de\\_Corraleja](https://www.ecured.cu/Fiestas_tradicionales_de_Corraleja).

Sentencia C-1192, 2005: Decision C-1192/05 decided on the constitutionality of Articles 1, 2, 22 and 80 of NTS, Ley 916 of 2004. The Court upheld the constitutionality of this law, confirming bullfighting as an artistic expression allowed by the Constitution. The Court stated that it was “[a] manifestation of Colombia’s diversity, an intangible good that symbolizes one of the many historical-cultural traditions of the nation.” The Court further stated that since bullfighting is a cultural manifestation of the nation, children do not need to be protected from this practice. The Court stated that “children should be provided the opportunity to attend these events so that they can learn and judge for themselves if bullfighting is an art form, or an outdated violent practice. For that reason, the statute does not violate the fundamental rights of children.” The Court also held that bullfighting is not part of the interpretation of Article 12 that corresponds to the prohibition of torture.

Sentencia C-367, 2006: Decision C-367/06 decided on the constitutionality of several provisions of NTS. The Court held the provisions constitutional, but added a limitation on the participation of minors in the practice of bullfighting. This decision prohibited children under the age of fourteen from participating in the “cuadrillas.”<sup>38</sup> Sentencia C-367 also mandated that mayors be impartial when making decisions that affect bullfighting. The Court went on to state that “[m]ayors have the duty to act, recognizing that the purpose of the different procedures is to assure and guarantee the rights of all the people without any level of discrimination.” The Court also reaffirmed that Congress has complete power to legislate on bullfighting on the national level as it sees fit.

Sentencia C-666, 2010: Decision C-666/10 decided on the constitutionality of Article 7 of SAP, Ley 84 of 1989, which corresponds to the exceptions to the duty of animal protection. The Court established several conditions that must be met for the exceptions of Article 7 to apply. In its holding, the Court stated that the seven practices in Article 7 would not violate the Constitution, so long as they were conducted within the following parameters.

- i. These animals should, in all cases, obtain special protection against suffering and pain during the execution of these activities. This exception allows the continuation of cultural expressions and entertainment with animals, so long as exceptionally cruel acts against these animals are eliminated, or lessen in the future in a process of adaptation between cultural expressions and duties of protection to animals.
- ii. These practices can only take place in municipalities and

<sup>38</sup> “Cuadrillas” is the group of people that accompany and assist the matador in the bullring throughout the duration of the bullfight.

districts in which the practices are themselves a manifestation of a regular, periodic and uninterrupted tradition, and therefore their execution responds to a certain regularity.

- iii. These practices can only take place during those occasions in which they have usually taken place and in the municipalities and districts where they are authorized.
- iv. These are the only practices that are authorized to be part of the exception in Article 7 to the constitutional duty to protect animals.
- v. Municipal authorities cannot economically support the construction of installations for the exclusive execution of the activities listed in Article 7 with public funds.

Sentencia C-889, 2012: Decision C-889/12 decided on the constitutionality of Articles 14 and 15 of NTS. The decision established the criteria that must be met for bullfighting to be legal:

- i. Bullfighting must meet the legal conditions established for public shows in general.
- ii. Bullfighting must meet the legal conditions established in the statute that regulates taurine activity, Ley 916 of 2014.
- iii. Bullfighting must comply with the constitutional conditions, restrictions, and limitations established in decision C-666 of 2010 to satisfy the mandate of animal welfare, animal protection and to avoid suffering and pain.

Sentencia C-283, 2014: Decision C-283/14 decided whether Congress has the power to prohibit certain cultural manifestations that involve animal cruelty. The Court stated that “[c]ulture needs to be permanently reevaluated so it can adapt to human evolution, to guarantee rights and the fulfillment of duties. Especially when the purpose is to eliminate the traces of a marginalized society that has excluded certain individuals and collectives.”

Sentencia C-041, 2017: Decision C-041/17 is one of the most important court decisions regarding bullfighting. The Court held unconstitutional Article 5 of Ley 1774 of 2016, which referred to the Article 7 exceptions (*i.e.*, seven activities of animal entertainment that were exempted from the statute’s authority) of SAP. The Court held that the statute was unconstitutional because it ignored the limits established by the Court in its decision C-666 of 2010.<sup>39</sup> The Court held that Ley 1774 reproduced material previously held to be unconstitutional. However, even though the Court was clear in holding these exceptions unconstitutional, it deferred the effects of the decision

<sup>39</sup> Contreras, *supra* note 20.

and urged Congress to legislate in this matter in a two-year period, as the Court considered it Congress' duty to legislate on the legal status of bullfighting. This decision will be upheld if no action is taken by the Congress on this matter within this time period.

Over the past ten years, the Court has turned from regulating the practice of bullfighting and its spectators to examining the constitutionality of the sport under SAP. The Court has recognized that bullfighting is a cruel practice that should not be justified under the umbrella of cultural traditions. The Court has also stated that Congress can prohibit cultural manifestations that imply animal cruelty. The recognition of a duty of animal protection as a constitutional value derived from the duty of environmental protection and the acceptance that animals are sentient beings, might reflect the evolution of the moral values in Colombian society.

### VIII. PENDING BILLS REGARDING BULLFIGHTING

After analyzing the context in which the laws and court decisions regarding bullfighting have developed, it is important to note that many of the significant changes concerning bullfighting have taken place in the last year. Following this trend, many bills have been filed in 2016 and 2017 that seek to regulate bullfighting on the national level, and one bill has sought to eliminate bullfighting altogether.

#### *a. Elimination of Bullfighting: Proyecto de ley 271 of 2017:*

This bill was filed after the Constitutional Court's decision C-041 of 2017 urged Congress to legislate on the constitutionality of bullfighting in Colombia within two years. The bill seeks to eliminate bullfighting, along with some of the other practices that are exceptions to the duty of animal protection in Article 7 of SAP. Article 1 of this bill establishes that the purpose of the law is "to strengthen civic culture for peace, respect for life, and integrity of sentient beings." This bill seeks to eliminate bullfighting on the premise that it is an expression of violence and cruelty for entertainment. The bill reads, in Article 4, that territorial entities with government support recommend an attention plan and a proposal with alternatives so those benefited by bullfighting have other options of labor integration.

#### *b. Bills Regulating the Practice of Bullfighting*

The following bills seek to regulate bullfighting, rather than prohibiting it outright. In the event any of these bills become law, bullfighting would still be considered constitutional, but subject to certain regulations:

- i. Proyecto de ley 164, 2016: This bill seeks to establish special measures against animal suffering and pain during the practice of bullfighting and other similar activities.
- ii. Proyecto de ley 224, 2016: This bill seeks "to prohibit the use of items that lacerate, mutilate, injure, or kill animals in public shows."
- iii. Proyecto de ley 237, 2017: This bill proposes a modification to NTS. Although it was withdrawn, it is currently being improved and will be re-introduced during the next legislative session.
- iv. Proyecto de ley 228, 2017: This bill proposes a new regulation of "corralejas."

### IX. BULLFIGHTING ON THE NATIONAL LEVEL AND THE ISOLATED CASE OF BOGOTA

Bullfighting in Colombia can best be analyzed based on the situation at the national level and in the capital, Bogota.

#### *a. Bullfighting Status as of 2017*

On the national level, the Constitutional Court's decision C-041 of 2017 held the seven exceptions of SAP unconstitutional, and ordered Congress to legislate on the issue within two years. While the Court could have ruled on the matter, it chose to honor decision C-666 of 2010. This decision held that Congress was the only branch with the authority to decide on bullfighting, as Congress has the constitutional obligation of passing legislation. This situation created an environment of legal uncertainty until Congress legislates on the matter or its two-year deadline is up.

On May 11, 2017, the former Minister of the Interior of Colombia, Juan Fernando Cristo, with the endorsement of the government, filed Bill No. 271 of 2017 with the General Secretary of the House of Representatives. The bill seeks to eliminate the seven exceptions to SAP. The bill was introduced after the Constitutional Court's Decision C-041 of 2017. The bill has been approved in first debate by the seventh commission of the House of Representatives; now, it will proceed to a second debate in the plenary of the Senate.<sup>40</sup>

<sup>40</sup> Press Release, Conexión Animal, *Coalición Colombia sin Toreo da a conocer comunicado frente a resultado del primer debate*—PL 271 de 2017, (May 30, 2017), <https://plugradio.wixsite.com/conexionanimal/single-post/2017/05/31/Coalici%C3%B3n-Colombia-sin-Toreo-da-a-conocer-comunicado-frente-a-resultado-del-primer-debate---PL-271-de-2017>.

*b. Bullfighting in Bogota and the Plaza Santamaria*

Bogota is a unique situation that has been developing for the past five years. Colombia is generally organized under a unitary model, which means that departments, districts, and municipalities must report to the central authority. However, this is not the case in Bogota. The reason why Bogota is treated differently is Plaza Santamaria—the most important bullfighting stadium in Colombia. It was inaugurated in 1931 and is known for its outstanding architectural design. The Plaza Santamaria can hold approximately 15,000 people, and it is where the bullfighting season takes place in Bogota every year.<sup>41</sup>

Because the Plaza Santamaria belongs to the city of Bogota, the local government has the power to decide the future of bullfighting in the city. Since the arena is a public space that belongs to all citizens of Bogota, the city has the power to decide the best use for the arena. On the other hand, if the bullfighting stadium belongs to the private sector, the government does not have the power to make any decision on how it can be used. However, in 2012, the Court held that mayors did not have the power to ban bullfighting in cities where bullfighting takes place on a traditional and regular basis.

The issue escalated in 2012, when former Mayor Gustavo Petro requested the Taurine Corporation, the managing authority of the Plaza, to cease the use of javelins, swords, and knives used to injure and kill bulls during bullfights. Petro's request was essentially a request to end the traditional Spanish-style bullfight, and instead opt for the bloodless-style, for the sake of preventing bulls from being killed in the ring. However, the Taurine Corporation refused to comply, stating that it would be disrespectful to the tradition of bullfighting. Following this response, Petro revoked the leasing contract for Plaza Santamaria between the Capital District of Bogota and the Taurine Corporation through Resolution 280 of 2012, and announced that the stadium would be used for cultural activities like poetry and theater performances.<sup>42</sup> The Taurine Corporation had a contract with the city to manage the Plaza Santamaria and the bullfighting events. The former mayor's stance was that when the Taurine Corporation refused to switch bullfighting styles, it breached the management contract, and therefore the city was entitled to revoke the lease agreement.<sup>43</sup>

The Taurine Corporation filed a claim before the Constitutional Court, arguing violation of administrative due process and violation of their freedom of artistic expression. The Constitutional Court ruled for the Taurine Corporation in decision T-293 of 2013 that “the mayor does not have the authority to prohibit the sacrifice of animals as part of entertainment, so long as they are part of the cultural expression, deeply rooted in many regions of the country.” The Court's decision was based on decision 666 of 2010, which held that “[b]ullfighting can only take place in the municipalities where it is a manifestation of their regular tradition.” Accordingly, decision C-889 of 2012 upheld the constitutionality of NTS, Ley 916 of 2004, which states that “[m]ayors and municipal councils cannot prohibit bullfighting in those municipalities where bullfighting is considered a tradition.” The Constitutional Court ordered the “immediate restitution of Plaza Santamaria to the Taurine Corporation as the permanent bullring for bullfighting events and the preservation of the taurine culture.”

Mayor Petro did not comply with the decision and confirmed the suspension of the lease agreement. In September of 2014, the city requested to overturn decision T-293 of 2013, arguing that the municipality was entitled to deny the allocation of public resources for events where the mistreatment of animals was justified as a tradition in accordance with decision C-666 of 2010. The Court ratified the decision that upheld the Taurine Corporation's right to administrative due process and freedom of artistic expression, and ordered the city to resume the leasing of the Plaza Santamaria with the Taurine Corporation. Mayor Petro responded he would comply with the order, but that the Plaza needed to undergo restoration, as it was unsafe to allow the public in the arena due to the antiquity of the building. He requested two years for the the remodeling works of the Plaza. The Court agreed on the timeline, and Petro promised to hand over the Plaza at the end of 2016, the end of his mayoral period.<sup>44</sup>

While Bogota and the Taurine Corporation were trying to defend their interests before the Constitutional Court, animal activists were protesting against bullfighting and collecting signatures to convince the Court to send Bogota residents to the polls to decide the issue by popular consultation. Popular consultation would allow residents to vote on whether they wanted bullfighting to continue in the city. During these protests, novilleros and banderilleros,<sup>45</sup> camped outside of the Plaza and engaged in a hunger strike. They demanded the re-opening of Plaza Santamaria, arguing that, with the closing of the Plaza, 35,000 people would be negatively affected. These groups also argued that their right

<sup>41</sup> *La apasionante historia de la plaza de toros*, SEMANA (Dec. 17, 2016), <http://www.semana.com/gente/articulo/plaza-de-toros-la-santamaria-clave-para-colombia/509754>.

<sup>42</sup> *Corridos de toros en Colombia, diversión a la antigua y polémica*, PERFIL (Feb. 22, 2017), <http://turismo.perfil.com/>.

<sup>43</sup> *Petro anuncia prohibición de las corridas de toros en la Plaza Santamaria*, SEMANA (June 13, 2012), <http://www.semana.com/>.

<sup>44</sup> PERFIL, *supra* note 40.

<sup>45</sup> Those who assist the matador during the bullfight.

of freedom of expression, right to work, and their right to keep a cultural tradition were being violated.<sup>46</sup>

Gustavo Petro left office in December of 2015, and Enrique Peñalosa took his place in January of 2016. The Plaza remained closed for another year due to the remodeling projects that began while Petro was in office. “[A]fter [eighteen] months of work and COP \$8.800 million, the Santamaria was ready to be opened for the taurine season.”<sup>47</sup> The Plaza reopened on January 22, 2017 for the opening of the taurine season. Mayor Peñalosa stated that regardless if he personally rejected this form of animal cruelty, his duty was to abide by the Constitutional Court’s decision to resume the lease agreement with the Taurine Corporation. Five thousand people gathered outside of the stadium, which was guarded by 1,200 police officers, on re-opening day. The authorities set up strong security around the stadium to avoid any disturbance of public disorder. Even so, the protests caused serious confrontation between the protesters and the police, who had to use tear gas to disperse the crowd, many of whom shouted “killers” to fans who came to the stadium. There were at least three police officers injured and an unknown number of detainees.<sup>48</sup>

While the situation remains tenuous in Bogota, it is demonstrative of the division in the country. Ultimately, public opinion may likely provoke an initiative action, also known as a popular consultation.

## **X. POPULAR CONSULTATION ON BULLFIGHTING IN THE CAPITAL DISTRICT OF BOGOTA**

Decision C-666 of 2017 declared bullfighting to be a cultural manifestation that is celebrated traditionally in the respective town or city and is protected under the exceptions of Article 7 of SAP, Ley 84 of 1989. A popular consultation would be a fair mechanism to determine if those who live in Bogota still accept this practice as part of their culture. If this consultation showed bullfighting was not engrained in Bogota’s culture, it could not be protected under Article 7 of SAP. A popular consultation would not seek the prohibition of bullfighting, but merely a determination as to whether Bogota residents still deem bullfighting a large part of their culture, thereby warranting an Article 7 exception.

<sup>46</sup> Carol Malaver, *Prohibir las corridas tiene respaldo constitucional, sostiene la alcaldía*, EL TIEMPO (June 13, 2012), <http://www.eltiempo.com/archivo/documento/CMS-11943568>.

<sup>47</sup> *Plaza La Santamaría reabrirá sus puertas el próximo domingo*, NACIONAL (Jan. 18, 2017), <http://www.lapatria.com/nacional/plaza-la-santamaria-reabrirá-sus-puertas-el-proximo-domingo-343202>.

<sup>48</sup> *Entre marchas y agresiones, regresan los toros a la Santamaría*, EL ESPECTADOR (Feb. 22, 2017), <http://www.elspectador.com/noticias/bogota/entre-marchas-y-agresiones-regresan-los-toros-santamari-articulo-676024>.

A coalition of animal, social, and environmental organizations joined forces to form “Bogota Without Bullfighting.” This group was created to present a formal proposal to the mayor, requesting him to support the initiative and present it before the Council of Bogota and the Administrative Tribunal. The initiative was posed in 2014 while former-mayor Gustavo Petro was in office. The Administrative Tribunal of Cundinamarca accepted it and voted favorably on the constitutionality of the question: “Do you agree, yes or no, with the celebration of bullfighting, and novilladas in the Capital District of Bogota?” This resolution was challenged several times, and after two years, in 2017, the Constitutional Court decided favorably on its constitutionality through Decision T-121, 2017.<sup>49</sup>

To better understand popular consultations, the legal definition is instructive. The Political Constitution of Colombia defines the mechanisms of popular participation in Article 103, stating that “[t]he following are mechanisms for the participation of the people in exercise of their sovereignty: voting, plebiscite, referendum, popular consultation, open council, legislative initiative, and revocation of the mandate. The law will regulate them.”<sup>50</sup> A popular consultation defined in Ley 134 of 1994 is “the institution by which a question of general nature on a national, departmental, municipal, district, or local matter is submitted by the President of the Republic, the governor, or the mayor, as the case may be, to the consideration of the people, so they can formally give their opinion.” The questions asked must be well-structured and presented in a clear fashion to the public, so that they can be answered with the assertion of a yes or no.<sup>51</sup>

In 2015, the mayor proposed the initiative to have a popular consultation regarding bullfighting events in the city. This initiative was approved by the Administrative Tribunal of Cundinamarca on August 20, 2015. However, it was challenged several times. In September of the same year, the State Council decided on all lawsuits filed against the Administrative Tribunal’s decision through Resolution 11001-03-15-000-2015-02257-00. The State Council confirmed its previous decision, holding that bullfighting was constitutional per terms of different laws and previous court decisions. The Administrative Tribunal also stated that the mayor had overstepped his duties by proposing an initiative to have a popular consultation on the matter. The State Council stated that “in a pluralist democracy, the means to modify artistic practices or

<sup>49</sup> Carlos Crespo, *En qué va la lucha contra la tauromaquia en Colombia?*, EL TURBION (2017), <https://elturbion.com/?p=14674>.

<sup>50</sup> Constitución Política De Colombia [C.P.] art. 103.

<sup>51</sup> El Congreso de Colombia [The Congress of Colombia], 31 de mayo de 1994, Por la Cual se Dictan Normas Sobre Mecanismos de Participación Ciudadana, Diario Oficial No. 41373.

expressions is not an imposition, but the intercultural dialogue, a model of society that the Constitution of 1991 established.”<sup>52</sup>

The decision was taken to the Constitutional Court to be reviewed. In the meantime, the reopening of Plaza Santamaria and the taurine season were taking place. The taurine season was named the “season of freedom,” and it was celebrated from January 22 to February 19. In decision T-121 of 2017, the Constitutional Court revoked the State Council’s decision that denied the Administrative Tribunal’s resolution that approved the popular consultation. The Court ordered Mayor Peñalosa to arrange a popular consultation on bullfighting that would take place in the next three months. The Court held that the Administrative Tribunal of Cundinamarca correctly authorized the public consultation in accordance with the Court’s previous decisions, and therefore was within the mayor’s powers to promote this mechanism of democratic participation.

The popular consultation was scheduled to take place on August 13; however, on June 21, 2017, Mayor Peñalosa, following the request of animal rights groups, filed a petition asking the Constitutional Court to change the date to March 11, 2018. The mayor argued that it was in the best interest of the city, as the March 11 date coincided with the date scheduled for the election of Congress, and that the city would save \$45,000,000 COP, or the amount of the popular consultation alone. The Constitutional Court denied the petition and confirmed the August 13 date, holding that “it could not modify the date that the same [city] had chosen, as it was beyond the reach of its assessment as the constitutional judge.”<sup>53</sup>

On August 8, 2017, the public consultation was suspended indefinitely due to economic setbacks. At a press conference, the mayor’s office of Bogota confirmed that the city did not have the economic means to perform a poll that would cost \$45,000,000 Colombian pesos. The National Registrar prevented the city from setting a date until it had overcome its budget constraints.<sup>54</sup> On February 7, 2018, The Constitutional Court overturned its own decision where it gave power to the Mayor of Bogota to summon the residents of the capital to the polls to give their opinion on whether they wanted bullfighting in their city. In its holding, the court stated that it was Congress who had the power

to decide on the future of bullfighting. Therefore, the Mayor of Bogota did not have the power to send Bogota residents to the polls to give their opinion in this matter.

## XI. BULLFIGHTING ALTERNATIVES

### *a. Abolition versus Regulation*

As discussed previously, Congress has an opportunity to abolish bullfighting. The government presented Bill 271, which seeks the complete prohibition of bullfighting for all of Colombia. If Bill 271 becomes law, Colombia would abandon the outdated tradition, and bulls would no longer be tortured and killed for entertainment. With the bill’s passage, NTS would be repealed, as would all laws that established bullfighting as a cultural artistic practice and a tradition that could not be prohibited. According to animal welfare advocates, prohibiting bullfighting would allow for an advancement in the recognition of animal rights in Colombia, and society would accept and embrace the just treatment of all forms of life.

There is also the possibility that Congress opts for regulation instead of a prohibition on bullfighting. Regulations and amendments to the practice seek to avoid bulls being killed during the bullfight. Bill 224 of 2016 proposed the prohibition of items that “lacerate, mutilate, injure, or kill animals in public shows.” Some assert that the implementation of the “bloodless” bullfight would be a step closer to its prohibition, while still respecting tradition and the right to freedom of expression of those who support the practice.

If Bill 224 becomes law, Colombia would abandon the Spanish-style bullfighting where bulls are tortured and subsequently killed, to adapt bloodless bullfighting. Neither side, opponents or supporters, particularly endorse bloodless bullfighting. Bullfighting supporters in Colombia are very passionate about the customs and traditions that bullfighting has carried throughout the years. For them, the dance between the matador and bull symbolizes a battle between a man and a beast, where the matador with great skill risks his life to dominate and force the beast to submit. To them, the centerpiece of a bullfight is the death of the bull. Bullfights would lose significance if the bull was not subdued by the matador and killed as the culmination of the battle.

For those who oppose bullfighting, the bloodless-style is just as cruel as the Spanish-style. The bull is still killed, with the main difference being that its life is taken after the bullfight, when the audience is not watching. The bloodless-style may not physically torture the bull as badly as the Spanish-style, but the bull’s spirit is still broken from discomfort, fear, stress, and exhaustion. The bloodless-style also causes

<sup>52</sup> Consejo de Estado, Sala de lo Contencioso Administrativo [C.E.] [Highest Court on Administrative Law], 23 de septiembre de 2015, Res. 11001-03-15-000-2015-02257-00, (Colom.).

<sup>53</sup> *Corte Constitucional Mantiene Fecha para la Consulta Antitaurina*, EL TIEMPO (Aug. 4, 2017), <http://www.eltiempo.com/justicia/cortes/corte-constitucional-mantiene-la-fecha-de-la-consulta-antitaurina-de-bogota-116670>.

<sup>54</sup> *Aplazan Consulta Antitaurina en Bogotá por Falta de Recursos*, EL TIEMPO (Aug. 8, 2017), <http://www.eltiempo.com/bogota/se-suspende-temporalmente-consulta-antitaurina-en-por-falta-de-recursos-117622>.

physical injuries to the bull that are still considered animal cruelty. To those who support the abolition of bullfighting, the bloodless-style is the imitation of a violent practice, the art of killing the bull without killing it. Opponents argue the bloodless-style would still have the same social implications—violence against animals being legitimized. They argue there is no place for compromise where there is an implication of suffering and pain.

### *b. Bloodless Bullfighting*

Understanding bloodless bullfighting is crucial since it is still a very real possibility in Colombia. Bloodless bullfighting is a style where a Velcro pad is placed over the bull's back, and Velcro tips are attached to the javelins so they can be attached to the bull's back without harming the animal. The bloodless-style was created to imitate the Spanish-style, where the javelins are stabbed in the bull's back to debilitate him. This kind of bullfighting is meant to spare the bull's life, supporting the argument of an evolved, less cruel form of bullfighting.

Bloodless bullfighting has its origins in the United States. Between 1980 and 1990, the Portuguese-American Frank Borba invented a new style of bullfighting in California called "Corrida incruenta," a Spanish term that translates to "cruel-less bullfight." Bullfighting in California was prohibited by the animal protection laws, including this style of Portuguese bullfighting. Portuguese bullfighting differs from the Spanish-style, as the Portuguese-style requires the killing of the bull after the bullfight has ended, when there are no observers. In the Spanish-style, the bull is killed in the colosseum in front of an audience. The Portuguese-style can be exceptionally cruel, due to the possibility that the bull may not be put out of its misery for several days after the fight. Looking to rid the sport of a cruel component, Frank Borba replaced the traditional weapons with Velcro squares. In theory, the bulls are not actually stabbed, allowing for a bloodless bullfight, and also allowing for no violations of California's anti-cruelty laws.<sup>55</sup> Unfortunately though, in 2010, it was discovered that nails were still being attached to the Velcro weapons.

Bloodless bullfighting is not popular in the United States or in most other countries around the world. The bloodless-style gained a slight boost in popularity worldwide when the bullfighting industries saw a possibility to attract a larger audience. The bloodless bullfights eventually expanded to other states in the United States, like Nevada and Illinois. Animal rights groups quickly began researching, and

found that this new style of bullfighting was far from being bloodless or humane.<sup>56</sup> Today, bloodless bullfighting continues to be legal in California. Bloodless bullfighting is still an option being considered in Colombia, with neither side being particularly excited about the possibility.

## **XII. CONCLUSION**

As Colombia's judicial system criminalizes animal cruelty, and Congress' views on bullfighting remain uncertain, a controversial atmosphere is created in Colombia. To date, bullfighting is permitted, but not protected, by the legal system. The Colombian Constitution does not have any explicit provision that shields bullfighting from regulatory change.

In a bullfight, the bull is teased from beginning to end and stabbed several times with different weapons until its entire body shuts down and collapses, with the primary purpose of the event being human entertainment. Bullfighting supporters argue that a bullfight is a dance, a ritual between a man and a beast that has inspired various beautiful arts. However, the dance is not between equal participants. Bulls do not have the option to leave the ring, or even hide. Bulls only have the option of confronting the matador in the ring. Bullfighters have the freedom to walk out and even hide if they fear for their safety. Moreover, the fate of the bull is decided before its triumphant entrance into the ring. Bulls must die, and even in the rare case a bull's life is pardoned, it is up to the owner to decide if it lives after the bullfight. In the event the owner spares the bull's life, it will most likely die from injuries caused during the bullfight.

It is hard to predict whether bullfighting will disappear in the short term. While some in Colombia realize that certain activities are inherently cruel towards animals, some do not. Notwithstanding, the number of people that reject unjustified cruel activities is increasing rapidly. However, the taurine guild has many members in privileged and influential positions, allowing it to lobby the government to ensure bullfighting maintains its permitted legal status. Both supporters and opponents now wait to see whether Congress will accept this practice as no longer acceptable by society. The possibility of regulation of bullfighting is also still a viable alternative. Regulation would almost certainly not comply with the mandate of animal protection since bulls would still be subjected to extreme psychological and emotional stress, even though they may technically avoid being killed in the ring.

Even though the judicial branch has stated that bullfighting is cruel and inhumane, it has not specifically declared Article 7 of SAP

<sup>55</sup> Jordi Casamitjana, *The Cruelty of the Bloodless Bullfights* (Jan. 2012), <https://www.scribd.com/document/79120710/The-Cruelty-of-the-Bloodless-Bullfights>.

<sup>56</sup> *Id.*

unconstitutional. Instead, the court deferred this decision and urged Congress to legislate on within two years. The Constitutional Court had the had the constitutional, legal, and social arguments to put an end to the uncertainty and controversy that this topic creates. However, bullfighting seems to be an issue where few want to make final decisions. Congress' defended the practice for many years, as it was an important part of Colombia's culture and tradition. Decision 1774 of 2016, recognizing that all animals are capable of feeling pain and suffering, declared animals are sentient beings. This was a huge step forward in the construction of a compassionate society that respects and protects the different forms of life. However, this should be more than just words on paper. Congress has the duty to assume its role, and realize that bullfighting is cruel and inhumane, and that modern society does not accept it as a moral practice.

Colombia is a very conservative society. Many still believe that cultural customs must be respected and cannot be changed, even if they are inconsistent with new social morals and values. However, culture and traditions can change over time, and the Colombian society understands that animals can indeed experience pain and suffering, and more people will continue to reject practices that involve animal cruelty. If society and its leaders continue to believe that social customs are beyond the principle of animal protection, to protect animals will continue to be an option, rather than a social duty. With the prohibition of bullfighting, Colombia would become part of the growing global movement that seeks recognition of animal rights and deeply rejects animal cruelty. It is up to Congress to materialize this collective mindset and stop bulls from unjustly suffering and dying for the entertainment of a few.

## ESTABLISHING AND ENFORCING ANIMAL WELFARE LABELING CLAIMS: IMPROVING TRANSPARENCY AND ENSURING ACCOUNTABILITY

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### I. INTRODUCTION

The use of animal welfare claims has increased dramatically over the past decade as consumers have become concerned about the well-being of animals raised for food.<sup>2</sup> Millions of animals are raised and slaughtered for food in the United States in appalling conditions.<sup>3</sup> Most animals are raised indoors and confined to areas, crates, or battery cages where they cannot express natural behaviors.<sup>4</sup> Birds cannot extend their wings, sows cannot easily stand up or turn around, and dairy cows are confined on concrete indoors.<sup>5</sup> Painful mutilations are routinely performed on animals to prevent them from harming one another in such crowded and stressful conditions.<sup>6</sup> For example, "hogs have their tails docked to avoid tail biting by other hogs in close proximity. Laying hens and broilers have their toenails, spurs, and beaks clipped. Dairy

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<sup>2</sup> See ANIMAL WELFARE INST., CONSUMER PERCEPTIONS OF FARM ANIMAL WELFARE (Oct. 2010), <http://www.awionline.org/ht/a/GetDocumentAction/i/25067> (providing statistics about consumers' levels of concern for farm animal welfare, perceptions of claims such as "humanely raised," willingness to pay more for food that is "humanely raised," and understanding of current labels); see AM. HUMANE ASS'N, HUMANE HEARTLAND, FARM ANIMAL WELFARE SURVEY (Nov. 13, 2014) [hereinafter ANIMAL WELFARE SURVEY], <http://www.americanhumane.org/assets/humane-assets/humane-heartland-farm-animals-survey-results.pdf> (explaining that 89% of respondents were "very concerned" with farm animal welfare); see JAYSON L. LUSK, ET AL., CONSUMER PERCEPTIONS FOR FARM ANIMAL WELFARE: RESULTS OF A NATIONWIDE TELEPHONE SURVEY 13 (2007) (explaining that 95% of respondents agreed with the statement: "[I]t is important to me that animals on farms are well cared for.").

<sup>3</sup> *USDA Livestock Slaughter: 2016 Summary*, U.S. DEP'T OF AGRIC. 6 (Apr. 2017), <http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-19-2017.pdf>; *USDA Poultry—Production and Value*, U.S. DEP'T. OF AGRIC. 5 (2017), <http://usda.mannlib.cornell.edu/usda/current/PoulProdVa/PoulProdVa-04-28-2017.pdf>.

<sup>4</sup> PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 33 (2011), <https://www.ncifap.org/wp-content/uploads/PCIFAPFin.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

cows may have their horns removed.<sup>77</sup> Normal diets of animals have been altered to maximize efficiency. Beef cattle are typically fed grains rather than grass, which results in faster weight gain, but they also often suffer from internal abscesses.<sup>8</sup> This system of industrial animal agriculture was described by *Animal Machines* author Ruth Harrison as a “new type of farming...[with] animals living out their lives in darkness and immobility without the sight of the sun,” developed by “a generation of men who see in the animal they rear only its conversion to human food.”<sup>9</sup>

#### *a. Regulation of Animal Welfare*

Despite the significant number of animals involved in food production and a growing public interest in farm animal welfare, conventional farm animal husbandry is largely exempt from regulation. For example, animals raised for food are exempted under the Animal Welfare Act, the key animal protection statute.<sup>10</sup> The Humane Methods of Slaughter Act (HMSA) of 1958<sup>11</sup> applies to farm animals, requiring that the slaughter of livestock “be carried out only by humane methods” to prevent “needless suffering.”<sup>12</sup> However, HMSA applies to only five percent of animals slaughtered for food in the United States because the Act exempts poultry,<sup>13</sup> which are raised and killed for food more than all other land animals combined.<sup>14</sup> Chickens, for example, comprised the vast majority—approximately 8.78 billion—of the animals raised for food in the U.S. in 2016.<sup>15</sup> For those animals covered by the Humane Slaughter Act, the law is not always enforced by USDA inspectors.<sup>16</sup> While all states have animal cruelty laws, “[twenty-five] states specifically exempt farm animals from animal cruelty laws, and in [thirty] states certain ‘normal’ farm practices are exempted.”<sup>17</sup> Building on consumer interest, there have been some recent successes by animal welfare groups in enacting legislation related to farm animal welfare. For example, in 2016, Massachusetts voters approved a ballot measure banning the sale of products from pigs, calves, and hens that were not

provided with enough room to move around, as well as the use of such confinement practices in the state.<sup>18</sup> The new law, which takes effect in 2022, requires the Massachusetts Attorney General to issue and enforce regulations, including a \$1,000 fine for each violation.<sup>19</sup> A similar ballot measure has been proposed in California.<sup>20</sup>

#### *b. Impact of Consumer Demand for Animal Welfare*

In the absence of robust laws protecting the welfare of farm animals, the marketplace has sought to fill a void to meet consumer preferences for humane treatment of food-producing animals. Recent changes in production practices and procurement policies have been driven by increased consumer demand, rather than by changes in regulations.<sup>21</sup> In a 2013 national survey, 82 of consumers who frequently purchase packaged meat or poultry products agreed with the statement: “The well-being of animals raised on farms for food is important to me.”<sup>22</sup> Retailers and restaurateurs which are “particularly sensitive to consumer concerns” have used their considerable market power<sup>23</sup> to demand minimal animal welfare standards from their suppliers.<sup>24</sup> Thus, private standards for animal welfare have been developing. For example, approximately fifty food companies have committed to phase out the confinement of sows in gestational crates over the next decade.<sup>25</sup> Food companies have also committed to sourcing cage-free eggs.<sup>26</sup> Recently, other major food companies such as Campbell

<sup>18</sup> ABBY ELIZABETH CONWAY, *MASS. VOTERS APPROVE QUESTION 3, BANNING CERTAIN FARM ANIMAL CONFINEMENT PRACTICES*, WBUR (Nov. 8, 2016), [HTTP://WWW.WBUR.ORG/POLITICKER/2016/11/08/QUESTION-THREE-ANIMAL-CONFINEMENT-RESULTS](http://www.wbur.org/politicker/2016/11/08/question-three-animal-confinement-results).

<sup>19</sup> *Id.*

<sup>20</sup> Request for Title and Summary for Proposed Initiative Statute, CAL. ELEC. CODE 9001, 9608 (proposed Aug. 29, 2017), [https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29\\_0.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29_0.pdf).

<sup>21</sup> Adrian Uzea et al., *Activists and Animal Welfare: Quality Verifications in the Canadian Pork Sector*, 62 J. AG. ECON. 281, 283 (2011).

<sup>22</sup> Animal Welfare Inst., *Label Confusion: How “Humane” and “Sustainable” Claims on Meat Packages Deceive Consumers 2* (2014) [hereinafter *Label Confusion*].

<sup>23</sup> PEW COMM’N ON INDUS. FARM ANIMAL PROD., *supra* note 3, at 35. This market power is due to consolidation in the grocery and restaurant industries—“[ten] grocery and [fifteen] restaurant companies control the majority of sales in animal products.” *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> HUMANE SOC’Y OF THE U.S., *Food Company Policies on Gestation Crates*, <http://www.humanesociety.org/assets/pdfs/farm/gestation-crate-policies.pdf> (last visited Mar. 13, 2018).

<sup>26</sup> *CORPORATE COMMITMENTS ON FARM ANIMAL CONFINEMENT ISSUES*, CAGEFREEFUTURE.COM, [HTTP://CAGEFREEFUTURE.COM/WP/COMMITMENTS/](http://cagefreefuture.com/wp/commitments/) (LAST VISITED MAR. 13, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 35.

<sup>10</sup> 7 U.S.C. § 2132(g) (2006).

<sup>11</sup> 7 U.S.C. §§ 1901-1907 (2006).

<sup>12</sup> 7 U.S.C. § 1901.

<sup>13</sup> *Id.*

<sup>14</sup> HUMANE SOC’Y OF THE U.S., *FARM ANIMAL STATISTICS: SLAUGHTER TOTALS*, [HTTP://WWW.HUMANESOCIETY.ORG/NEWS/RESOURCES/RESEARCH/STATS\\_SLAUGHTER\\_TOTALS.HTML?REFERRER=HTTPS://SEARCH.YAHOO.COM/](http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html?referrer=https://search.yahoo.com/) (LAST VISITED MAR. 3, 2018).

<sup>15</sup> USDA Poultry—Production and Value, *supra* note 2, at 5.

<sup>16</sup> See Gail Eisnitz, *Slaughterhouse 44* (2007).

<sup>17</sup> Pew Comm’n on Indus. Farm Animal Prod., *supra* note 3, at 38.

Soup Company, Nestle, and Heinz-Kraft announced higher welfare standards for broiler chickens.<sup>27</sup> McDonald's audits packing plants to ensure humane handling and slaughtering of cattle, and has established an animal welfare committee of outside experts and established on-farm standards for its suppliers.<sup>28</sup> Retailers, such as Whole Foods, have adopted more stringent standards for meat and poultry products in response to customers' interests.<sup>29</sup> These commitments are major victories for farm animals and consumers, who can rely on the restaurants, food service providers, and grocery chains to verify claims on meat sold there. However, for products sold at restaurants and retailers that do not require or verify animal welfare standards, consumers are left to rely on claims made on package labels about the conditions under which the meat was produced.

More than one billion animals raised for food each year in the United States are covered by a certification program.<sup>30</sup> Animal welfare claims relate to multiple factors of animal raising and production and generally convey humane treatment. Examples include: "humanely raised," "humanely raised and handled," "humanely raised on family farms," "humanely treated," "raised in a humane environment," "raised in a stress-free environment," and "raised with care." These claims are distinguished from other meat and poultry labeling claims that relate to only one or two aspects of production, such as "no antibiotics administered," "free range," and "grass fed."

For producers, there are several compelling reasons to raise livestock using humane practices. Apart from ethics, humane practices make financial sense. Consumers perceive "humanely raised" meat and poultry products as having better quality and are thus willing to pay higher prices for them.<sup>31</sup> In a survey commissioned by the American Humane Association, 91% of respondents stated they were at least "somewhat willing" to pay more for humanely raised products, and 74% of respondents said they were "very willing" to pay more.<sup>32</sup> Capitalizing

<sup>27</sup> Rebekah Schouten, *Kraft Heinz Commits to Higher Animal Welfare Standard*, FOOD BUSINESS NET (Oct. 27, 2017), [http://www.foodbusinessnews.net/articles/news\\_home/Business\\_News/2017/10/Kraft\\_Heinz\\_commits\\_to\\_higher.aspx?ID=%7B9944A22E-8103-4D2A-AB5F-75A8FA42F67E%7D&cck=1](http://www.foodbusinessnews.net/articles/news_home/Business_News/2017/10/Kraft_Heinz_commits_to_higher.aspx?ID=%7B9944A22E-8103-4D2A-AB5F-75A8FA42F67E%7D&cck=1).

<sup>28</sup> Pew Comm'n on Indus. Farm Animal Prod., *supra* note 3, at 35.

<sup>29</sup> WHOLE FOODS MARKET, *Farm Animal and Meat Standards* (2018), <http://www.wholefoodsmarket.com/farm-animal-meat-quality-standards>.

<sup>30</sup> STEPHANIE STROM, *WHAT TO MAKE OF THOSE ANIMAL-WELFARE LABELS ON MEAT AND EGGS*, N.Y. TIMES (JAN. 31, 2017), [https://www.nytimes.com/2017/01/31/dining/animal-welfare-labels.html?rref=collection%2Fbyline%2Fstephanie-strom&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection](https://www.nytimes.com/2017/01/31/dining/animal-welfare-labels.html?rref=collection%2Fbyline%2Fstephanie-strom&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection).

<sup>31</sup> Ariane Kehlbacher et al., *Measuring the Consumer Benefits of Improving Farm Animal Welfare to Inform Welfare Labelling*, 37 FOOD POLICY 627, 633 (2012).

<sup>32</sup> Animal Welfare Survey, *supra* note 1.

on this consumer demand, farmers report double-digit price premiums for welfare-certified products.<sup>33</sup>

While the interest and support of consumers presents a tremendous opportunity for high welfare farms and could incentivize industrial scale producers to change practices to sell in this new market, it can also lead to consumer confusion and exploitation of the "humanely raised" claim.<sup>34</sup> This paper examines the problems establishing and enforcing a standard for animal welfare. Part II discusses the difficulties of defining "animal welfare." In Part II, the USDA's oversight of labels is explained and evaluated. Part III discusses the animal welfare standards and the proposed rule within the National Organic Program. Part IV provides summaries and assessment of certification programs, and Part V offers recommendations to improve transparency and accountability.

## II. DIFFICULTIES DEFINING "ANIMAL WELFARE"

Currently, there is no universally accepted definition of animal welfare, although there is widespread acceptance of the concept of the 'Five Freedoms' as outlined by the UK Farm Animal Welfare Council: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease; freedom to express normal behavior; and freedom from fear and distress (Farm Animal Welfare Council, 1988) Currently, there is no universally accepted definition of animal welfare, although there is widespread acceptance of the concept of the 'Five Freedoms' as outlined by the UK Farm Animal Welfare Council: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease; freedom to express normal behavior; and freedom from fear and distress (Farm Animal Welfare Council, 1988)

Although there is no universally accepted definition of "animal welfare," there is widespread recognition of the "Five Freedoms" concept defined by the UK Farm Animal Welfare Council.<sup>35</sup> These include: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, or disease; freedom to express normal behavior; and freedom from fear and distress.<sup>36</sup> Animal welfare has also been defined in terms of physical environment of the animal (e.g., shelter, feed), how an animal feels (typically measured by its behavior), and the extent to which an animal can express "natural" behaviors.<sup>37</sup> Animal welfare has

<sup>33</sup> LABEL CONFUSION, *supra* note 21, at 4.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> FARM ANIMAL WELFARE COUNCIL, *Five Freedoms* (2009), <http://webarchive.nationalarchives.gov.uk/20121010012427/http://www.fawc.org.uk/freedoms.htm>.

<sup>36</sup> *Id.*

<sup>37</sup> CAROLINE HEWSON, *WHAT IS ANIMAL WELFARE? COMMON DEFINITIONS AND THEIR PRACTICAL CONSEQUENCES*, 44 CAN. VET. J. 496 (2003); *SEE* FARM SANCTUARY, THE

also been defined as the state of an individual animal in regards to its attempts to cope with the environment, which varies on a continuum from very good to very poor.<sup>38</sup>

There are several reasons defining animal welfare for purposes of a labeling scheme is difficult. Animal welfare is a multi-dimensional concept that comprises physical and mental health, and aspects such as physical comfort, absence of hunger, diseases, and injuries. This multi-dimensional aspect makes it difficult to succinctly summarize what the phrase means, particularly on a package of meat or poultry.<sup>39</sup> Another difficulty in establishing a definition is due to the dynamic nature of animal welfare standards. Valuations of husbandry practices change over time as people's preferences change, or as technology enables improvements in husbandry techniques.<sup>40</sup>

More challenging than developing comprehensive welfare standards for each species of farm animals, is conveying the information in a way that genuinely informs consumers about how animals are raised. One issue is that consumers lack knowledge of contemporary farming practices and lack understanding of the welfare problems of animals living in intensive production systems.<sup>41</sup> Relatedly, in studies asking consumers to make judgments about the benefits of certain living conditions associated with animal welfare, they lack knowledge to evaluate them.<sup>42</sup> Another obstacle to transparency is that animal welfare is a "credence good"<sup>43</sup> related to the production, transportation, and slaughter of farm animals that cannot be discerned through thorough inspection of the product before, during, or after purchase and consumption.<sup>44</sup> While livestock producers possess information about their animals' welfare, consumers are, under most circumstances, unable to observe or verify it.<sup>45</sup> This results in "an asymmetric information problem"<sup>46</sup> that has implications for consumers and producers. First, consumers are uncertain about welfare levels in livestock production

and are unable to discern the meaningful differences between similar products. Consumers are thus likely to select the less costly products that claim to be "humane." As a result, livestock producers who genuinely provide high animal welfare standards cannot achieve a price premium and have no incentive to continue their practice. Hence, supply for genuinely high-welfare will not be able to meet demand, resulting in a "market failure."<sup>47</sup> While high-welfare, sustainable farmers lose their market to products that are deceptively labeled, consumers are "hoodwinked" into paying a premium for meat that is produced in conditions no better than the industry standard.<sup>48</sup>

Although consumers lack knowledge of farming practices and are unable to verify whether products with "humane" claims reflect their values, nearly all consumers expressed a belief that animal welfare label claims should represent a higher standard than the conventional industry standard. For example, in a survey commissioned by the American Humane Association, 95% of respondents indicated a belief that humanely raised labels signify better treatment of animals.<sup>49</sup> In a 2013 public opinion survey commissioned by the Animal Welfare Institute (AWI), 86% of respondents said they believe producers should not be allowed to use the claim "humanely raised" on their packaging unless they exceed minimum industry animal care standards.<sup>50</sup> In the same survey, 85% of those polled agreed the label "humanely raised" meant more than providing farm animals with adequate food, water, and shelter, and that it should also mean animals have adequate space, exercise areas, and social interaction with other animals.<sup>51</sup> Unfortunately, "humane" is permitted on meat and poultry labels with much less rigorous standards. The following section describes the USDA's oversight of labels and identifies issues that can contribute to a disconnect between consumer expectations and producer practices.

### III. USDA REGULATION OF LABELING ON MEAT AND POULTRY

The USDA has jurisdiction over the safety and proper labeling of meat and poultry.<sup>52</sup> The USDA's Food Safety and Inspection Service (FSIS) has primary responsibility for the regulation of food labeling

TRUTH BEHIND THE LABELS: FARM ANIMAL WELFARE STANDARDS AND LABELING PRACTICES 3-4 (APR. 2009).

<sup>38</sup> FARM SANCTUARY, *supra* note 36.

<sup>39</sup> Kehlbacher, *supra* note 30, at 628.

<sup>40</sup> *Id.* at 629.

<sup>41</sup> *Id.* at 628-29.

<sup>42</sup> *Id.* at 629.

<sup>43</sup> Michael Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. LAW & ECON. 67, 68-69 (1973).

<sup>44</sup> See Nicole J. Olynk et al., Labeling of Credence Attributes in Livestock Production: Verifying Attributes Which Are More Than "Meet the Eye," 5 J. FOOD L. & POL'Y 181, 184-85 (2009).

<sup>45</sup> Kehlbacher, *supra* note 30, at 628.

<sup>46</sup> Brian Roe & Ian Sheldon, Credence Good Labeling: The Efficiency and Distributional Implications of Several Policy Approaches, 89 AMER. J. AGRIC. 1020, 1020 (2007).

<sup>47</sup> KEHLBACHER, *SUPRA* NOTE 30, AT 628.

<sup>48</sup> *Id.*

<sup>49</sup> ANIMAL WELFARE SURVEY, *supra* note 1, at 12.

<sup>50</sup> ANIMAL WELFARE INST., *Petition to Amend FSIS Labeling Regulations* 24 (May 2014) [hereinafter AWI, *Petition*], <https://www.fsis.usda.gov/wps/wcm/connect/5bdab0ca-8072-480b-9bd9-c9bc04b56531/Petition-AWI-Labeling-0514.pdf?MOD=AJPERES>.

<sup>51</sup> *Id.*

<sup>52</sup> 21 U.S.C. §§ 601-626 (meat); 21 U.S.C. §§ 451- 472 (poultry).

for meat and poultry products under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA),<sup>53</sup> and is also authorized to regulate food labeling for exotic species of animals under the Agricultural Marketing Act (AMA) of 1946.<sup>54</sup> USDA is authorized under the FMIA and the PPIA to regulate labeling and packaging of meat, poultry, or processed parts to prevent the use of any false or misleading mark, label, or container.<sup>55</sup> Prior approval by FSIS is required for all labels used for meat and poultry products before those products may be marketed in interstate commerce.<sup>56</sup> FSIS evaluates approximately 60,000 new labels each year.<sup>57</sup> Regulations and policies establish requirements for the content and design of labeling to ensure that labeling is truthful, accurate, and not misleading.<sup>58</sup> Although some specified types of product labels on meat and poultry are eligible for generic approval without pre-market evaluation by FSIS,<sup>59</sup> all “labels with special statements and claims,” such as animal welfare claims, must be submitted to the FSIS before being used on a product.<sup>60</sup> The claims “animal welfare,” “humane,” and “raised with care” have no legal definition and the USDA has never acknowledged, in regulation or guidance, any particular set of animal standards as representing acceptable supporting evidence for the use of welfare-related claims.<sup>61</sup>

<sup>53</sup> 21 U.S.C. §§ 601-626 (meat); 21 U.S.C. §§ 451-472 (poultry).

<sup>54</sup> 7 U.S.C. § 1622.

<sup>55</sup> 21 U.S.C. § 601(n). The FMIA provides, in part, “that any carcass, ... meat or meat food product” is misbranded “(1) if [the product’s] labeling is false or misleading in any particular [way].”

<sup>56</sup> 21 U.S.C. § 607(d) (meat); 21 U.S.C. § 457(c) (poultry). FSIS derives its authority for label approval from the provision in the Acts that states that no food article “shall be sold or offered for sale by any person in commerce under any name or other marking or labeling...but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary.”

<sup>57</sup> GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS, U.S. DEP’T OF AGRIC. (R. Post et al., eds., 2007), [https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling\\_Requirements\\_Guide.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES).

<sup>58</sup> 9 C.F.R. pt. 317 (meat); 9 C.F.R. pt. 381 (poultry).

<sup>59</sup> Factual statements do not require pre-approval. FSIS, *FSIS Compliance Guideline for Label Approval* 17-19 (Aug. 2017), <https://www.fsis.usda.gov/wps/wcm/connect/bf170761-33e3-4a2d-8f86-940c2698e2c5/Label-Approval-Guide.pdf?MOD=AJPERES>. Generic label approval requires all mandatory label features be in conformance with FSIS regulations. 9 C.F.R. § 317.5(a)(1); 9 C.F.R. § 381.133(a)(1). Although such labels are not submitted to FSIS for approval, they are deemed to be approved and, therefore, may be applied to products in accordance with the agency’s prior label approval system. Prior Label Approval System: Generic Label Approval, 78 Fed. Reg. 66826 (Nov. 7, 2013).

<sup>60</sup> 9 C.F.R. § 412.1(c)(3).

<sup>61</sup> See FSIS, Labeling Guideline on Documentation Needed to Substantiate

To evaluate those claims, FSIS reviews testimonials, affidavits, animal production protocols, and other relevant documentation provided by animal producers as part of their label approval requests.<sup>62</sup> Claims are approved if the information submitted with the label application is truthful and not misleading.<sup>63</sup>

Recognizing that its approval process did not provide for consistent definitions of certain label claims, in 2008, FSIS held a public meeting to review its policies.<sup>64</sup> FSIS stated that “animal producers and certifying entities may have different views on the specific animal production practices that qualify a product to bare a given animal raising claim on its label. Thus, the same animal raising claim may reflect different animal raising practices, depending on how an animal producer or certifying entity defines the basis for the claim.”<sup>65</sup> At the public meeting, FSIS described challenges regarding the review of animal raising claims, such as the lack of a requirement for agency staff to verify claims by visiting farms.<sup>66</sup> In addition, FSIS primarily relies on the documentation submitted by the producers.<sup>67</sup>

In October of 2016, FSIS issued an updated compliance guideline on labeling and documentation needed to substantiate animal raising claims for label submission.<sup>68</sup> The guideline clarified the documentation typically necessary to support these claims, including:

1. A detailed written description explaining the meaning of the animal welfare or environmental stewardship claim and the controls used for ensuring that the raising claim is valid from birth to harvest or the period of raising being referenced by the claim;
2. A signed and dated document describing how the animals are raised...to support that the claims are not false or misleading;
3. A written description of the product tracing and segregation

Animal Raising Claims for Label Submissions (Sept. 2016) [hereinafter FSIS, Substantiate Animal Raising], <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES> (explaining the steps necessary to show compliance with production claims, but not defining the steps necessary to meet certain animal welfare claims).

<sup>62</sup> Product Labeling, 73 Fed. Reg. 60228, 60228 (Oct. 10, 2008).

<sup>63</sup> FSIS, Substantiate Animal Raising, *supra* note 60, at 2.

<sup>64</sup> Product Labeling, 73 Fed. Reg. at 60228, 60229.

<sup>65</sup> *Id.*

<sup>66</sup> FSIS, *Animal Raising Claims* 13-14 (Oct. 14, 2008), [https://www.fsis.usda.gov/wps/wcm/connect/50bdbb61-f293-4e4c-90d5-ac819a16ca03/Animal\\_Raising\\_Claims\\_101408.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/50bdbb61-f293-4e4c-90d5-ac819a16ca03/Animal_Raising_Claims_101408.pdf?MOD=AJPERES).

<sup>67</sup> *Id.*

<sup>68</sup> Food Safety and Inspection Services Labeling Guideline, 81 Fed. Reg. 68933 (Oct. 5, 2016).

mechanism from time of slaughter or further processing through packaging and wholesale or retail distribution; [and] 4. A written description for the identification, control, and segregation of nonconforming animals/product.<sup>69</sup>

For animal welfare claims, FSIS indicated it would only approve a claim if the label includes a statement showing ownership and an explanation of the meaning of the claim for consumers.<sup>70</sup> For example, “TMB Ranch defines ‘raised with care’ as [explain the meaning of the claim on the label].”<sup>71</sup> The definitions may appear alongside the claim, or they may be connected by a symbol and placed elsewhere on the same panel bearing that claim.<sup>72</sup> The guidelines include the following example: “the claim ‘TMB Ranch Humanely Raised\*’ on the principle display panel (PDP) (*i.e.*, front of the package) should be linked by an asterisk to a statement elsewhere on the PDP explaining the meaning of the claim;” and “the statement it is linked to could be, ‘\*Cattle are grass fed on our family farms according to our strict animal welfare practices (weblink to animal welfare practices).’”<sup>73</sup>

#### *a. Issues with USDA’s Review of Animal Welfare Claims*

The USDA’s review of animal welfare claims fails to improve transparency for consumers for several reasons. The following sections discuss those issues, including the difficulty with evaluating producers’ documentation.

##### *i. Difficulty Evaluating Producer Documentation*

Although FSIS’s labeling guidance calls for documentation to evaluate animal welfare claims, the agency has difficulty properly evaluating animal raising claims on labels.<sup>74</sup> Because FSIS does not regulate food animal production, FSIS office staff likely does not possess the expertise required to properly evaluate claims involving multiple aspects of production.<sup>75</sup> Furthermore, FSIS does not conduct on-farm verification; instead, it relies solely on producer-supplied information to determine the appropriateness and accuracy of claims. Because FSIS lacks ability to visit farms and production facilities to verify claims of animal welfare, FSIS has acknowledged that it “may not always have

<sup>69</sup> FSIS, *Substantiate Animal Raising*, *supra* note 60, at 8.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> FSIS, *Animal Raising Claims*, *supra* note 65, at 15.

<sup>75</sup> AWI, *Petition*, *supra* note 49, at 28.

the relevant information needed to properly evaluate the animal raising practices described in a producer’s animal production protocol.”<sup>76</sup>

The USDA’s updated guidance requires detailed documentation of how a producer meets its welfare standards, but uncertainty exists regarding whether such guidance will improve the agency’s labeling review practices. Prior to the guidance’s publication, AWI, to evaluate the USDA process for approving claims, submitted more than a dozen Freedom of Information Act (FOIA) requests regarding twenty-five animal welfare and environmental claims appearing on the labels of nineteen meat and poultry products.<sup>77</sup> USDA responded that it was unable to locate any documents for twenty of the twenty-five claims, suggesting the agency did not require producers to submit any supporting evidence whatsoever prior to issuing an approval for use of these claims.<sup>78</sup> Additionally, USDA provided very limited documentation for the other five claims.<sup>79</sup> For example, the claim “humanely raised on sustainable family farms,” which was approved for use on one turkey producer’s products, supporting documentation consisted of a single affidavit containing only two sentences pertaining to the claim.<sup>80</sup> Considering the complexity of animal welfare and humane animal raising practices, two sentences should not be deemed sufficient for approval of a high-value animal welfare claim.

##### *b. Lack of Standard Meaning*

The lack of definition for welfare claims makes it difficult to evaluate whether the animals were indeed humanely raised. This lack of a standard allows the producer to set the standard, and FSIS’s evaluation of whether the claim is misleading or deceptive is based on that producer’s standard.<sup>81</sup> The claim may simply represent a marketing tactic with little or no relevance to animal welfare.<sup>82</sup> For example, in a

<sup>76</sup> FSIS, *Animal Raising Claims*, *supra* note 65, at 15.

<sup>77</sup> ANIMAL WELFARE INST., *Label Confusion: How “Humane” and “Sustainable” Claims on Meat Packages Deceive Consumers* 5 (2014), [https://awionline.org/sites/default/files/publication/digital\\_download/FA-AWI-Food-Label-Report.pdf](https://awionline.org/sites/default/files/publication/digital_download/FA-AWI-Food-Label-Report.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> FSIS, *Substantiate Animal Raising*, *supra* note 60, at 8. As the FSIS’ guidance explains, the claim should be defined according to the company’s or producer’s standard. *Id.*

<sup>82</sup> ANIMAL WELFARE INST., *A Consumer’s Guide to Food Labels and Animal Welfare* 3 (2016), <https://awionline.org/sites/default/files/products/FA-AWI-FoodLabelGuide-Web.pdf>.

lawsuit that was subsequently settled,<sup>83</sup> the Humane Society accused Perdue Farms of false advertising for packaging claims that its broiler chickens are “humanely raised.”<sup>84</sup> The class-action alleged the claims were deceptive because they suggested conforming to a high animal welfare standard, when in fact, the standard Perdue used was no better than minimal industry standards.<sup>85</sup>

### *c. Lack of Certification Leads to Weak Standards*

The USDA’s lack of verification incentivizes “a race to the bottom” that allows producers to circumvent verified certification programs (discussed *infra*), while still using a “humanely raised” claim.<sup>86</sup> For example, the Humane Farm Animal Care program once certified Applegate Farms under its “Certified Humane” label.<sup>87</sup> The Certified Humane program audits producer compliance with comprehensive, species-specific, animal raising standards that are available to the public on its website.<sup>88</sup> Applegate Farms eventually discontinued its use of the Certified Humane third-party certification, but continued to label its products as “humanely raised.”<sup>89</sup> When AWI later requested FSIS provide label approval documents for three different Applegate products labeled with as “humanely raised,” the agency responded that it was unable to locate information regarding the claim on any of the Applegate products.<sup>90</sup> Thus, producers like Applegate are able to use label claims without verification, meanwhile representing to consumers the equivalent message of an independent third-party certification.<sup>91</sup>

### *d. Difficulty Communicating Standard to Consumers*

While USDA requires labels clearly state the conditions under which an animal is raised, this standard only has merit in theory, as it is exceedingly difficult to effectively implement in practice. To

illustrate the potential for confusion, a “humane” claim that is described as “without confinement” could have very different meanings that indicate significant differences in animal welfare. For example, this claim could mean the animal was not housed in an individual crate or cage, but it could also mean the animal was not confined to a building and was allowed access to pasture.<sup>92</sup> Regardless, “without confinement” refers only to the method of housing an animal, which is just one aspect of the claim “humanely raised.” In addition to housing, the animal welfare standards should address many other aspects of care, including: feed, water, floors, bedding, lighting, space allowance, air quality, ventilation, environmental enrichment, access to range and pasture, handling methods, health care practices, transportation, and slaughter.<sup>93</sup> It is difficult, if not impossible, to communicate the multiple factors involved in animal welfare in a sentence or two that can be included on a package. However, USDA’s policy permits a producer to make a “humane” claim based on only one aspect of animal welfare, while receiving approval for a claim that may not truly provide a high level of welfare.

### *e. Preemptive Effect of FSIS Label Approval*

USDA’s method for thoroughly and effectively evaluating labeling claims is particularly important because the FMIA and PPIA contain preemption clauses that state, in relevant part: “Marking, labeling, packaging, or ingredient requirements...in addition to, or different than, those made under this chapter may not be imposed by any State.”<sup>94</sup> Courts have interpreted these clauses broadly, holding that the FSIS’s pre-approval of a label claim “must be given preemptive effect” over state-law claims that would effectively require the label to include different or additional markings.<sup>95</sup> For example, when a plaintiff alleged Hormel deli meats labeled “100% Natural” and “No Preservatives” were false and misleading because the meats contained synthetic ingredients and preservatives, the court held that the claims were expressly preempted by PPIA and FMIA.<sup>96</sup> Because FSIS approved the claims, the plaintiff’s allegations sought to impose additional or different requirements on Hormel than those required by USDA.<sup>97</sup> Thus,

<sup>83</sup> PERDUE WILL REMOVE ITS ‘HUMANELY RAISED’ LABEL TO SETTLE HSUS LAWSUITS, FOOD SAFETY NEWS (Oct. 14, 2014), <http://www.foodsafetynews.com/2014/10/perdue-to-remove-its-humanely-raised-label/#.WoneWqjwbIU>.

<sup>84</sup> Hemy v. Perdue Farms, 2012 WL 12057254 (D.N.J. 2012).

<sup>85</sup> *Id.*

<sup>86</sup> Zak Franklin, Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare, 21 ANIMAL L. 285, 310 (2015).

<sup>87</sup> Producers who are Certified Humane, CERTIFIED HUMANE, <http://www.certifiedhumane.org/index.php?page=producers-products>.

<sup>88</sup> Standards, CERTIFIED HUMANE, <http://certifiedhumane.org/how-we-work/our-standards/> (last visited Mar. 15, 2018).

<sup>89</sup> AWI, *Petition*, *supra* note 49, at 30.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 26.

<sup>93</sup> *Id.* at 26-27.

<sup>94</sup> 21 U.S.C. § 467.

<sup>95</sup> Barnes v. Campbell Soup Co., No. C 12-05185 JSW, 2013 WL 5530017, at \*5 (N.D. Cal. 2013).

<sup>96</sup> Phelps v. Hormel Foods Corp., 244 F. Supp. 3d 1312, 1315 (S.D. Fla. 2017).

<sup>97</sup> *Id.* at 1317.

because of FSIS pre-approved labels, consumers have no legal recourse under state consumer protection statutes for misleading and deceptive animal welfare labeling claims.<sup>98</sup>

#### *f. Falling Short of Consumer Expectations*

In addition to the other problems regarding the lack of USDA's rigorous oversight of animal welfare claims, it is also worth noting that its policies do not meet consumer expectations. This is particularly important given USDA claimed its primary goal in re-evaluating the evaluation process of animal welfare claims was "to keep...consumer confidence in our labeling system."<sup>99</sup> As a result, consumers have placed a mistaken trust in the pre-approval process. For example, a 2013 survey revealed that 88% of consumers who frequently purchase meat or poultry products believe the government should require producers "to prove any claims such as 'humanely raised' or 'sustainably farmed' on product labels."<sup>100</sup> In contrast to the belief that government *should* verify claims, the survey also found that 62% of respondents do not feel confident FSIS actually *does* verify label claims.<sup>101</sup> When questioned about the support that should be required to make an animal welfare claim, 87% of frequent purchasers of meat products said the use of claims such as "humanely raised" should not be allowed "unless the claims are verified by an independent third party."<sup>102</sup>

In summary, USDA's lack of a robust evaluation process for animal welfare claims has resulted in labels that cannot be trusted by consumers.

## IV. NATIONAL ORGANIC PROGRAM

For many consumers, "organic" is the gold standard for sustainability<sup>103</sup> and animal welfare. A Consumer Reports survey found that 86% of consumers who frequently or always buy organic food believe that it is highly important that animals used to produce these foods are raised on farms with high standards for animal welfare.<sup>104</sup> Consumers also

<sup>98</sup> However, plaintiffs can bring claims under state law based on deceptive advertising. *See, e.g.,* Hemy, 2012 WL 12057254.

<sup>99</sup> FSIS, Substantiate Animal Raising, *supra* note 60, at 9.

<sup>100</sup> AWI, *Petition*, *supra* note 49, at 25.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *The USDA Organic Seal: Gold Standard Around the World*, ORGANIC INTEGRITY QUARTERLY 1 (May 2014), <https://www.ams.usda.gov/sites/default/files/media/2014-Organic-May-Newsletter.pdf>.

<sup>104</sup> *Consumer Reports Survey Finds Consumers Think It's Important to Have High Animal Welfare Standards For Food Labeled Organic*, GREENER CHOICES (Apr. 19, 2017), <http://greenerchoices.org/2017/04/19/animal-welfare-organic-farms-2017-survey/>.

have high expectations for organic standards. A 2014 survey conducted by the American Society for the Prevention of Cruelty to Animals (ASPCA) found that nearly 70% of consumers believe that certified organic farms give all animals access to "outdoor pasture and fresh air throughout the day," and that the animals have "significantly more space to move than on non-organic farms."<sup>105</sup> Unfortunately, due to regulation ambiguity and inconsistent application of standards, consumer expectations of "organic" products may not be met.

The Organic Foods Production Act of 1990 (OFPA)<sup>106</sup> exemplifies an effort by Congress to address an issue very similar to defining "animal welfare"—it established uniform and enforceable standards for "organic" foods.<sup>107</sup> Congress enacted the OFPA to address inconsistency among states in "organic" food labeling,<sup>108</sup> dilution of the term's meaning,<sup>109</sup> and confusion among consumers.<sup>110</sup> Similar to "humanely raised" meat products, consumer surveys revealed a demand for organic foods and a willingness to pay more for those products.<sup>111</sup> Prior to OFPA's enactment, "even the most sophisticated consumer" could not have understood what the term "organic" really meant, because food labeled "organic" was allowed to consist of anywhere from 20% to 100% organically-grown ingredients.<sup>112</sup>

<sup>105</sup> Am. Soc'y for the Prevention of Cruelty to Animals, *Research on Consumer Perceptions of Organic Food Standards for Treatment of Animals 1* (2014), [http://www.aspc.org/sites/default/files/aspc\\_organic\\_labeling\\_public\\_memo\\_4-10-14.pdf](http://www.aspc.org/sites/default/files/aspc_organic_labeling_public_memo_4-10-14.pdf).

<sup>106</sup> 7 U.S.C. §§ 6501-6524 (1990).

<sup>107</sup> *Id.* § 6504.

<sup>108</sup> When the OFPA was passed, there were twenty-two states with varying organic programs. Proposed Organic Certification Program: Joint Hearing Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition and the Subcommittee on Department Operations, Research, and Foreign Agriculture of the Committee on Agriculture, 101st Cong., 2 (1990).

<sup>109</sup> *Id.* at 13 (statement of Hon. Peter A. DeFazio) ("[S]ome farmers are actually labeling things organic which are produced in a manner no different than other conventional agricultural practices, yet gives them a distinct marketing advantage.... [T]he playing field is not level...those less scrupulous persons in the industry who would label nonorganic products as organic are getting a marketing advantage above them and a premium price for a product which is essentially no different."); *see also* RENÉE JOHNSON, CONG. RESEARCH SERV., RL31595, ORGANIC AGRICULTURE IN THE UNITED STATES: PROGRAM AND POLICY ISSUES 3 (2008) (explaining that the organic industry petitioned for federal standards to "reduce consumer confusion over the many different state and private standards then in use, and would promote confidence in the integrity of organic products over the long term.").

<sup>110</sup> Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and Its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD DRUG L. J. 537, 538 (1997).

<sup>111</sup> *Id.* at 540.

<sup>112</sup> *Id.* at 539.

Generally, organically-labeled products may only contain organic ingredients, meaning no antibiotics, hormones, genetic engineering, radiation, synthetic pesticides, or fertilizers can be used in production.<sup>113</sup> The OFPA required the Secretary of Agriculture to establish the National Organic Standards Board (NOSB) to assist in the development of standards for substances to be used in organic production and to promulgate regulations to implement the legislation.<sup>114</sup> After ten years of rulemaking, the regulations created the National Organic Program.<sup>115</sup> To bear the “organic” label, a producer must be certified by independent third-party “certifying agents” accredited by the USDA.<sup>116</sup>

Producers of “organic” meat must adhere to animal welfare standards, which apply to all species of farm animals, and require producers to establish and maintain living conditions that accommodate the health and natural behavior of animals.<sup>117</sup> Animals must be given access to the outdoors and shelter designed to allow for natural maintenance, comfort behaviors, and opportunity to exercise.<sup>118</sup>

#### *a. Ambiguity of Organic Animal Welfare Standards*

While the organic standards provide some animal welfare regulations that are verified by accredited third-parties, there has been a longstanding controversy about the meaning of some of the standards. Recognizing that “[a]nimal welfare is a basic principle of organic production,” in 2011, the NOSB recommended the USDA address gaps in animal welfare regulations.<sup>119</sup> While the NOP regulations prohibit “continuous total confinement” and require year-round access to the outdoors (except during certain conditions, such as extreme weather) with shade, shelter, exercise areas, fresh air, and direct sunlight,<sup>120</sup> the regulations did not specifically state how long access should be

provided and how much area should be accessible to the animals.<sup>121</sup> As a result, different interpretations of these regulations were implemented across the dairy, chicken, pork, and egg industries. For example, USDA estimates that half of all organic eggs sold today come from hens living in continuous total confinement.<sup>122</sup> In addition, the “outdoor access” regulation has been inconsistently applied by certification agencies.<sup>123</sup>

At the root of this inconsistency is an appeals decision made in October of 2002 following the publication of the final organic standards in the Federal Register.<sup>124</sup> An egg-laying operation in Massachusetts applied to receive organic certification.<sup>125</sup> During the inspection, the certifying agent determined the operation’s use of porches did not satisfy the outdoor access requirements under the organic standards, and it issued a Proposed Notice of Denial of Certification.<sup>126</sup> The operation appealed the decision, and three days later, the certifying agent received notification the USDA had sustained the appeal, and was directed to retroactively grant certification to the date of the Proposed Notice of Denial of Certification.<sup>127</sup> Following this appeals decision by USDA, “porches” have been considered as sufficient outdoor access, although the NOP never amended the regulations, resulting in inconsistency among certifying agents’ enforcement of outdoor access requirements.<sup>128</sup> Most certifying agents do not allow porches to satisfy outdoor access requirements, thus creating an uneven playing field between producers, depending on which agent they choose for certification services.<sup>129</sup> The Accredited Certifiers Association (ACA), which represents most ACAs operating under USDA accreditation, including fourteen ACAs housed in State Departments of Agriculture, has indicated to the USDA its wish for consistent and clear standards to enforce.<sup>130</sup>

<sup>113</sup> 7 C.F.R. pt. 205 (2018).

<sup>114</sup> GIL H. HARDEN, U.S. DEP’T. OF AGRIC., OVERSIGHT OF THE NATIONAL ORGANIC PROGRAM, 1 (2010), [www.usda.gov/oig/webdocs/01601-03-HY.pdf](http://www.usda.gov/oig/webdocs/01601-03-HY.pdf).

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* These agents are either state, private, or foreign organizations. *Id.* To receive an organic certification, a farm must submit an “organic plan” to the certifying agent for approval. 7 U.S.C. § 6513 (1990). Producers who comply with the standards of the National Organic Program may label their products as “USDA Certified Organic.” *See Id.* § 6505(a).

<sup>117</sup> 7 C.F.R. § 205.239(a) (2018).

<sup>118</sup> *Id.* § 205.239(a)(1).

<sup>119</sup> NAT’L ORGANIC STANDARDS BD., LIVESTOCK COMM., *Final Recommendation Animal Welfare and Stocking Rates* 1 (2011), <https://www.ams.usda.gov/sites/default/files/media/NOP%20Livestock%20Final%20Rec%20Animal%20Welfare%20and%20Stocking%20Rates.pdf>.

<sup>120</sup> 7 C.F.R. § 205.239(a)(1).

<sup>121</sup> HARDEN, *supra* note 113, at 22.

<sup>122</sup> PETER WHORISKEY, *MORE THAN A MILLION HENS, FILLING BARN AT THREE PER SQUARE FOOT. AND YES, THEY’RE USDA ORGANIC*, WASHINGTON POST (JULY 13, 2017), [HTTP://WWW.CHICAGOTRIBUNE.COM/BUSINESS/CT-EGGLANDS-BEST-ORGANIC-HERBRUCK-FARM-20170713-STORY.HTML](http://www.chicagotribune.com/business/CT-EGGLANDS-BEST-ORGANIC-HERBRUCK-FARM-20170713-STORY.HTML); NATIONAL ORGANIC PROGRAM; ORGANIC LIVESTOCK AND POULTRY PRACTICES, 81 FED. REG. 21956, 21957 (APR. 13, 2016).

<sup>123</sup> LAURA BATCHA, ORGANIC TRADE ASS’N, LETTER TO PAUL LEWIS, RE: ORGANIC LIVESTOCK AND POULTRY PRACTICES SECOND PROPOSED RULE 3 (June 9, 2017), [https://ota.com/sites/default/files/indexed\\_files/OTA\\_OLPP\\_AMS-NOP-17-0031.pdf](https://ota.com/sites/default/files/indexed_files/OTA_OLPP_AMS-NOP-17-0031.pdf); HARDEN, *supra* note 113, at 22.

<sup>124</sup> BATCHA, *supra* note 122, at 3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 3-4.

<sup>130</sup> *Id.* at 4.

*b. Missed Opportunity for Clarity*

After a decade of collaboration between farmers and advocates to develop new rules to address the ambiguity of the outdoor access requirement and generally strengthen animal welfare standards, the Organic Livestock and Poultry Practices (OLPP) rules were finalized on January 18, 2017.<sup>131</sup> As 2017 went on, the rules were repeatedly delayed by the USDA following the Trump administration's regulatory freeze.<sup>132</sup> Scheduled to go into effect on May 14, 2018, and now in the fifth "final" version, the OLPP specified a set of standards for organic livestock and poultry designed to minimize stress, facilitate natural behaviors, and promote animals' well-being.<sup>133</sup> Championed throughout the organic industry—from farmers, to consumer groups, to retailers, and animal-welfare advocates—the OLPP was intended to bring production in line with consumer expectations of higher animal welfare standards.<sup>134</sup> For this reason, the rules were considered necessary to preserve the integrity of the organic label.<sup>135</sup>

The OLPP established requirements for organic animals to have daily access to the outdoors, more specifically areas that are at least partially soil or covered in vegetation.<sup>136</sup> The OLPP stated that concrete pads and covered or fenced porches would not suffice.<sup>137</sup> The rule clarified that the access must be meaningful and that doors to the outside be accessible.<sup>138</sup> In addition, the rule specified minimums for space, air quality, light, and enrichments for poultry and livestock.<sup>139</sup> Finally, the rule also provided clarifications on physical alterations, and transport and slaughter requirements for livestock and poultry to ensure the health and welfare of the animals.<sup>140</sup>

Despite overwhelming support from producers, consumers, and animal welfare groups,<sup>141</sup> on December 18, 2017, USDA published

<sup>131</sup> NATIONAL ORGANIC PROGRAM; ORGANIC LIVESTOCK AND POULTRY PRACTICES, 82 FED. REG. 7042 (JAN. 19, 2017) (TO BE CODIFIED AT 7 C.F.R. PT. 205).

<sup>132</sup> Lynne Curry, *Years in the Making, Organic Animal Welfare Rules Killed by Trump's USDA*, CIVIL EATS (Dec. 18, 2017), <https://civileats.com/2017/12/18/years-in-the-making-trumps-usda-kills-organic-animal-welfare-rules/>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> National Organic Program; Organic Livestock and Poultry Practices, 82 Fed. Reg. at 7045, 7046.

<sup>137</sup> *Id.* at 45.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> IN THE COMMENT PERIOD FOR THE FINAL RULE, OF THE 47,000 COMMENTS RECEIVED, 99% WERE IN FAVOR OF THE RULE. ORGANIC TRADE ASSOCIATION DISMAYED AT USDA PROPOSAL TO WITHDRAW ORGANIC ANIMAL WELFARE RULE, ORGANIC TRADE ASS'N (DEC. 15, 2017), [HTTPS://WWW.OTA.COM/NEWS/PRESS-RELEASES/20000](https://www.ota.com/news/press-releases/20000).

its decision to withdraw the OLPP, citing its belief that OFPA did not authorize the animal welfare provisions of the final rule.<sup>142</sup> The agency's current interpretation of the statute is that OFPA's reference to additional regulatory standards "for the care" of organically produced livestock should be limited to health care practices similar to those specified by Congress in the statute, rather than expanding the statute's scope to encompass stand-alone animal welfare concerns.<sup>143</sup>

This decision incorrectly interprets the OFPA, which states that "The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced."<sup>144</sup> Notably, Congress used the term "care," not "health care."<sup>145</sup> As reflected in the current organic regulations, which include standards for living conditions such as "year-round access for all animals to the outdoors"<sup>146</sup>—which fall clearly within the USDA's authority to ensure "care" of livestock—so, too, does the OLPP rule clarifying the outdoor access rule.

The withdrawal of the OLPP rule is a missed opportunity for the USDA to clarify and strengthen animal welfare standards within the NOP to meet consumer expectations and improve transparency of the organic label.<sup>147</sup> The OLPP is the result of a decade of compromise between organic producers of various scale. By withdrawing the rule, the Agricultural Marketing Service (AMS) has needlessly thwarted an opportunity to improve the transparency and consistency of the organic standard. The final OLPP "rule would [have] prevent[ed] future inconsistency regarding outdoor access and ensure[d] a level playing field for all organic livestock and poultry operations."<sup>148</sup>

<sup>142</sup> National Organic Program; Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59988 (Dec. 18, 2017). On March 13, 2018, the USDA finalized its decision to withdraw the rule. National Organic Program; Organic Livestock and Poultry Practices—Final Rule, Withdrawal, 83 Fed. Reg. 10775 (Mar. 13, 2018).

<sup>143</sup> National Organic Program; Organic Livestock and Poultry Practices—Withdrawal, 82 Fed. Reg. 59988 (Dec. 18, 2017).

<sup>144</sup> 7 U.S.C. § 6509 (emphasis added).

<sup>145</sup> See Charlotte Vallaey, Comments of Consumers Union to the U.S. Department of Agriculture's Agricultural Marketing Service on the National Organic Program: Organic Livestock and Poultry Practices; Withdrawal of Final Rule Docket No. AMS-NOP-15-0012-6686 (Jan. 17, 2018), [http://consumersunion.org/wp-content/uploads/2018/01/Consumers\\_Union\\_OLPP\\_Comments\\_January\\_2018.pdf](http://consumersunion.org/wp-content/uploads/2018/01/Consumers_Union_OLPP_Comments_January_2018.pdf).

<sup>146</sup> 7 C.F.R. § 205.239.

<sup>147</sup> Animal Welfare Inst. et al., Animal Welfare in the National Organic Program: The USDA Must Act Quickly to Protect Millions of Animals 22 (2017), <https://farmforward.com/wp-content/uploads/2017/08/Organic-OLPP-Animal-Welfare-Report-2017.pdf>.

<sup>148</sup> BATCHA, *supra* note 122, at 4.

## V. THIRD-PARTY CERTIFICATIONS

The marketplace has responded to consumer demand for verified and humanely-raised animal products by establishing voluntary certification labels. Market regulation has several benefits over government regulation—it avoids the problem of establishing regulations that reflect changing consumer preferences, and by providing a “menu-style approach,” it allows consumers to select products with different standards at different price points.<sup>149</sup> The disadvantage of a uniform “humane” standard is that consumers will have difficulty distinguishing among labels that all claim to reflect high animal welfare standards. There are, in fact, significant differences between each certification program. The following sections briefly summarize each program’s standards and highlight several differences between four third-party labels: Animal Welfare Approved (AWA), Certified Humane, American Humane Certified, and Global Animal Partnership.

### a. *Animal Welfare Approved (AWA)*

Animal Welfare Approved (AWA), an organization by A Greener World, is a national nonprofit organization that audits, certifies, and supports family farmers who raise their animals according to the highest animal welfare and environmental standards.<sup>150</sup> For example, AWA’s standards prohibit certain physical alterations that are typically allowed by other “humane” label standards, such as beak trimming of laying hens and teeth filing of piglets.<sup>151</sup> AWA is the most highly-regarded animal welfare food label.<sup>152</sup> The standards address every aspect of each species’ lifecycle needs from birth to death, and require animals to be raised on family farms with adequate and well-managed space indoors and outdoors, promoting animal health and allowing the animals to engage in natural behaviors.<sup>153</sup> The program is only one of two audited high welfare slaughter practices and is the only seal that requires pasture access for all animals.<sup>154</sup>

<sup>149</sup> Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 *ANIMAL L.* 391, 420 (2013).

<sup>150</sup> *About*, ANIMAL WELFARE APPROVED, <https://animalwelfareapproved.us/about/> (last visited Mar. 8, 2018).

<sup>151</sup> *Pig Standards*, ANIMAL WELFARE APPROVED, <https://animalwelfareapproved.us/standards/pig-2017/> (last visited Mar. 8, 2018); *Laying Hen Standards*, ANIMAL WELFARE APPROVED, <https://animalwelfareapproved.us/standards/layinghens-2017/> (last visited Mar. 8, 2018).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

### b. *Certified Humane*

Certified Humane includes standards for the treatment of breeding animals, animals during transport, and animals at slaughter, and is administered by the non-profit Humane Farm Animal Care.<sup>155</sup> The program asserts that “[a]nimals must be free to do what comes naturally.”<sup>156</sup> While minimum space allowances and indoor environmental enrichment must be provided, access to the outdoors is not required for birds, egg-laying hens, and pigs.<sup>157</sup> The standards also permit feedlots for beef cattle, and allow practices such as beak trimming of hens and turkeys and tail docking of pigs under certain circumstances.<sup>158</sup>

### c. *American Humane Certified*

The American Humane Certified (AHC) standards include the treatment of breeding animals, animals during transport, and animals at slaughter.<sup>159</sup> The standards “were built upon the Five Freedoms of Animal Welfare, which require that an animal be healthy, comfortable, well-nourished, safe, able to express normal behavior, and free from unpleasant states such as pain, fear, and distress.”<sup>160</sup> Despite this mission statement, AHC standards “[p]rovide[] the lowest space allowances of the main humane certification programs, and is the only welfare program to permit the use of cages for housing egg-laying hens.”<sup>161</sup> There are no requirements for outdoor access for birds, egg-laying hens, beef cattle, or pigs.<sup>162</sup> “Beak trimming of poultry and tail docking of pigs without pain relief are allowed.”<sup>163</sup> “Other basic natural behaviors such as foraging for chickens, rooting and foraging for pigs, nest building for pregnant pigs, and grazing on pasture for beef cattle and dairy cows are not required to be accommodated.”<sup>164</sup> For these reasons, Consumer Reports has deemed AHC to not be a:

<sup>155</sup> *Our Standards*, CERTIFIED HUMANE, <https://certifiedhumane.org/how-we-work/our-standards/> (last visited Mar. 8, 2018).

<sup>156</sup> *Id.*

<sup>157</sup> ANIMAL WELFARE INST., *A Consumer’s Guide to Food Labels and Animal Welfare*, <https://awionline.org/content/consumers-guide-food-labels-and-animal-welfare> (last visited Mar. 8, 2018).

<sup>158</sup> *Id.*

<sup>159</sup> *Science-Based Standards*, AMERICAN HUMANE, <http://www.humaneheartland.org/our-standards> (last visited Mar. 8, 2018).

<sup>160</sup> *Id.*

<sup>161</sup> *A Consumer’s Guide to Food Labels and Animal Welfare*, supra note 156.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *American Humane Certified*, CONSUMER REPORTS GREENER CHOICES (SEPT. 6, 2017), <http://greenerchoices.org/2017/01/11/american-humane-certified/>.

[m]eaningful label for ensuring that farm animals are raised in an environment that allows them to engage in their instinctive and natural behaviors, with freedom of movement, access to well-managed outdoor areas and fresh air, and comfortable indoor space, all of which consumers believe should be part of humane treatment.<sup>165</sup>

A 2016 class-action lawsuit challenged use of the AHC label on chicken,<sup>166</sup> asserting the practices allowed by the standards codify inhumane factory farm procedures, thereby failing to “conform with the Five Freedoms or reasonable consumer expectations of humane treatment.”<sup>167</sup>

#### *d. Global Animal Partnership*

The Global Animal Partnership (GAP) has established **5 Step Animal Welfare Rating Standards** used at retailers such as Whole Foods, which recognize and reward producers for their welfare practices, promotes and facilitates continuous improvement, and better informs consumers about the production systems they choose to support.<sup>168</sup> GAP establishes standards, but does not conduct audits or certify farms.<sup>169</sup> Instead, GAP accredits independent certification companies to conduct audits and award GAP certifications on its behalf.<sup>170</sup> GAP maintains multi-tiered certification standards (“Step Levels” 1-5+) for each species.<sup>171</sup> A higher “Step Rating” signifies a higher standard of welfare.<sup>172</sup> To qualify for certification, producers only need to meet the Step 1 standard—“no cages, no crates, no crowding.”<sup>173</sup> However, these standards may not be much better than those in industrial farming systems; for example, Step 1 standards allow pigs and chickens to be confined indoors to spaces that only slightly exceed the industry norm.<sup>174</sup>

<sup>165</sup> *Id.*

<sup>166</sup> First Amended Class Action Complaint at 2, *Leining v. Foster Poultry Farms*, Case No. BC588004 (Sup. Ct. L.A., July 13, 2015), <https://assets.documentcloud.org/documents/2993250/Complaint.pdf>.

<sup>167</sup> *Id.* at 7.

<sup>168</sup> GLOB. ANIMAL P'SHIP, *The 5-Step Animal Welfare Program*, <https://globalanimalpartnership.org/5-step-animal-welfare-rating-program/> (last visited Mar. 8, 2018).

<sup>169</sup> ASPCA & VT. LAW CTR. FOR AGRIC. & FOOD SYS., *FARM ANIMAL WELFARE CERTIFICATION GUIDE 35* (2017), [http://www.aspc.org/sites/default/files/frm\\_wlfr\\_cert\\_guide\\_jan\\_2017\\_links.pdf](http://www.aspc.org/sites/default/files/frm_wlfr_cert_guide_jan_2017_links.pdf).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> GLOB. ANIMAL P'SHIP, *supra* note 167.

<sup>174</sup> *Global Animal Partnership Step 1*, CONSUMER REPORTS GREENER CHOICES (2017), <http://greenerchoices.org/2017/03/07/global-animal-partnership-step-1/>.

Step 1 does not require producers to provide animals with materials to engage in natural behaviors.<sup>175</sup> For beef, Step 1 reflects the industry norm of raising beef cattle on range or pasture for the first part of the animal's life, and then on a feedlot for the remainder of the animal's life.<sup>176</sup>

In a class action against Whole Foods, People for the Ethical Treatment of Animals (PETA) asserted that in its advertisements, Whole Foods failed to adequately disclose that the 5-Step standards are no better, or only marginally better, than common industry practices.<sup>177</sup> PETA argued that the 5-Step standards create the false impression of ensuring improvement to animal welfare and superior quality meat products.<sup>178</sup> PETA highlighted the Step 1 standard which prohibits cages for poultry, but the standard practice in the industry is not to raise broiler chickens (as opposed to egg-laying chickens) in cages.<sup>179</sup> In addition, the standard requiring “no cages, [and] no crowding” gives the impression that the absence of cages means healthier and more pleasant environments for broiler chickens and turkeys.<sup>180</sup> However, birds raised by Step 1 and 2-certified suppliers can be crowded into sheds at nearly the same density that is standard on factory farms.<sup>181</sup> PETA also alleged that the certification program is not enforced against Whole Food's chicken, turkey, pork, and beef suppliers in a meaningful way because the audit process occurs infrequently, and violations of the standards, even over multiple years, causes no loss of certification.<sup>182</sup>

#### *e. Certifications Issues*

While the variety of certification organizations appears to empower consumers by providing them with choice among producers, there are several ways in which certifications obscure animal welfare standards and may inhibit consumers from understanding how their food is produced.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Complaint, *PETA v. Whole Foods*, Case 5:15-cv-04301-NC, at \*2 (N.D. Cal. Sept. 21, 2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Animal Welfare for Boiler Chickens*, NAT'L CHICKEN COUNCIL (2012), <http://www.nationalchickencouncil.org/industry-issues/animal-welfare-for-broiler-chickens/>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*; The District Court dismissed the case, holding that PETA had not alleged affirmative misrepresentations or an actionable omission related to consumer safety. *PETA v. Whole Foods*, No. 15-CV-04301-NC, at \*4 (N.D. Cal. 2016).

<sup>182</sup> Complaint, *supra* note 176.

### i. Difficulty Distinguishing Among Certification Standards

As described above, each certification includes standards that provide different levels of welfare. Such nuances between the various aspects of animal welfare make parsing the labels difficult for shoppers. The certifications do not educate or empower consumers because the variety of labeling schemes fail to “rescue animal welfare from its default position as a credence attribute fully unobservable to consumers.”<sup>183</sup> As stated by Temple Grandin, the noted animal scientist and animal welfare champion, “I don’t think many consumers understand that there are these differences in certification standards.”<sup>184</sup> Although the standards of most certification schemes are available online,<sup>185</sup> consumers have no easy basis for deciding which set of standards is better or worse than another.<sup>186</sup> Moreover, consumers are unlikely to gain the knowledge necessary to make informed decisions that conforms to their values and preferences. Few consumers can distinguish between similar-sounding labels, or have the time to research what each label actually means,<sup>187</sup> and even fewer consumers have the animal, agricultural, or scientific acumen to compare different farming practices, even if they take the time to read each program’s lengthy standards.<sup>188</sup> This lack of knowledge undermines any value labels have as mechanisms to inform consumers. Consumers who cannot distinguish between labels are left to focus on prices when making their purchasing decisions, which “effectively forecloses any actual market for enhanced-welfare animal products.”<sup>189</sup> In addition, consumers may be misled into purchasing products that do not meet their expectations regarding animal welfare.

### ii. Misplaced Reliance on Certifications

By relying on certifications, consumers miss the opportunity to learn about how their food is actually produced.<sup>190</sup> A consumer who is concerned about animal welfare can assuage her conscience by

<sup>183</sup> Sullivan, *supra* note 148, at 422.

<sup>184</sup> Strom, *supra* note 29.

<sup>185</sup> See, e.g., *Animal Welfare Approved Standards for Beef Cattle*, ANIMAL WELFARE APPROVED (2017), <https://animalwelfareapproved.us/wp-content/uploads/2017/04/AWA-Beef-Cattle-Standards-2017-v3.pdf> (featuring twenty-eight pages of standards); *Humane Farm Animal Care Animal Care Standards*, CERTIFIED HUMANE (2014), <https://certifiedhumane.org/wp-content/uploads/Std14.BeefCattle.3M-1.pdf> (featuring fifty-four pages of standards).

<sup>186</sup> Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 117, 132 (Winter 2007).

<sup>187</sup> Franklin, *supra* note 85, at 311.

<sup>188</sup> *Id.* at 312.

<sup>189</sup> Sullivan, *supra* note 148, at 422.

<sup>190</sup> Leslie & Sunstein, *supra* note 185, at 133.

selecting a certified “humane” label, although such label itself gives no information about how an animal was treated during its life.<sup>191</sup> Understanding the practices involved in animal production could lead consumers to reconsider their food preferences.<sup>192</sup>

## VI. RECOMMENDATIONS FOR IMPROVING TRANSPARENCY AND ENSURING CORPORATE ACCOUNTABILITY: MARKET INNOVATION WITH GOVERNMENT OVERSIGHT

This paper has identified the challenges of establishing and enforcing animal welfare labels. While the USDA permits the use of “humanely raised” claims without third-party certification and the organic standards for animal welfare fall short of consumer expectations, the various certified labeling schemes also do little to inform consumers about treatment of farm animals. Thus, improving transparency to empower consumers is unlikely to be found solely in a single governmental or marketplace solution.

As the discussions in Parts III and IV reveal, the USDA has failed to adequately oversee animal welfare claims, and in the case of organics, has frustrated efforts to improve welfare standards. Thus, it seems counter-productive to call for government regulation of animal welfare claims. Nevertheless, some authors and organizations have proposed legislative and regulatory solutions, such as federal legislation to establish animal welfare standards<sup>193</sup> and rulemaking by the USDA to amend labeling regulations under the FMIA and the PPIA to require independent third-party certification for the approval of animal welfare claims.<sup>194</sup> Not only are such proposals politically infeasible, it is unlikely this proposal would benefit producers, better inform consumers of animal raising practices, or improve animal welfare. To illustrate one challenge, without uniform standards for “humanely raised” claims, third-party certifications of claims would only ensure that the producer has met its own standards for what constitutes “humane” practices, which is not much different than having a variety of certification programs in the marketplace. In theory, enacting legislation or regulations to ban certain practices or require particular conditions for farm animals can set

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Amy Mosel, *What About Wilbur? Proposing A Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 181 (2001) (proposing a federal statute that sets forth minimum requirements for raising farm animals and directs the Secretary of Agriculture to enforce the statute).

<sup>194</sup> AWI, *Petition*, *supra* note 49, at 4.

a floor for what constitutes humane standards.<sup>195</sup> In practice, however, seeking a legislative or administrative rule for animal welfare would be a process fraught with special interest battles, and the result is likely to be a watered-down approach influenced by the most powerful players in the agricultural industry.<sup>196</sup> A diluted legal standard would significantly disadvantage smaller producers using higher welfare standards because it would allow other producers to utilize the lowest, cheapest standards to convey humane treatment, which would discourage the development of better welfare standards.

This is not to say that government oversight is unimportant to achieving transparency for consumers and accountability by producers. USDA's lax oversight currently leaves consumers and animal welfare groups to "police" producers to make sure animal welfare claims are verifiable and not misleading. This role "puts an unfair and unrealistic burden on [consumers and animal welfare groups]" to alter an entrenched industrial food system.<sup>197</sup> A consumer-led development of animal welfare standards runs the risk of the standards being tied to what consumers perceive to be important, which may not always be what is in the best interests of animals.<sup>198</sup>

Instead, there are measures to be taken by the USDA and certification programs to achieve the goals of transparency for consumers. A combination of market-led standards accredited by third parties should be verified by FSIS. However, to promote accountability and transparency, the USDA should thoroughly review the documentation set forth in its 2016 guidance to avoid approval of misleading labels. In addition, the USDA should determine that animal welfare standards that are no better than industry standards are misleading and deceptive. At a minimum, the USDA should recognize that an animal welfare claim signals to consumers that the product is superior to a like product from a conventionally-raised animal. Even without visiting the farm or production facility, the USDA should compare industry standards with those of the producer to ensure the use of higher welfare practices.

Certification programs are opportunities for labeling innovation in terms of communicating information and establishing higher animal

welfare standards, based not only on consumer preferences, but scientific research. Producers of high animal welfare products can create a "consumer-focused" label that clearly communicates how producer's compliance with particular standards impact animal welfare, reflect practices most important to consumers, and have the greatest potential to highlight differences among producers' practices.<sup>199</sup> The specific standards that would be reflected on the label would vary by animal species, depending on the specific issues of concern for that species and that industry.<sup>200</sup> The standards could change over time as issues of concern change.<sup>201</sup> Another benefit of different label schemes is that it would foster public debate on existing practices and animal welfare in much the same way development of a federal definition of "organic" has focused debate on organic standards.<sup>202</sup> The different labels and processes for developing the labels could amplify the discussion of animal-welfare issues and perhaps challenge consumers to think more critically about their purchasing decisions, truly empowering purchases that reflect their values.

## VII. CONCLUSION

Consumer demand has been the driving force behind changes to producer practices regarding the treatment of farm animals. However, the plethora of labels permitted by USDA and third-party certification programs often fail to adequately convey the type of treatment and conditions provided to these animals. The USDA and certifying organizations all have roles to play in improving transparency for consumers. Innovation in labeling, coupled with verification by the USDA and third-party certification programs, can help educate and empower consumers to make purchasing decisions that align with their ethics. This, in turn, can incentivize the development and implementation of higher welfare standards for farm animals.

<sup>195</sup> Christine Parker, *Voting with Your Fork? Industrial Free-Range Eggs and the Regulatory Construction of Consumer Choice*, 649 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 68 (2013).

<sup>196</sup> See, e.g., *Organic Livestock and Poultry Rule*, NAT'L PORK PRODUCERS COUNCIL (2017), <http://nppc.org/issues/issue/organic-livestock-and-poultry-practices-rule/> (stating the organization's opposition to the OLPP); Tracy Brunner, *Comments on Organic Livestock and Poultry Rule*, NAT'L CATTLEMEN'S BEEF ASS'N (July 13, 2016), [http://portal.criticalimpact.com/user/25397/files/NCBA\\_Comments\\_on\\_AMS\\_Organic\\_Rule.pdf](http://portal.criticalimpact.com/user/25397/files/NCBA_Comments_on_AMS_Organic_Rule.pdf) (stating the organization's opposition to the OLPP).

<sup>197</sup> Margot J. Pollans, *Farming and Eating*, 13 J. FOOD L. & POL'Y 99, 110 (2017).

<sup>198</sup> Sullivan, *supra* note 148, at 421.

<sup>199</sup> Leslie & Sunstein, *supra* note 183, at 133.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 135.

**BREED-SPECIFIC DOG LAWS:  
MOVING THE UNITED STATES AWAY FROM  
AN "ANTI-PIT BULL" MENTALITY**

PAIGE RIEM

**I. INTRODUCTION**

*a. Issue Addressed*

While laws and attitudes have progressed overtime regarding many issues of animal welfare, some issues still have a long way to go. One issue that is pervasive in society today is the negative connotation surrounding the dog breed known as the Pit Bull. The term "Pit Bull" actually denotes three different dog breeds, which are the American Staffordshire Terrier, the Staffordshire Bull Terrier, and the American Pit Bull.<sup>1</sup> Society tends to place all of these dogs into the Pit Bull category, and they are often labeled as inherently vicious killers that could attack at any moment and are "bred for fighting."<sup>2</sup> Pit Bulls have been described as dogs that "attack[] without a bark or any warning, ha[ve] a high threshold of pain, and usually will not quit [a] fight voluntarily."<sup>3</sup>

This reputation has been facilitated by negative media portrayal and false information, which has elicited fear in some humans. Statistics regarding dog bites that are shared in the media are also commonly misleading, based on the fact that there are actually several dog breeds placed into the Pit Bull category.<sup>4</sup> This means the amount of dog bites by Pit Bulls is skewed since the dog bites are not correlated to the individual breeds responsible.<sup>5</sup> Highly-publicized dog-bite injury and death cases, as well as gruesome dog-fighting competition incidents, have also aided in the destruction of the Pit Bull's character.

Some cities have chosen to deal with their "Pit Bull problem" by implementing breed-specific dog laws that ban or restrict the keeping of a dog based solely on its breed. The pertinent issues that arise in the

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<sup>1</sup> Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 *FORDHAM L. REV.* 2847, 2851 (2006).

<sup>2</sup> Russell G. Donaldson, *Annotation, Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as Pit Bulls or Bull Terriers*, 80 *A.L.R.* 4th 70 (1990).

<sup>3</sup> Gregg Neal, *Pit Bull Dog Attack Litigation*, 33 *AM. JUR. TRIALS* 4, 7 (1986).

<sup>4</sup> Hussain, *supra* note 1, at 2870.

<sup>5</sup> *Id.*

context of implementing this type of a law are: 1) whether the purpose and intent of breed-specific dog laws is rationally related to promoting human health, safety, and welfare; and 2) whether there is a more effective way of protecting humans, while still promoting the welfare of all dogs.

### *b. Overview of Analysis and Proposed Solution*

There are two main approaches to dealing with the dog-bite issues present in society: breed-specific legislation and dangerous dog laws. Breed-specific dog laws limit or ban ownership of a dog solely based on breed, while dangerous dog laws impose regulations based on the individual dog exhibiting vicious behavior. Currently, there are ordinances in place across the United States that reflect both approaches; however, some states have banned the implementation of breed-specific legislation altogether. There is also relevant case law on this issue, specifically where dog owners have challenged breed-specific dog laws for several reasons, including arguments centered around “substantive due process, equal protection, and vagueness.”<sup>6</sup> The courts’ responses to these challenges have been mixed, with some courts still holding that breed-specific dog laws are rationally related to public health, safety, and welfare.<sup>7</sup>

While the health, safety, and welfare of humans is indeed a legitimate concern, banning an entire dog breed is the not an effective way to ensure human welfare. The breed is irrelevant—the person who raises the dog has the power to properly train it regardless of breed. Breed-specific dog laws have many ineffective factors surrounding them, which make dangerous dog laws a more viable option in several respects. First, breed-specific dog laws are costly for a city to implement and enforce, and no prominent studies suggest the number of injuries or deaths is actually lessened by their implementation. Breed-specific bans also introduce the controversial issue of DNA testing, along with what officials make the determinations as to which dogs violate the law. On the other hand, dangerous dog laws are more cost-effective; they only regulate dogs that pose a real threat to humans; and they place the duty on the owner to properly train the dog, rather than trying to wipe out a whole breed based on societal perceptions.

Potential statutory language for dangerous dog laws should focus on the actions the animal has taken against humans, and no breed

specifications should be included. The statutory language should include a definition of “dangerous dog,” and then specify the exact acts that can deem a dog dangerous. Additionally, the statute should articulate what restrictions are placed on a dog once it is deemed dangerous, and more specifically what actions a dog owner must take to ensure the dog does not remain a threat (*i.e.*, leashing and supervision). Finally, there must be provisions regarding enforcement, including fines and potential euthanization if injurious acts continue to occur.

Beyond merely implementing dangerous dog laws, general responsible dog ownership needs to be made a priority. One possible way to educate the public about dog ownership is to implement a training program for all dog owners to take part in; ideally, a program where the dog owner must not only license the dog, but also take part in a new dog owner informational course provided for free by the city. The informational course could teach the dog owner about his liability for the dog’s actions, the resources available for training the dog, the benefits of spaying and neutering, and the provisions of that specific city’s dog laws. A program like this could increase the likelihood that dogs receive necessary training, and that owners have the essential knowledge to raise a dog that will not be a threat to human safety.

## **II. ANALYSIS**

### *a. Breed-Specific Dog Laws*

Breed-specific dog laws refer to laws that single out certain breeds and either ban the breed entirely or strictly regulate the breed.<sup>8</sup> Historically, these types of laws have been implemented following a highly-publicized incident of a dog injuring or killing a human, and typically target the dog breed responsible, such as the Pit Bull.<sup>9</sup> However, instead of “punishing dog owners that exacerbate the problem of dog bites, breed bans deny responsible owners the right to private property and subject them to unnecessary regulations and hardships.”<sup>10</sup> The cities where these types of laws have been implemented have the mindset that eliminating a certain breed from the area entirely, or placing immense restrictions on dog ownership of that breed, is the quickest and easiest way to prevent attacks on humans by those dogs.<sup>11</sup> However, this type

<sup>8</sup> Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 ANIMAL L. 313, 315 (2004).

<sup>9</sup> Hussain, *supra* note 1, at 2872.

<sup>10</sup> Jessica Strutzel, *Pit Bull Ban a Waste of Taxpayer Dollars*, PLATTE INST. FOR ECON. RES. (2010), <http://www.platteinstitute.org/research/detail/pit-bull-ban-a-waste-of-taxpayer-dollars>.

<sup>11</sup> Campbell, *supra* note 6.

<sup>6</sup> Dana M. Campbell, *Pit Bull Bans: The State of Breed-Specific Legislation*, GPSOLO MAG. (2009), [https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/pitbull.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pitbull.html).

<sup>7</sup> See *Am. Dog Owners Ass’n v. City of Lynn*, 533 N.E.2d 642, 646 (Mass. 1989); *Am. Dog Owners Ass’n v. City of Yakima*, 777 P.2d 1046, 1047 (Wash. 1989).

of legal approach is not a “quick fix” to the dog-bite problem.<sup>12</sup> When breed-specific dog laws are enforced, the dog owner’s action or inaction as a caregiver and trainer of the dog is not taken into consideration. No matter what measures an owner takes to train or supervise his dog properly, if the dog is a breed that has been singled out, restrictions or bans will still apply to the dog.<sup>13</sup> Breed-specific dog laws are also very costly to implement. The costs a city must endure increase based on the impounding and possible euthanization of dogs found to be in violation of the breed-specific restriction or ban.<sup>14</sup>

Unsurprisingly, these laws have not gone unchallenged as they have been adopted around the United States. The typical challenges raise issues of “substantive due process, equal protection, and vagueness.”<sup>15</sup> For example, arguments have stemmed from the definition of “Pit Bull” under the statute, and the stated definition may not describe what constitutes a “Pit Bull” with enough detail for owners to know if they are violating the statute.<sup>16</sup> These types of issues often arise in the context of mixed-breed dogs. Frequently, the police and animal control units do not have training in designating dogs as the breed being banned or regulated.<sup>17</sup> “Due process requires that laws provide the public with sufficient notice of the activity or conduct being regulated or banned[,]” and this issue is complicated immensely when the statute is vague.<sup>18</sup>

Another argument against breed-specific dog laws is that they are either over-inclusive or under-inclusive.<sup>19</sup> The over-inclusive argument is that these types of laws ban an entire breed, when in reality, it is only certain dogs of that breed that are dangerous; the under-inclusive argument is that these types of laws only address one breed or a handful of breeds, when in reality, dogs of many different breeds have injured or killed humans.<sup>20</sup> These arguments bring to light some of the major issues and flaws surrounding the implementation of breed-specific dog laws in the United States.

### *b. Dangerous Dog Laws*

<sup>12</sup> Meagan Dziura, Should We Beware of Dog or Beware of Breed? An Economic Comparison, 10 J. L. ECON. & POL’Y 463, 472 (2014).

<sup>13</sup> *Id.* at 480-81.

<sup>14</sup> *Id.* at 476.

<sup>15</sup> Campbell, *supra* note 6.

<sup>16</sup> *Id.*; see also *Am. Dog Owners Ass’n v. City of Lynn*, 533 N.E.2d 642, 646 (Mass. 1989).

<sup>17</sup> Campbell, *supra* note 6.

<sup>18</sup> *Id.*

<sup>19</sup> Campbell, *supra* note 6.

<sup>20</sup> *Id.*; see also *Am. Dog Owners Ass’n v. City of Yakima*, 777 P.2d 1046, 1047 (Wash. 1989).

Dangerous dog laws refer to laws that do not single out, ban, or restrict specific dog breeds, but instead label a dog as “dangerous” on a case-by-case basis. A dog is considered “dangerous” based only on the conduct it has displayed, rather than based on a supposed predisposition to viciousness because of its breed. These laws attempt to lessen dog-bites by addressing the problem at its true source—the individual dog and the dog’s owner, if he played a role in the dog’s actions.

A typical dangerous dog law has several sections: “(1) a definition of a ‘dangerous dog’ or ‘vicious dog’; (2) a procedure for officially declaring a dog dangerous; (3) restrictions applicable to those dogs officially declared dangerous; and (4) penalties for violating the restrictions.”<sup>21</sup> There are several steps that occur when a city enacts a dangerous dog law and a dog has reached the level of potentially being deemed dangerous: 1) a complaint is made by a resident, an animal control officer, or dog bite victim; 2) the owner of the dog is informed of the complaint regarding his dog; 3) the dog owner can then challenge the complaint, depending on what the regulation specifies; 4) if the dog is subsequently deemed dangerous by a judge or public official, the dog owner must comply with the restrictions provided under the ordinance; and 5) if it was a “serious attack,” the ordinance may recommend euthanizing the dog.<sup>22</sup>

There certainly are costs associated with implementing dangerous dog laws during appeals of a “dangerous” designation, just as there are costs when a dog is waiting to be deemed a certain breed through DNA testing; however, dangerous dog law costs are less than those associated with breed-specific dog laws, and are more effective at reaching the goal of stopping dog attacks.<sup>23</sup> Since dangerous dog laws only address dogs that are truly dangerous, instead of entire breeds, the city spends its time and resources more efficiently.

### *c. Municipal Ordinances Exhibiting Both Categories of Laws*

As of 2015, seven states had barred the municipal regulation of dogs based exclusively on breed, and fifteen states barred municipal affirmation of dogs as dangerous, potentially dangerous, or vicious based exclusively on breed.<sup>24</sup> This is a step in the right direction as far

<sup>21</sup> Dziura, *supra* note 12, at 473; see also 3 PA. STAT. AND CONS. STAT. ANN. §§ 459-502-A to 459-507-A (West 2008); OKLA. STAT. ANN. tit. 4, §§ 44-47 (West 2006).

<sup>22</sup> Hussain, *supra* note 1, at 2855-56.

<sup>23</sup> *Id.* at 2875.

<sup>24</sup> The seven states that prohibited the municipal regulation of dogs based solely on breed include: Arizona, Connecticut, Illinois, Maine, Rhode Island, South Dakota, and Utah. The fifteen states that prohibited municipal declaration of dogs as dangerous, potentially dangerous, or vicious based solely on breed include: California,

as dangerous dog laws becoming a more prominent approach to dealing with the issue of dog-related injuries to humans. However, some cities are still focusing their efforts and resources towards clearing out Pit Bulls from their cities altogether. In Washington, “[i]t is unlawful to keep, or harbor, own or in any way possess a pit bull dog within the city of Yakima.”<sup>25</sup> Violating the statute is a “gross misdemeanor,” which can result in a fine.<sup>26</sup> This is just one example of a breed-specific dog law that affects all dogs of a specified breed, but not because of individual acts of viciousness.

In Des Moines, Iowa, a “high risk dog” is described in part as a dog that has bitten or attacked “one or more times without provocation.”<sup>27</sup> This ordinance goes on to specifically name American Pit Bull Terriers, Staffordshire Terriers, and American Staffordshire Terriers as “high risk” dogs.<sup>28</sup> Furthermore, if a dog that is considered to be high risk is “found more than twice not to be confined or leashed[,]” it will be “destroyed.”<sup>29</sup> A plain reading of this ordinance would imply that if an American Pit Bull Terrier, for example, is found not properly leashed more than two times, it will be euthanized, without considering any actions of the dog.

In contrast, two examples of dangerous dog laws can be found in statutes enacted in Pennsylvania and Oklahoma. Under the Pennsylvania statute, an owner is considered to be harboring a dangerous dog if it has:

(i) Inflicted severe injury on a human being without provocation on public or private property[;] (ii) Killed or inflicted severe injury on a domestic animal, dog or cat without provocation while off the owner’s property[;] (iii) Attacked a human being without provocation[; or] (iv) Been used in the commission of a crime.<sup>30</sup>

All of these elements must be proven beyond a reasonable doubt by the party charging the owner with harboring a dangerous dog.<sup>31</sup> Once a dog has been deemed dangerous, restrictions attach to the dog, including muzzling, leashing, and enclosure requirements.<sup>32</sup> In Oklahoma, the dangerous dog statute defines a “potentially dangerous

dog” and a “dangerous dog” separately.<sup>33</sup> The definition of “potentially dangerous dog” includes a dog that, “when unprovoked[,] inflicts bites on a human either on public or private property.”<sup>34</sup> The definition of “dangerous dog” includes a dog that “has inflicted severe injury on a human being without provocation on public or private property[, or] has been previously found to be potentially dangerous, the owner having received notice of such...and the dog thereafter aggressively bites, attacks, or endangers the safety of humans.”<sup>35</sup> The obvious difference between the Pennsylvania and Oklahoma statutes, and the breed-specific statutes previously detailed, is the focus on the actions and tendencies of the individual dog, rather than its breed.

#### *d. Pertinent Case Law*

Over time, courts have interpreted dog ordinances in various ways. One example is a 1989 Supreme Court of Washington case that examines a breed-specific dog law, which banned Pit Bulls from the city of Yakima, Washington. In this case, the American Dog Owners Association brought suit on behalf of its members who had dogs that fell under the ordinance’s ban.<sup>36</sup> Although the plaintiffs argued the ordinance was vague, the court held the ordinance “gave sufficient notice about what was prohibited,” it “contained adequate standards for identification of Pit Bulls,” and it “was not unconstitutionally vague.”<sup>37</sup>

In the same year, an ordinance banning Pit Bulls and “other vicious dogs” in a village in Ohio was upheld as constitutional.<sup>38</sup> The court held that the breed-specific ordinance was “rationally related to the safety and welfare of the residents of the Village of South Point.”<sup>39</sup> Because of “broad police powers,” courts have been able to place the health, safety, and welfare goals of state and local governments at the forefront when handling cases such as these.<sup>40</sup>

In contrast, in another 1989 case, the Supreme Judicial Court of Massachusetts held that a Lynn, Massachusetts ordinance that instituted restrictions on Pit Bulls as a breed was unconstitutionally vague based on its definition of “Pit Bull.”<sup>41</sup> The court held the ordinance created a subjective standard, making it difficult to designate which dogs were

Colorado, Florida, Illinois, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, and Washington. Rebecca Wisch, *Overview of States that Prohibit Breed-Specific Legislation by State Law*, ANIMAL LEGAL & HIST. CTR. (2017), <https://www.animallaw.info/article/overview-states-prohibit-bsl>.

<sup>25</sup> YAKIMA, WASH., CODE § 6.18.020(A) (1989).

<sup>26</sup> *Id.*

<sup>27</sup> Des Moines, Iowa, Code § 18-41 (1991).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 18-57.

<sup>30</sup> 3 PA. STAT. AND CONS. STAT. ANN. § 459-502-A(a)(1) (West 2008).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 459-504-A.

<sup>33</sup> OKLA. STAT. ANN. tit. 4, § 44 (West 2006).

<sup>34</sup> *Id.* § 44(1)(a).

<sup>35</sup> *Id.* § 44(2)(a)-(b).

<sup>36</sup> *Am. Dog Owners Ass’n v. City of Yakima*, 777 P.2d 1046, 1047 (Wash. 1989).

<sup>37</sup> *Id.* at 1047-49.

<sup>38</sup> *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1246 (S.D. Ohio 1989).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; Campbell, *supra* note 6.

<sup>41</sup> *Am. Dog Owners Ass’n v. City of Lynn*, 533 N.E.2d 642, 646 (Mass. 1989).

considered Pit Bulls under the ordinance, which consequently made the ordinance difficult to enforce.<sup>42</sup> In *American Dog Owners Association v. City of Des Moines*, the city enacted a breed-specific dog ordinance that specifically listed Pit Bulls in the definition of "vicious dog."<sup>43</sup> The plaintiffs challenged the ordinance, claiming the definition of "vicious dog" was vague, and therefore left subjective discretion to city officials.<sup>44</sup> The court struck down the portion of the ordinance referring to mixed-breed Pit Bulls, but upheld the ordinance overall.<sup>45</sup>

In a 2009 case arising out of Colorado, the federal District Court held that breed-specific ordinances were indeed rationally related to promoting the health, safety, and welfare of the city's residents.<sup>46</sup> Although this case is several years old, this decision enforces the notion that breed-specific dog laws are not a thing of the past; pegging certain dog breeds as "vicious" is still prevalent today. For example, in a 2017 case arising out of Iowa, resident dog owners challenged the city's overall ban on owning Pit Bulls as vague, and in violation of the Equal Protection Clause and Due Process Clause.<sup>47</sup> However, the court held the ordinance was not unconstitutionally vague, reasoning that the "citizens [we]re provided with clear standards regarding what dogs [we]re subject to the [o]rdinance."<sup>48</sup> Importantly, the plaintiffs' Due Process Clause and Equal Protection Clause arguments were not dismissed, and survived to be argued at the next level of the case.<sup>49</sup> Their arguments pointed out the lack of proof for the ordinance having a rational relation to the city's safety, and that all dog owners, no matter the dog breed, should be treated the same.<sup>50</sup>

The relevant case law for this topic shows that courts have interpreted breed-specific dog laws differently all over the United States for many years. While there is no doubt that dog-related injuries to humans is a necessary issue for courts and the government to focus on, there is a solution that does not involve banning an entire breed, and that is through the implementation of dangerous dog laws. These laws truly "serve a legitimate governmental interest in protecting the public health and welfare."<sup>51</sup>

<sup>42</sup> *Id.*

<sup>43</sup> *Am. Dog Owners Ass'n v. City of Des Moines*, 469 N.W.2d 416, 417 (Iowa 1991).

<sup>44</sup> *Id.* at 418.

<sup>45</sup> *Id.*

<sup>46</sup> *Am. Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271, 1279 (D. Colo. 2009).

<sup>47</sup> *Frost v. City of Sioux City, Iowa*, No. 16-CV-4107-LRR, 2017 WL 4126986, at \*1, \*2-3 (N.D. Iowa 2017).

<sup>48</sup> *Id.* at \*11.

<sup>49</sup> *Id.* at \*9-10.

<sup>50</sup> *Id.*

<sup>51</sup> Hussain, *supra* note 1, at 2858.

### III. PROPOSED SOLUTION

#### a. Why Breed-Specific Dog Laws Are Ineffective

Dog bites and attacks that cause injury and death to humans every year is indeed a serious issue. However, humans should recognize that Pit Bulls are not the only dogs that have been singled out, regulated, and banned with breed-specific dog laws. Other dog breeds including Rottweilers, Chow Chows, German Shepherds, and Doberman Pinschers have also been targeted by this type of legislation.<sup>52</sup>

Notably, many of the targeted breeds are not the only breeds of dogs that are capable of biting humans. This type of behavior can be attributed largely to training and the dog's daily life, which is controlled by the owner. For example, factors that can contribute to aggression in dogs include "encouraging aggressive behavior," "abusing or neglecting...by limiting socialization," and not having the dog spayed or neutered.<sup>53</sup> Since breed-specific dog laws put the "blame on the breed of the dog, and not the owner's behavior," these laws do not incentivize proper owner behavior.<sup>54</sup> Furthermore, these laws impose the financial burden on the government to deal with the dog-bite problem, instead of financially burdening the dog owner.<sup>55</sup>

The overall effectiveness of breed-specific laws is another issue worth addressing. While these laws may seem like a viable solution to dog bite cases, and protecting the health, safety, and welfare of humans, this premise is false. Implementation of these ordinances only creates a "false sense of safety" for the public.<sup>56</sup> Studies outside of the United States, such as in Spain and Great Britain, have shown that breed-specific dog laws, including Pit Bull bans, have not reduced the number of dog attacks on humans.<sup>57</sup> A study in Spain showed that Pit Bulls were not the dog breed "most responsible" for injuring humans either before the ban or after.<sup>58</sup>

A 2003 study regarding the effectiveness of a breed-specific Pit Bull ban was conducted in the United States.<sup>59</sup> A task force in Prince George's County, Maryland determined "that the public's safety had not improved as a result of the ban, despite the fact that the county had spent

<sup>52</sup> Dziura, *supra* note 12, at 470-71.

<sup>53</sup> *Id.* at 483-84.

<sup>54</sup> *Id.* at 475.

<sup>55</sup> *Id.* at 480.

<sup>56</sup> *Id.*

<sup>57</sup> Campbell, *supra* note 6.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

more than \$250,000 per year to round up and destroy banned dogs.”<sup>60</sup> The task force even recommended the ban be repealed.<sup>61</sup> These studies indicate that breed-specific dog laws are both ineffective and costly to implement.<sup>62</sup> The entire “process of impounding, appeal, and eventual euthanasia” can amount to a large financial burden on a city’s already-limited resources.<sup>63</sup> This spending seems unfounded, especially if the supposed goals of the law are not being achieved.

Breed-specific dog laws not only affect the dogs themselves, but also the dog owner. Breed-specific dog laws can impact where a dog owner resides, depending on whether he is willing to give up the dog or risk an ordinance violation. Moreover, insurance policies and housing options can be affected by owning a restricted breed. In addition to the laws a city imposes on its residents, insurance companies and landlords may also implement their own restrictions regarding breeds a dog owner can own. “Homeowners’ insurance companies will often not write policies for owners of [P]it [B]ulls, [which makes] getting a mortgage, and therefore buying a house, almost impossible.”<sup>64</sup> If this occurs, renting a house might be the dog owner’s only option, with another set of problems arising in that context. A large portion of landlords and apartment complexes have created regulations or bans on particular breeds, including Pit Bulls.<sup>65</sup> Therefore, dog owners of restricted breeds may be faced with choosing between housing their families or keeping their beloved dogs.

Another complicated situation can arise when a city implements a ban or regulation and an owner who lives in the city has had a Pit Bull for years. Most cities recognize this as a problem and allow for these type of dog owners to be “grandfathered” into compliance with the ordinance. However, there could still be unexpected inconveniences and expenses placed on the owner once the ordinance is implemented. For example, this type of ordinance could cause an unnecessary monetary impact on responsible dog owners, and it could influence whether they want to continue to live in that city in the future.

In addition, an important question when considering effectiveness of breed-specific bans is whether they will truly stop people from owning Pit Bulls, or any other targeted breed. Dog owners who disagree with these laws might choose to fight them, or they may choose not to obey them. For example, as of 2014, Denver, Colorado estimated that 4,500 Pit Bulls still lived in the city, even though the breed has been completely

banned since 1989.<sup>66</sup> If a dog owner wants to own a Pit Bull, chances are they are not going to be eager and willing to let the city dictate what type of dog they can own.

#### *b. Dangerous Dog Laws as the Most Effective Type of Legislation*

There is an alternate way to attack the problem of dangerous dogs without banning an entire breed, and that is through the implementation of dangerous dog laws. Regulations and restrictions should only be relevant upon the dog exhibiting dangerous behavior.<sup>67</sup> At the center of dangerous dog laws is the notion that “if [a dog] is well trained and properly controlled, it is not a significant danger.”<sup>68</sup> Dangerous dog laws focus on punishing the dog and the owner who cause harm to others, while not grouping other responsible dog owners into the same category.<sup>69</sup>

By implementing this type of law, the government can focus its time and resources regulating dogs that are an actual threat to the public.<sup>70</sup> The costs of implementing these laws are placed on the dog owner, rather than the government.<sup>71</sup> Moreover, in terms of housing and insurance policies, dangerous dog laws differentiate between irresponsible and responsible dog owners. If a dog is deemed dangerous, this may hinder the owner’s ability to find housing or obtain an insurance policy, due to the dog’s increased liability. However, this situation also incentivizes responsible dog ownership. If a dog owner knows that housing options will be limited if his dog is designated “dangerous,” more care may be put towards proper training and supervision of the dog. Breed-specific dog laws do not incentivize responsible ownership, because the dog is banned or regulated based solely on breed and not based on its actions, or the precautions taken by the owner.<sup>72</sup>

A counterargument to the effective implementation of dangerous dog laws is that these laws may be hard to enforce due to a “lack of uniformity with animal control databases.”<sup>73</sup> For example, if a dog had previously been deemed “dangerous” under an ordinance in one city, the owner simply moving to a new city would effectively allow him to start fresh, negating the “dangerous” designation placed on the

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Dziura, *supra* note 12, at 480.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 475.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 472.

<sup>67</sup> *Id.* at 464.

<sup>68</sup> Burstein, *supra* note 8, at 323.

<sup>69</sup> Dziura, *supra* note 12, at 481.

<sup>70</sup> Hussain, *supra* note 1, at 2882.

<sup>71</sup> Dziura, *supra* note 12, at 480.

<sup>72</sup> *See Id.* at 481.

<sup>73</sup> *Id.* at 479.

dog in the previous city.<sup>74</sup> However, this argument only proves that there needs to be more widespread use of dangerous dog laws, so that their implementation can be as effective as intended. The American Kennel Club, a supporter of controlling dangerous dogs rather than breed discrimination, noted that in order “[t]o provide communities with the most effective dangerous dog control possible, laws must not be breed specific. Instead of holding all dog owners accountable for their behavior, breed-specific laws place restrictions only on the owners of certain breeds of dogs.”<sup>75</sup>

### *c. Public Policy Considerations*

From a public policy standpoint, dangerous dog laws are a superior form of effectively dealing with the prevalent issue of injuries and deaths caused by dogs. At the same time, they not only promote the welfare of humans, but they also promote animal welfare. Furthermore, dangerous dog laws also uphold the fairest way of dealing with the problem, by not singling out and discriminating against a dog based on its breed alone. When dogs are assessed on a case-by-case basis, the dog’s tendencies are taken into consideration.

The implementation of breed-specific dog laws raises several issues, including the struggles of DNA testing. For example, a 2007 Kansas City, Kansas case involved a dog named Niko that was taken from his owners due to an alleged violation of the city-wide Pit Bull ban.<sup>76</sup> For eight months, while DNA tests and paperwork were processed, Niko sat in an animal control kennel away from his owners and struggled with health issues tied to his time in confinement.<sup>77</sup> The city finally released the dog back to his owners once the DNA test established that Niko was actually a Boxer-mix, not a Pit Bull, which is what his owners had argued the whole time.<sup>78</sup> This case illustrates the harsh reality of implementing breed-specific dog laws and bans throughout a city—not only does it take time and resources to perform the testing and kenneling, but it also can result in accusations that a dog owner is violating an ordinance, when in reality, they are not. A dog, whether it is deemed in violation of the ordinance or not, will suffer by sitting in a kennel while the city performs the DNA testing, which ultimately hinders the animal’s overall welfare.

<sup>74</sup> *Id.*

<sup>75</sup> Linda Weiss, *Breed-Specific Legislation in the United States*, ANIMAL LEGAL & HIST. CTR. (2001), <https://www.animallaw.info/article/breed-specific-legislation-united-states>; see Strutzel, *supra* note 10.

<sup>76</sup> Campbell, *supra* note 6.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Another issue that poses concerns in the context of breed-specific dog laws is what officials are making the determination that a dog is a particular breed.<sup>79</sup> If a city enacts a breed-specific dog law, the burden is placed on the city to prove the “heritage” of the specific dog in question.<sup>80</sup> In some cities, the city manager has the power to make these determinations, while in other places, the mayor or animal control officers have the power to make these decisions.<sup>81</sup> Often, the officials responsible for making these breed determinations receive no “special[ized] training in breed identification.”<sup>82</sup> This becomes especially complicated considering the term “Pit Bull,” when defined in most breed-specific ordinances, is typically referring to the American Staffordshire Terrier, the Staffordshire Bull Terrier, the American Pit Bull, and other mixes.<sup>83</sup> Due to the lack of breed training, mistakes and subjective determinations can be made, which could result in a dog being taken away from its family, or worse, euthanized. The likelihood of a wrong determination becomes ever more prevalent when the dog in question is a mixed-breed. What percentage of Pit Bull qualifies the dog as regulated or banned under the ordinance?

In regard to the increased costs associated with processes such as DNA testing, in 2009, economist John Dunham for the Best Friends Animal Society developed a cost-calculator “of enforcing a breed-specific law targeting pit bull terrier-type dogs for every city, county, and state in the United States.”<sup>84</sup> Based on the percentage of dog ownership and estimated prices of the animal control programs in an area, the calculator takes into consideration the costs associated with enforcement, kenneling and veterinary care, euthanization, litigation, and DNA testing.<sup>85</sup> The calculator also accounts for the number of total dogs in an area, and the number of “pit-bull-terrier-like dogs” in an area.<sup>86</sup> For example, in East Lansing, Michigan, the estimated total annual cost of implementing breed-specific dog laws would be \$67,912.<sup>87</sup> Of that

<sup>79</sup> *Id.* at 39.

<sup>80</sup> Ledy Vankavage, *New DOJ Rules on Service Dogs*, PUB. MGMT. 25 (July 2011), [https://icma.org/sites/default/files/306576\\_ICMA%20July%202011%20Service%20Dog%20article.pdf](https://icma.org/sites/default/files/306576_ICMA%20July%202011%20Service%20Dog%20article.pdf).

<sup>81</sup> Campbell, *supra* note 6.

<sup>82</sup> *Id.*

<sup>83</sup> Hussain, *supra* note 1; Dziura, *supra* note 12, at 474.

<sup>84</sup> Vankavage, *supra* note 80.

<sup>85</sup> John Dunham, *Best Friends Breed-Discriminatory Legislation—Fiscal Impact*, BEST FRIENDS ANIMAL SOC. (2012), <http://bestfriends.guerrillaeconomics.net/report/31dbf260-42ca-42d1-88b9-172f958a68d1/download?Name=BDL%20Data%20Tables&IsHandled=True&Format=0>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

total, \$8,282 is the estimated cost solely for "kenneling and veterinary care," presumably to care for the dog while it has its DNA tested.<sup>88</sup>

In terms of animal welfare, breed-specific dog laws punish some dogs that have done nothing wrong. The dogs can be banned from living in certain places, taken away from their owners, or even euthanized, solely for being a certain breed. This is not justice, this is discrimination. Banning an entire breed does not help keep humans safer, it merely increases humans' fear of that breed. If a city bans all Pit Bulls, inevitably another dog will take its place as a dangerous dog. To support this presumption, consider the fact that Pit Bulls have not always been the only focus of laws trying to rid the world of vicious dogs; for example, German Shepherds, Doberman Pinschers, and Rottweilers have also been at the forefront of criticism in the past.<sup>89</sup> "All dogs can and do inflict injury."<sup>90</sup>

An additional dynamic to the topic of breed-specific dog laws is that Pit Bulls and other dogs that have been deemed "vicious looking" by society are often kept for purposes other than just as a companion animal.<sup>91</sup> For example, Pit Bulls are often kept as guard dogs for drugs and other illegal contraband, or for lucrative reasons like dog-fighting.<sup>92</sup> The Pit Bull's reputation and physical build are used as an intimidation tactic. These dogs may be abused in order to promote aggression, and they may be trained to "attack on command."<sup>93</sup> In these types of situations, breed-specific bans are unlikely to result in these owners no longer keeping dogs for these purposes.<sup>94</sup> In reality, the owners will likely train another breed of dog to take over the same responsibilities, and that dog will be taught the same dangerous tendencies as the Pit Bull would have in that person's care.<sup>95</sup> Responsible ownership needs to be made a priority; which breed-specific dog laws do not incentivize. In the context of a breed-specific ban, no safety or preventative measures that an owner takes to properly train their dog, and keep the public safe, can help them keep their dog.<sup>96</sup>

Another key public policy issue is the media's portrayal of Pit Bulls. The National Canine Research Council conducted a four-day study in August of 2007 of the media reportage of the dog attacks that

occurred during that time.<sup>97</sup> On the first day, an elderly man was attacked by a Labrador-mix, which sent the man to the hospital; notably, only one article about the attack appeared in the local newspaper.<sup>98</sup> On the second day, a child was killed by a mixed-breed dog, prompting two articles to appear about the incident in the local newspaper.<sup>99</sup> On the third day, a child was hospitalized from injuries caused by a mixed-breed dog, prompting one local newspaper article about the incident.<sup>100</sup> On the fourth day, a woman was hospitalized from protecting her small dog during an attack of two Pit Bulls that escaped their chains; importantly, the small dog was not injured in the attack.<sup>101</sup> Rather than one or two articles running in the local newspaper, there were "more than 230 articles in national and international newspapers and on the major cable news networks."<sup>102</sup> While this is just one example of how Pit Bulls are portrayed in the media, this example is representative of how the breed is perceived in comparison to other breeds.

#### *d. Potential Statutory Language*

As with any category of enacted statutes, there are both pros and cons to dangerous dog laws that have been implemented across the United States. Trial and error is sometimes the only way to test a statute's effectiveness. Based on this analysis, and dangerous dog laws that are currently being implemented, certain provisions from the Minnesota statute could be used by other localities as a model for a basic, potentially effective, dangerous dog statutory provision.

To start, a "dangerous dog" should refer to a dog that has "(1) without provocation, inflicted substantial bodily harm on a human being on public or private property, [or] (2) killed a domestic animal without provocation while off the owner's property."<sup>103</sup> Once a dog is deemed "dangerous," the owner is responsible for keeping the dog in a "proper enclosure" when on the owner's property, and muzzled and leashed while off the owner's property.<sup>104</sup> The dog's registration must be renewed each year, and if the owner moves, he must re-register the dog as dangerous within the new location.<sup>105</sup> The dog must be spayed

<sup>88</sup> *Id.*

<sup>89</sup> Campbell, *supra* note 6.

<sup>90</sup> Hussain, *supra* note 1, at 2881.

<sup>91</sup> Campbell, *supra* note 6.

<sup>92</sup> *Id.*

<sup>93</sup> Hussain, *supra* note 1, at 2874.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Dziura, *supra* note 12, at 480-81.

<sup>97</sup> Campbell, *supra* note 6.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> MINN. STAT. ANN. § 347.50 (West 2008).

<sup>104</sup> *Id.* § 347.52.

<sup>105</sup> *Id.*

or neutered at the expense of the owner.<sup>106</sup> Disclosure to the landlord regarding the dangerous dog must be made by the dog owner.<sup>107</sup> If ownership of the dog is transferred, the original owner must disclose that the dog has been "identified as dangerous."<sup>108</sup>

In addition to using the Minnesota statute as a base, localities and states should also consider how they want their laws to address certain public policy concerns. Potential statutory language addressing key public policy considerations is as follows:

Each dog that is deemed dangerous shall receive training by an accredited professional, at the expense of the owner. The amount of training to be completed, which is proportional to the specific dog's needs, shall be based on recommendations from a veterinary professional and an animal control professional. Failure to comply with any of the provisions of this statute shall result in a fine of no less than \$5,000 for the first offense. For a dog that is deemed dangerous under the statute, repeat offenses may result in euthanization. To determine if euthanization is appropriate, several factors shall be taken into account, including how many serious incidents the dog has been involved in, the precautionary measures taken by the dog owner to prevent future incidents from occurring, and the professional recommendation of a veterinarian or an animal behaviorist after an evaluation of the dog.

The Minnesota statute and the suggested additions should be used as a model because it seeks to regulate dogs only after they have shown vicious tendencies. Notably, the Minnesota statute includes a definition for a "potentially dangerous dog," which was excluded from the model above, since this category has the ability to become over-inclusive. The "potentially dangerous" designation could, in some cases, start to have the same effect as a breed-specific dog law, if dogs are singled out before there is concrete proof that they have vicious tendencies. The goal of dangerous dog laws is to address only the dogs that are truly a threat to humans, and this is best accomplished by one clear definition for a "dangerous dog." Ideally, this definition would be broad enough to reach all dogs that are a danger to society, but still narrow enough to exclude non-dangerous dogs.

As explained in more detail below, each of the aforementioned statutory provisions are justified. The provisions regarding leashing, muzzling, and proper enclosures seek to ensure the owner is taking appropriate precautions to prevent the dog from causing harm to others. The registration provision will help ensure a dog owner cannot move jurisdictions to escape regulation. Notification of the dog's dangerous

designation is also important when transferring ownership of the dog itself, allowing the new dog owner to be fully informed about the dog's tendencies and what restrictions he now must comply with. The spaying and neutering requirement could help contribute to positive impacts on the dog's temperament and behavior. Finally, the training requirement speaks to the fact that dogs that are properly trained tend to harm humans less.

Although the \$5,000 fine for noncompliance is steep, it incentivizes proper compliance by dog owners. The fine also helps owners recognize that euthanization can potentially be prevented if the owner takes the restrictions seriously and does not put the dog in a situation where it could harm another animal or human. The euthanization considerations require each dog's case to be considered individually, and ensures that no lives are wasted through hasty decision-making.

The effectiveness of this type of law stems from the fact that it only labels dangerous dogs as dangerous, while focusing on the owner of the individual dog that portrays vicious tendencies. No dog is born vicious, and no dog is born as an attack dog. The dog might be born with a large body and the ability to easily acquire muscle, but the dog's owner is the one training or not training it to behave in a vicious manner, whether it is intentional or unintentional on the owner's part.

#### *e. Training Program for Dog Owners*

Beyond enacting dangerous dog laws, a separate solution could be implementing a program for all dog owners to take part in, where the dog owner must not only license the dog but also take an informational course provided by the city. A portion of the dog licensing fees collected in each county could be put towards providing the program to the public. The informational course could teach the dog owner about his liability for the dog's actions and resources available for training the dog. A pamphlet with relevant information could also be provided to the attendees. This solution speaks to the issues that arise in housing and insurance policies relating to breed specifications and bans, because the licensing and informational course could be required before signing a lease, or before purchasing an insurance policy.

This program would be most effective on a city-to-city basis, implemented as an ordinance. A possible model for the provisions of this proposed legislation could be as follows:

All dog owners, in addition to obtaining a dog license, must complete a two-hour dog owner informational course provided by the city. The course must be taken within five months of owning a new dog. The course shall provide the new dog owner with information about his liability for the dog's actions, and the local resources available

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

for training (*i.e.*, obedience training classes) and care of the dog (*i.e.*, benefits of spaying and neutering). The course will specifically iterate the pertinent provisions of the city's dog laws to ensure that the dog owner has been fully informed of what standards he must comply with. A pamphlet shall be provided containing this information for future reference. This course will be offered by the city free of charge on the last Saturday of every month, with the time and the location being posted on the city's website. The new dog owner shall sign-up to take this course via the city's website. Failure to attend the informational course as a new dog owner shall result in a \$250 fine. While obtaining a dog license is required for each new dog, an owner must only attend the informational session for a subsequent dog if five years or more has passed since his previous attendance. Records shall be kept by the city to document the dog owners that have attended the informational course. A reasonable portion of the dog licensing fees collected in each county shall be put towards providing the program to the public.

In terms of the reasonableness of the proposed language above, the five-month window to attend the program gives new dog owners ample time to complete it, and the class poses a relatively short time commitment, being only two hours in length. The program is only offered once a month to wisely manage the city's monetary resources. The program and the pamphlet could both be funded by a reasonable portion of the dog licensing fees collected in each county, allowing it to be free to the public. The five-year window for subsequent dog owners is to ensure that the city is not repetitively teaching the same people identical information, but also accounting for the fact that the laws and information provided might change within a five-year span. The \$250 fine for not attending seeks to ensure compliance. Enforcement would mainly depend on reports made by the public and animal control officers; however, since the program is free to the public, and not attending the program could result in a fine, attendance is incentivized.

The proposed program's purpose and goals are also supported by a 2006 report from the National Canine Research Council, which determined "the most common factors found in fatal dog attacks."<sup>109</sup> According to the report, 97% of the dogs that fatally injured someone were not spayed or neutered, and 84% of the dogs that were involved in the attacks were "abused or neglected" by their owners, or the owners "failed to properly chain their dogs."<sup>110</sup> Of the dogs that had been involved in a fatal attack, 78% were kept for guarding or breeding purposes, not as pets.<sup>111</sup> Medical studies have concluded that the dog's

predisposition for biting has to do with several factors, such as the dog's "early experience[s], socialization and training, health, reproductive status, [and] quality of ownership and supervision."<sup>112</sup> Breed has not been deemed an inherent factor.<sup>113</sup> Responsible ownership, opposed to abusive and irresponsible ownership, must be promoted to achieve the goal of lessening dog attacks on humans. Taking these factors into account, the program would address these issues by providing the new dog owner with information about spaying and neutering, leash laws, and the care and treatment necessary to be a prudent dog owner.

In terms of animal welfare, the program is a step towards getting dogs the care and training necessary to live a healthy and happy life as a companion animal. After all, it is not the dog's fault if its owner does not get it neutered, or if its owner fails to train it to behave in public; however, it will be the dog that pays the price if it is euthanized for injuring someone in the future. Simply put, there are small preventative steps that a dog owner can take today to prevent greater harm down the road, and that is what this program aims to accomplish.

Undeniably, a negative of instituting this program would be the costs associated with its administration. However, rather than forcing the city to allocate costs from other local programs, a reasonable portion of the dog licensing fees collected in each county could be put towards the program. If dog-related injuries are a big enough issue in the city to implement bans and regulations, then allocating money towards an informational program seems like a small task. The benefits of this program would outweigh the costs, and it could have an impact on the number of dog-related injuries per city. Since the crux of this issue is the human in charge of the dog, education of the dog owner needs to be a priority.

#### IV. CONCLUSION

The most effective way to approach future dog-related legislation to best protect the health, safety, and welfare of both humans and animals, is implementing dangerous dog laws rather than breed-specific dog laws. Breed-specific dog laws are ineffective, costly, and discriminatory, often singling out a dog before it has shown vicious tendencies. A more practical, effective, and cost-efficient way to address this issue is to hone in on the source of the problem: the individual dogs causing the harm and their owners. To accomplish this goal, dangerous dog laws should be implemented. The owners must be put on notice and held responsible for their actions, and they must understand the role they play in the way their dogs behave. Beyond just the implementation

<sup>109</sup> Campbell, *supra* note 6.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Hussain, *supra* note 1, at 2869.

<sup>113</sup> *Id.*

of dangerous dog laws, cities could create an educational program for new dog owners to teach them about their liabilities as dog owners and what resources are available to help them train and care for their dogs. Ultimately, implementing dangerous dog laws and educating the community on proper care and training for dogs is the most efficient way to address and lessen the number of dog attacks on humans.<sup>114</sup>

## CROCODILE TEARS: HOW BUSINESSES USE ANIMAL TESTING LABELING AS PROPAGANDA TO INCREASE PROFIT

CHRISTYNE J. VACHON<sup>1\*</sup>

### I. INTRODUCTION

In his Just So Stories, Rudyard Kipling wrote the story of the Elephant's Child, also known as "How the Elephant Got Its Trunk," which tells the story of how the elephant got its long trunk, instead of the short stubby one it had.<sup>2</sup> In this story, the little elephant meets the crocodile and is lured to the edge of the water through the use of charm, wit, and crocodile tears.<sup>3</sup> At the edge of the water, the crocodile tried to eat the elephant by taking the elephant's stubby nose in his jaws—from which a tug of war ensued—causing the elephant's trunk to grow.<sup>4</sup> The use of crocodile tears, wit, and charm were the crocodile's propaganda campaign to lure in the elephant.<sup>5</sup> This article intends to lure the reader into the world of business propaganda by looking through the lens of labeling usage related to animal testing.

My dear friend and fellow artist, Lawrence (Larry) Martin-Bittman, was a spy for the former Czechoslovakia.<sup>6</sup> He has described himself as "a former Soviet-bloc practitioner of international deception games."<sup>7</sup> At the time, he was known as Ladislav Bittman and was a senior official in the Czech Intelligence Service, one of the stronger arms of the KGB.<sup>8</sup> He directed the propaganda and disinformation division

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<sup>2</sup> Rudyard Kipling, *The Elephant's Child*, <https://www.iata.org/whatwedo/cargo/live-animals/Documents/pet-container-requirements.pdf> (last visited Mar. 26, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Brian Fitzgerald, *Spies who came in from the Cold War brought exceptional documents*, B.U. BRIDGE (Oct. 8, 2004), <http://www.bu.edu/bridge/archive/2004/10-08/spy.html>.

<sup>7</sup> Lawrence Martin-Bittman, *Is the Cold War Back? Russian Propaganda and Active Measures Under Putin*, 9 JUPSS 151, 151 (2015); *The Varied Aspects of Ladislav Bittman: Artist, Professor, Journalist and Former Spy*, MUCKRACKER INSIDER 7 (2005) ("In total, Bittman was a spy for 14 years, operating in various capacities within the Communist Party and was stationed in Prague, Berlin, and Vienna. On August 20, 1968, the Soviet Union invaded Czechoslovakia, effectively ending the Prague Spring.... [Bittman] approached the United States embassy and asked for asylum.").

<sup>8</sup> *The Varied Aspects of Ladislav Bittman*, *supra* note 6.

<sup>114</sup> Dziura, *supra* note 12, at 464.

of the Czech Intelligence Services.<sup>9</sup> In 1968, with the Soviet Union's brutal suppression of the "Prague Spring," Larry Bittman became disillusioned with communism and sought asylum in the United States. After a year of debriefing at the Pentagon, Larry was released into the United States without much knowledge of American culture or where to reside.<sup>10</sup> He found his way to Massachusetts, and eventually taught as a professor of journalism for Boston University, carving out an expertise for himself in disinformation in journalism.<sup>11</sup> Several years later, Larry and I became friends over our mutual interest in art. As our friendship developed, I learned more about Larry's life prior to retirement.

Larry is aware that my areas of practice, scholarship, and teaching are in business law. Although he has repeatedly stated that he does not know much about finance or business, he has repeatedly told me that he saw the tell-tale signs of the deception game in the corporate apparatus. Recently, as we were discussing this issue, he stated, "I think business has been infected by the bug [of disinformation & propaganda.]" Larry also knows that I, like him, am a lover of animals. In fact, when the United States brought Larry to Washington, D.C. to debrief him after his defection, one of the government's friendly gestures was to bring Larry's dog, which he had been forced to leave behind.

It is no secret that for-profit companies compete for consumers' dollars; the company must stand out amongst its competitors in its industry. The creation of public relations advisors has helped companies develop creative campaigns, including the use of propaganda. In more recent years, consumers' decision-making has shifted from primarily looking at price and product origin to heavily emphasizing the sustainability impact of the company. Corporate social responsibility is generally defined as the impact a company has in the world, and what it does to lessen any negative impact.<sup>12</sup> The impact a company has as a social citizen is becoming increasingly more important to consumers. Consequently, companies have engulfed public relations campaigns with conscious capitalism, whether the company is a proponent of sustainability or not. Companies develop propaganda campaigns using sustainability to sway the purchasing powers of consumers either in their direction or away from competitors. This technique is common with animal welfare labels.<sup>13</sup>

<sup>9</sup> *The Spy Who Came Into the Classroom Teaches at Boston U.*, N.Y. TIMES (1994), <http://www.nytimes.com/1994/04/27/us/the-spy-who-came-into-the-classroom-teaches-at-boston-u.html?mcubz=1>.

<sup>10</sup> The Czech government rendered a death sentence on Bittman while he was being debriefed in Washington, D.C.

<sup>11</sup> *The Spy Who Came Into the Classroom Teaches at Boston U.*, *supra* note 8.

<sup>12</sup> Mark Ostrau & Ashley Walter, *Corporate Social Responsibility and the Supply Chain*, FENWICK & WEST (Nov. 2012), [https://www.fenwick.com/FenwickDocuments/COMM\\_November2012\\_SupplyChain.pdf](https://www.fenwick.com/FenwickDocuments/COMM_November2012_SupplyChain.pdf).

<sup>13</sup> This paper only discusses the use of labels on non-consumable products.

The labels discussed in this article are: "Vegan Friendly," "Cruelty Free," and "Not Tested on Animals" (cumulatively, "Labels"). Companies use Labels on everything from cosmetics to children's toys, from household cleaners to automotive products. Given the interests of consumers, companies use the Labels to increase consumer appeal. The Labels are a clever propaganda tool, because with the use of a few words, the company conveys a message of conscious capitalism. However, since the Labels are largely unregulated, they generally mean whatever standard the company chooses.

In Section II of this paper, with the help of Larry Bittman's knowledge, the terms propaganda and disinformation are analyzed, including the terms' history and current applications. In Section III of this paper, the general structure of corporate governance and how propaganda fits into that dynamic, including corporate social responsibility, are examined. Following that foundation, Section IV of this paper describes how the Labels are used and the effects of their use. Finally, this paper concludes by making several recommendations to consumers.

## II. WHAT IS PROPAGANDA & DISINFORMATION?

I first learned the difference between propaganda and disinformation from Larry Bittman. Larry explained the difference between what the public refers to as "disinformation" and what Larry refers to as "professional disinformation." General disinformation typically refers to campaigns that fall into the category of propaganda. There is a significant difference between propaganda and disinformation. Disinformation is information that is "secretly introduced into the discourse with the intent to deceive" either the public or the elite (*i.e.*, political decision-makers).<sup>14</sup> The secret introduction of information, which always has a small amount of truth, is the key difference from propaganda. The secret introduction of disinformation happens because the source of the disinformation does not want the intended recipient to know the source.<sup>15</sup> On the other hand, with propaganda, the source of the information is known.<sup>16</sup> This section discusses both disinformation and propaganda, and explains how Labels used by companies touting animal welfare fall into the category of propaganda.

Although the Russians created disinformation,<sup>17</sup> the concept of

<sup>14</sup> If the intended recipient is the elite, the disinformation is usually not published. Instead, the disinformation may be slipped into a file, or delivered directly to the person. Personal Interview with Larry Bittman, Professor, Boston University.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; see also ION MIHAI PACEPA & RONALD J. RYCHLAK, DISINFORMATION 72 (2013) (explaining the differences between misinformation and disinformation in the Russian spy context, stating that "[m]isinformation is an official government tool and

deceiving the enemy in war time dates back hundreds of years. For example, consider the Trojan War Horse—when the Greeks made a hollow wooden horse on wheels delivered as a gift to the city of Troy. In the hollow horse, the Greeks hid their army. The eager recipients wheeled the horse into the city, and, at night, the Greeks snuck out of the horse and brought doom.<sup>18</sup> As an official science, however, disinformation has its roots in Russia. Russian manuals on disinformation taught that the science began with:

the passionate love affair between Catherine the Great and Prince Grigory Potemkin, her principal political and military adviser. In 1787, Potemkin was the governor general of the New Russia (today's Ukraine), and took his love, the empress, on a tour of the Crimea, which he [had] managed to annex from the Turks four years earlier. To impress his love, Potemkin had sham villages assembled for her to see. One of those fake villages, at the mouth of the river, Bug, even welcomed the empress with a triumphal arch with the sign: "This is the way to Constantinople."<sup>19</sup>

When the Communist Party seized power in Russia, it recognized disinformation was a valuable tool.<sup>20</sup> During the Cold War, more Russians worked for the deception game than for the Soviet army and defense industry combined.<sup>21</sup> As former chief of communist Romania's espionage service and top advisor to President Nicolae Ceausecu, Lieutenant General Ion Mihai Pacepa stated: "Changing minds is in fact what communism is all about.... It is a typically Russian tactic not to attack a threat head-on, and disinformation proved a deliciously indirect way of confounding the Kremlin's enemies."<sup>22</sup> In fact, Stalin went even further with the use of disinformation by creating a disinformation campaign to make the science of disinformation seem as if its origin was French.<sup>23</sup>

Currently, "[d]isinformation plays an extremely important role in international communication...and is penetrating practically

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recognizable as such. Disinformation is a secret intelligence tool, intended to bestow a Western, non[-]government cachet on government lies.")

<sup>18</sup> Lin Donn, *Legend of the Trojan War*, <http://greece.mrdonn.org/trojanwar.html> (last visited Mar. 26, 2018); see also PACEPA & RYCHLAK, *supra* note 16, at 74.

<sup>19</sup> PACEPA & RYCHLAK, *supra* note 16, at 36.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 75-76.

<sup>23</sup> *Id.* at 31 (discussing the use of "glasnost" as a term of disinformation in the 1930s, well before Gorbachev's glasnost, to mean "the quality of being made available for public discussion or manipulation."); *The Varied Aspects of Ladislav Bittman*, *supra* note 6.

every field of communication today in the United States, [especially] the Internet."<sup>24</sup> Both for-profit and non-profit businesses continue to use disinformation to disseminate misleading information, whether intentionally or unintentionally.<sup>25</sup> The subject information may involve finances, reports, cost estimates, or competitor information.<sup>26</sup> Hidden in the campaign lies the source of information.<sup>27</sup>

Propoganda, a related cousin to disinformation, offers another alternative. Propaganda involves selling an idea.<sup>28</sup> There is both an old propagandist's strategy and a new one.<sup>29</sup> The old version of propaganda applied "mechanistic reaction psychology," which viewed the human mind like a reactive machine to outside stimulus.<sup>30</sup> The propagandist would target the individual, and not the masses.<sup>31</sup> The older approach relied almost exclusively on a printed document with a campaign aimed at recruiting a specific individual in a specific moment with that specific document.<sup>32</sup> One of the better-known United States propaganda tools was a government poster with an image of Uncle Sam pointing at the observer of the poster with the word "YOU!"<sup>33</sup> While the poster was viewable by a mass audience, the image and language in the poster was aimed at each individual observer.<sup>34</sup>

The new version of propaganda continues to sell an idea, but the basis of the campaign rests in the premise that every individual is part of a societal group. The new version of propaganda attempts to sway public opinion, causing the propagandist to make careful observations of the group's collective mind.<sup>35</sup> For example, the modern propagandist studies systematically and objectively the material with which he is working. If the matter is a nationwide sales campaign, he studies the field and determines which features of a product are losing their public appeal, and in what new direction the public taste is veering. "He will not fail to investigate to what extent it is the wife who has the final word in the choice of her husband's car, or his suits and shirts."<sup>36</sup>

To reach the group, the propagandist now uses group information.

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<sup>24</sup> Jean Gordon Kocienda, *Sniffing Out Social Media Disinformation*, CISCO BLOGS (Oct. 15, 2012), <http://blogs.cisco.com/security/sniffing-out-social-media-disinformation/>.

<sup>25</sup> *Id.*

<sup>26</sup> EDWARD BERNAYS, PROPAGANDA 76-77 (1928).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 71-72.

<sup>36</sup> *Id.*

Instead of the poster with Uncle Sam pointing at the observer, the new propagandist develops a campaign that works change through underlying currents and eliminates the resistance. The old version of propaganda told the observer what to do or want, while the new version of propaganda works to change the group's ways of thinking towards a desired result.<sup>37</sup> In fact, it was not until 2010 that Russia considered the Internet, one of the greatest ways to reach the masses, a "serious propaganda tool."<sup>38</sup> Since 2010, propoganda engulfs the Internet and social media with "contradictory evidence and information which invites the conclusion that there is no real truth."<sup>39</sup>

Since this paper analyzes companies' use of Labels on their products, propaganda is the proper *label* for the applicable deception tool. Using Labels, propaganda may occur at various levels: the finished product, the composite ingredients used to create the finished product, the supplier level, the third-party level, and the parent company level.<sup>40</sup>

At the heart of both propaganda and disinformation lies an element of seduction. Every day, information campaigns bombard us—telling us what to do, what to spend our money on, and what to think—so much so that we tune much of it out.<sup>41</sup> As Edward Bernays, the father of public relations, stated: "It is evident that the successful propagandist must understand the true motives and not be content to accept the reasons which men give for what they do."<sup>42</sup> Psychologists who follow

<sup>37</sup> *Id.* Therefore, in business, the concept of "alpha pup" matters. An alpha pup is a trend-setting younger-generation person. This is an important category of individuals for marketing, especially sustainability marketing. A propaganda campaign may target a group of alpha pups with the hopes that the alpha pups will sway the rest of their generation. "One of the most effective methods is the utilization of the group formation of modern society in order to spread ideas." *Id.* at 78-79.

<sup>38</sup> Lawrence Martin-Bittman, *supra* note 6, at 153 (indicating that prior to 2010, the Russians primarily used the Internet to exchange political criticisms, which did not pose much of a threat.).

<sup>39</sup> *Id.*

<sup>40</sup> Suzi Scheler, *When 'Not Tested on Animals' is Complete Bullshit*, CRUELTY-FREE KITTIE (Mar. 7, 2017) <http://www.crueltyfreekitty.com/cruelty-free-101/not-tested-on-animals-or-is-it/>.

<sup>41</sup> ROBERT GREENE, *THE ART OF SEDUCTION* xx (2001).

<sup>42</sup> BERNAYS, *supra* note 25, at 75. "Seducers have a warrior's outlook on life. They see each person as a kind of walled castle to which they are laying siege. Seduction is a process of penetrating the target's mind, their first point of defense." GREENE, *supra* note 40, at xxii. Furthermore:

[T]here are nine seducer types in the world. Each type has a particular character trait that comes from deep within and creates a seductive pull. *Sirens* have an abundance of sexual energy and know how to use it. *Rakes* insatiably adore the opposite sex, and their desire is infectious. *Ideal Lovers* have an aesthetic sensibility that they apply to romance. *Dandies* like to play with their image, creating

Freud<sup>43</sup> note that many thoughts and actions evolve as substitutes from suppressed wants and desires, or perhaps something someone is ashamed of.<sup>44</sup> For example, consumers who emphasize making decisions consistent with ethics and sustainability standards may be responding to a subconscious guilt for contributing to problems perceived in our world. Consequently, the more opportunities to purchase products and services perceived as part of conscious capitalism, the more it appeals to the consumer's subconscious desire to make amends, providing an open door for seduction.<sup>45</sup> "Seduction is a form of deception, but people want to be led astray, they yearn to be seduced. If they didn't, seducers would not find so many willing victims."<sup>46</sup>

A successful propagandist must understand some basic human and group psychology. For instance, an effective propaganda campaign applies the principles of reaction psychology, meaning that when a stimulus is repeated often, a habit is established. Similarly, when a concept is repeated, the status of the concept may change from a mere idea to a conviction in the recipient's mind.<sup>47</sup> In one form or another, persuasion exists in every aspect of our social life, whether it be consciously or subconsciously.<sup>48</sup> Advertisements seek to subtly seduce us (*i.e.*, a soft sell).<sup>49</sup> From courtiers in court to artists, Cleopatra to Napoleon, Ford Motor Company to cigarettes, those that engage in seduction know there is great power to be gained through seduction, rather than force.<sup>50</sup> Once

a striking and androgynous allure. *Naturals* are spontaneous and open. *Coquettes* are self-sufficient, with a fascinating cool at their core. *Charmers* want and know how to please—they are social creatures. *Charismatics* have an unusual confidence in themselves. *Stars* are ethereal and envelop themselves in mystery. *Id.* at 3.

<sup>43</sup> Please note that Freud was the uncle of Edward Bernays, the founder of the professional practice of public relations.

<sup>44</sup> BERNAYS, *supra* note 25, at 75.

<sup>45</sup> *Id.* ("A thing may be desired not for its intrinsic worth or usefulness, but because he has unconsciously come to see in it a symbol of something else, the desire for which he is ashamed to admit to himself.")

<sup>46</sup> GREENE, *supra* note 40, at xxiv.

<sup>47</sup> BERNAYS, *supra* note 25, at 76-77.

<sup>48</sup> GREENE, *supra* note 40, at xx.

<sup>49</sup> *Id.* ("Forms of seduction can be found everywhere, blending male and female strategies. Advertisements insinuate, the soft sell dominates.")

<sup>50</sup> *Id.* (discussing the history of the "power to be gained by seducing their superiors and competitors through psychological games, soft words, [and] a little coquetry."). Furthermore:

[A]s culture became democratized, actors, dandies, and artists came to use the tactics of seduction as a way to charm and win over their audience and social milieu. In the nineteenth century another

again, Edward Bernays stated the logical conclusion so aptly: “So the question naturally arose: If we understand the mechanism and motives of the group mind, is it not possible to control and regiment the masses according to our will without their knowing about it?”<sup>51</sup>

### III. FOR-PROFIT BUSINESS GOVERNANCE

#### a. Governance and CSR

An understanding of corporate social responsibility is critical when determining whether to use “crocodile tears” publicly. First, however, the unique relationship between the company’s owners and management must be examined.

##### i. General Governance

Within a large, for-profit company, opportunism exists due to the split between who has ownership of the company and control of the decision-making of the company. To avoid the unwieldy cost and weight of contracting for every possible eventuality, the law has provided certain safeguards. Since the company primarily conducts its internal functions under state law, the law of the state of formation will house the legal boundaries placed to control opportunism.

Harkening back to the concept of corporate ownership, the entity would not exist if it were not for owners, also known as investors. State law has developed to emphasize the interests of the owners over others.<sup>52</sup> Every possible participant that could be impacted by the for-profit business is a stakeholder—holding a stake in the actions of the company. Examples of stakeholders include owners, employees, consumers, communities where the company operates, animals tested for products, the environment, and governments. However, under state law, the owner-stakeholder’s interest holds primacy over other stakeholders’ interest, and that interest is profit maximization.<sup>53</sup> The

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great change occurred: politicians like Napoleon consciously saw themselves as seducers, on a grand scale. These men depended on the art of seductive oratory, but they also mastered what had once been feminine strategies: staging vast spectacles, using theatrical devices, creating a charged physical presence. All this, they learned, was the essence of charisma—and remains so today.  
*Id.*

<sup>51</sup> BERNAYS, *supra* note 25, at 71-72.

<sup>52</sup> Jonathan D. Springer, *Corporate Law Corporate Constituency Statutes: Hollow Hopes and False Fears*, ANN. SURV. AM. L. 85, 87 (1999) (explaining this approach as “shareholder primacy”).

<sup>53</sup> Lawrence E. Mitchell, *Cooperation and Constraint in the Modern*

historical development of governance law and theory requires the decision-makers for the company to act consistent with the fiduciary duties owed to the owners. Consequently, the decision-makers must act with a profit motive consistent with the owner’s interest.<sup>54</sup>

The law of the duties owed to the owners of for-profit ventures found great guidance in 1919 in *Dodge v. Ford Motor Company*.<sup>55</sup> In this decision, the court set forth the decision-makers’ fiduciary duties and obligations to the owners of the company, stating that “it is not within the lawful powers of the board of directors to shape and conduct the affairs of the corporation for merely incidental benefit of shareholders and for the primary purpose of benefitting others.”<sup>56</sup> Here, the court instructed company decision-makers that while governing the actions of the company, they must consider the implications to the shareholders more than just casually.<sup>57</sup> In fact, the decision-makers must not wield the company for another stakeholder with a benefit to the owners as a by-product.<sup>58</sup>

The court continued, stating: “[N]o one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.”<sup>59</sup> The court indicated that if decision-makers are not conducting themselves consistent with the duty to act with the primary emphasis to the owner-stakeholders, the court has a right to intervene.<sup>60</sup>

This concept was further clarified in 1968, when the court in *Shlensky v. Wrigley* held that if the decision-makers failed to “follow the crowd” in conducting the affairs of the business, this was not a per se

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*Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 501 (1995).

<sup>54</sup> Compare Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L. J. 401, 401 (1993), with DAVID BORNSTEIN & SUSAN DAVIS, *SOCIAL ENTREPRENEURSHIP: WHAT YOU NEED TO KNOW*, 4-5 (2010), and Christyne J. Vachon, *Scratch My Back and I’ll Scratch Yours*, 8 HASTINGS BUS. L. J. 1 (2012) (“Some argue that this approach has not changed the fiduciary duty since, in fact, taking into account the outside effects of the corporate activities has potential to prop up the bottom-line. This still aligns with the traditional duty to the shareholder.”).

<sup>55</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); James Cox & Thomas Hazen, *The Scope of the Authorized Business and Duties to Other Constituencies*, *Treatise on the Law of Corporations* § 4:10 (3d ed., 2012).

<sup>56</sup> *Dodge*, 170 N.W. at 684. It is important to note the use of the word “primary,” instead of “only.” The implication is that while other stakeholders’ interests may be served, it must be the profit interests that are primary.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> For an exposition on the importance of the duty of loyalty to owners-stakeholders, see *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

breach of their duties to the owners.<sup>61</sup> In this case, most Major League Baseball (MLB) parks were installing lights to host games at night.<sup>62</sup> The Wrigley Field Board of Directors opted not to, indicating, among other things, a desire not to negatively impact the neighborhood around the ballpark.<sup>63</sup> The court held that management may consider another stakeholder, such as the surrounding community, as part of its business decision.<sup>64</sup>

## ii. Corporate Social Responsibility

For purposes of this paper, “corporate social responsibility” is defined as the decision-making and policies of a for-profit business that reflects the potential impact that the business’ actions has on various other stakeholders other than the owners of the business.<sup>65</sup> Certainly, the actual law reflects more of what Justice Marshall noted in 1819 in *Trustees of Dartmouth College v. Woodward*, stating: “The objects for which a corporation is created are universally such as the government wishes to promote.”<sup>66</sup> While the law allows for decision-makers within the business to not focus entirely on the owners, decision-makers tend to err on the side of directing their energies consistent with the profit motive of owners. Additionally, most states in the United States have “other constituency statutes.”<sup>67</sup> These statutes allow for decision-makers to consider the interest of other stakeholders other than the owners.<sup>68</sup>

<sup>61</sup> *Shlensky v. Wrigley*, 273 N.E.2d 776, 781 (Ill. App. Ct. 1968).

<sup>62</sup> *Id.* at 777.

<sup>63</sup> *Id.* at 778.

<sup>64</sup> *Id.* at 781.

<sup>65</sup> *Ostrau & Walter*, *supra* note 11. Corporate social responsibility is often used interchangeably with “business ethics,” “corporate philanthropy,” “corporate citizenship,” and “sustainability,” depending on the context. *Id.*

<sup>66</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

<sup>67</sup> *Cox & Hazen*, *supra* note 54.

<sup>68</sup> *Id.*; see generally AM. L. INST., *The Objective and Conduct of the Business Corporation* § 2.01, in *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* NOS. 2-4 (1984-1985):

- (a) Subject to the provisions of Subsection (b) and § 6.02 (Action of Directors That Has the Foreseeable Effect of Blocking Unsolicited Tender Offers), a corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.
- (b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
  - (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
  - (2) May take into account ethical considerations that are

These statutes also permit the decision-makers flexibility to consider the effect of policy and take responsibility for other stakeholders, such as lab-tested animals.<sup>69</sup>

The public is all too familiar with the implications for investors when a company refuses to internally investigate or publicly announce an issue until the information becomes public and the company is forced to take action (*i.e.*, the sexual harassment claims within Uber).<sup>70</sup> As witnessed with Uber, the impact of the initial news, the resignation of the Chief Executive Officer, and the results of the investigation all negatively impacted the value of ownership in that company.<sup>71</sup>

## b. Where Does Propaganda Fit In?

As stated by Samuel Insull, a utility magnet of the Commonwealth Edison Company in Chicago, “[i]t matters not how much capital you may have, how fair the rates may be, how favorable the conditions of service, if you haven’t behind you a sympathetic public opinion, you are bound to fail.”<sup>72</sup> On this profit maximization quest for the owners, decision-makers must turn a profit, which entails competing with other businesses and other industries for a portion of the industry pie and for consumer dollars.<sup>73</sup> The typical avenue public companies pursue is

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reasonably regarded as appropriate to the responsible conduct of business; and

- (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

<sup>69</sup> *Cox & Hazen*, *supra* note 54.

<sup>70</sup> Considering the scandals, new laws, changing business ethics, and increased scrutiny and support from the public and regulators, for-profits find themselves developing a public relations agenda that responds to the atmosphere of controversy and scrutiny with emphasis on corporate philanthropy, which may include the company collaborating with non-profits. Vachon, *supra* note 53, at 11; see James Austin & Ezequiel Reficco, *Corporate Social Entrepreneurship*, 11 INT’L J. NOT-FOR-PROFIT L. 86, 87, 90 (2009) (explaining that corporate social reporting has serious implications for the shaping of contemporary capitalism, which underscores the importance of corporate social reporting); Martha Minow, *Partners, Not Rivals: Redrawing the Lines Between Public and Private, Nonprofit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1066 (2000).

<sup>71</sup> Jen Wiczner, *Uber’s Stock Price Plunged After CEO Travis Kalanick Resigned*, FORTUNE (Aug. 1, 2017), <http://fortune.com/go/finance/uber-stock-ceo-kalanick/>.

<sup>72</sup> Samuel Insull, *Public Friendliness Most Important Factor In Public Service Operation, Mr. Insull Says*, in *PUBLIC SERVICE MAGAZINE* 32-33 (Jan. 1922); see also BERNAYS, *supra* note 25, at 93.

<sup>73</sup> BERNAYS, *supra* note 25, at 85.

to engage in mergers and acquisitions to increase public interaction.<sup>74</sup> Mergers and acquisitions increase and intensify the relations the public has with big business, and vice versa.<sup>75</sup> Similarly, mass production has increased the need for companies to have more contact with the public, since mass production has no value if not for mass purchases.<sup>76</sup> Finally, any advertising improvement will affect the company dynamic with the public.<sup>77</sup> In this competition, business managers must discover ways to make their business stand out against competitors to the vast consumer-public, making them uber-reliant on public input and public opinion.<sup>78</sup> Welcome, the public relations manager!<sup>79</sup>

The public relations officer is the company's propagandist.<sup>80</sup>

<sup>74</sup> For example, take Amazon's acquisition of Whole Foods Market, which resulted in almost immediate reduction in Whole Foods' prices. Why? Amazon uses big data to draw purchases. Amazon dropped prices so that customers would shop more frequently, and thus, the more grocery shopping data the customers would generate for Amazon. See Greg Petro, *Amazon's Acquisition Of Whole Foods Is About Two Things: Data And Product*, FORBES (Aug. 2, 2017), <https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/#35bb9d5ca808>.

<sup>75</sup> BERNAYS, *supra* note 25, at 90.

<sup>76</sup> *Id.* at 84.

<sup>77</sup> *Id.* Bernays referred to the growth of newspapers and magazines having circulation in the millions, and printed advertising improving, which was relevant at the time. Larry Bittman points out the parallel of political propoganda: "The emergence of digital information systems resulted, among other things, in a technical revolution in the intelligence service business: collection, analysis, distribution[,] and manipulation of information for disinformation purposes." Martin-Bittman, *supra* note 6, at 155.

<sup>78</sup> BERNAYS, *supra* note 25, at 85. Additionally:

The relationship between business and the public has become closer in the past few decades. Business today is taking the public into partnership. A number of causes, some economic, others due to the growing public understanding of business and the public interest in business, have produced this situation. Business realize that its relationship to the public is not confined to the manufacture and sale of a given product, but includes at the same time the selling of itself and of all those things for which it stands in the public mind.

*Id.* at 62.

<sup>79</sup> The public relations manager:

[F]unctions primarily as an adviser to his client, very much as a lawyer does. A lawyer concentrates on the legal aspects of his clients' business. A counsel on public relations concentrates on the public contracts of his client's business. Every phase of his client's ideas, products, or activities which may affect the public or in which the public may have an interest is part of his function.

*Id.* at 64.

<sup>80</sup> In fact, Lawrence Martin-Bittman said he knew several former operatives

Edward Bernays is considered by many to be the founder of the official business advisor position—the public relations advisor.<sup>81</sup> He got his start in public relations during World War I working for the United States government.<sup>82</sup> His work continued after the war, helping the Department of War with a public relations campaign to encourage businesses to hire war veterans.<sup>83</sup> He was also pivotal in the public relations campaign to market cigarettes to women for the American Tobacco Company's Lucky Strike brand.<sup>84</sup> In fact, he coined the phrase "torches for freedom" for the cigarettes.<sup>85</sup>

Everything about public relations is about selling an idea. As Edward Bernays wrote in his seminal book, *Propoganda*, in 1928: "New activities call for new nomenclature. The propagandist who specializes in interpreting enterprises and ideas to the public, and in interpreting the public to promulgators of new enterprises and ideas, has come to be know [sic] by the name of 'public relations counsel.'"<sup>86</sup> He continued:

The newer salesmanship, understanding the group structure of society and principles of mass psychology, would first ask: "Who is it that influences the eating habits of the world?" The answer, obviously, is: "The physicians." The new salesman will then suggest to physicians to say publicly that it is wholesome to eat bacon. He knows as a mathematical certainty, that large numbers of persons will follow the advice of their doctors, because he understands the psychological relation of dependence of men upon their physicians.<sup>87</sup>

who were hired by large companies when they finished their stints as spies.

<sup>81</sup> LARRY TYE, *THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS* (2002).

<sup>82</sup> *Edward Bernays, 'Father of Public Relations' And Leader in Opinion Making, Dies at 103*, N.Y. TIMES (Mar. 10, 1995), <https://archive.nytimes.com/www.nytimes.com/books/98/08/16/specials/bernays-obit.html>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> BERNAYS, *supra* note 25, at 63-64. Moreover:

[T]he public relations activities of a business cannot be a protective coloring to hide its real aims. It is bad business as well as bad morals to feature exclusively a few high-class articles, when the main stock is of medium grade or cheap for the general impression given is a false one. A sound public relations policy will not attempt to stampede the public with exaggerated claims and false pretenses, but to interpret the individual business vividly and truly through every avenue that leads to public opinion.

*Id.* at 88-89.

<sup>87</sup> *Id.* at 76-77. "Under the old salesmanship the manufacturer said to the

From this information, the company propagandist understands the target group of persons and formulates a campaign that will affect the psychological and emotional thinking of the persons in that group for the desired effect—to change the consumers’ customs or habits. This is not a direct attack like the Uncle Sam poster, but instead, the propagandist “creates circumstances which will swing emotional currents so as to make for purchaser demand.”<sup>88</sup>

Edward Bernays pointed out that if consumers made purchasing decisions by tasting, chemical testing on their skin, smelling, or feeling every product, a great impracticability would result. Consequently, the public has, in a sense, agreed to let companies narrow the field of choices, with the means of narrowing being propaganda.<sup>89</sup> Understandably, companies maximize the use of this permission by researching the public, understanding the various groups within the public, and determining methods to reach the groups on behalf of the company—all with the goal to boost public opinion and sell more products.<sup>90</sup> With the propagandist’s help, the company “seeks to tell the public, in all appropriate ways, by the direct advertising message and by the subtlest aesthetic suggestion, the quality of the goods or services which it has to offer.”<sup>91</sup> For example, a company starts labeling its soaps or cosmetics “cruelty free,” or otherwise “greenwashing” its products. Greenwashing is when a company implements a strategy that provides disclosure of environmental information that is positive, and hides the negative environmental impacts.<sup>92</sup> “The corporate disinformation machine has become so ubiquitous that virtually any news item on environmental risks produces an attack by an industry front group.”<sup>93</sup>

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prospective purchaser, ‘Please buy a piano.’ The new salesmanship has reversed the process and caused the prospective purchaser to say to the manufacturer, ‘Please sell me a piano.’” *Id.* at 56.

<sup>88</sup> *Id.* at 76-77.

<sup>89</sup> *Id.* at 39.

<sup>90</sup> *Id.* at 66. “Social groups, economic groups, geographical groups, age groups, doctrinal groups, language groups, cultural groups, all these represent his divisions through which, on behalf of his client, he may talk to the public.” *Id.* at 28.

<sup>91</sup> *Id.* at 88-89.

<sup>92</sup> Bruce Rockwood, *Corporate Disinformation and Social Responsibility: The Case of Climate Change Denial*, J. NE. ASS’N BUS., ECON. & TECH. (Fall 2009) (“Greater activist pressure deters greenwash, but induces some firms to disclose less about their environmental performance. Environmental management systems discourage firms with poor expected environmental performance from greenwashing, which may justify public policies encouraging firms to adopt them.”).

<sup>93</sup> *Id.*

## IV. THE ISSUE: LABELING FOR ANIMALS

### *a. Background*

Since the early 1920s, animals have been used for medical testing in the United States.<sup>94</sup> The use of animals grew after World War II to include testing for consumer product safety.<sup>95</sup> In the eighteenth century, society began to change its mind regarding animal welfare based on the premise that animals can experience pain and suffering.<sup>96</sup> In 1963, the National Institute of Health set forth voluntary guidelines for the care of laboratory animals.<sup>97</sup> It was not until 1966 that Congress enacted the Laboratory Animal Welfare Act (LAWA) to regulate the care and treatment of animals used in research, with the exclusion of rodents.<sup>98</sup> In 1985, after an activist from People for the Ethical Treatment of Animals (PETA) published video footage of monkeys being mistreated in a research facility, new rules for the treatment of research animals added additional protections.<sup>99</sup> Congress extended the reach of LAWA to require subject institutions to create committees, Institutional Animal

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<sup>94</sup> *Cruelty-Free Labeling*, MSPCA, [https://www.mspca.org/animal\\_protection/cruelty-free-labeling/](https://www.mspca.org/animal_protection/cruelty-free-labeling/) (last visited Mar. 27, 2018).

<sup>95</sup> *Id.*

<sup>96</sup> TAMARA L. ROLEFF, CURRENT CONTROVERSIES SERIES: THE RIGHTS OF ANIMALS 5 (Hurley et al., 1999). Furthermore:

[I]n the United States, animal experimentation emerged as a public-policy issue in the [nineteenth] century, largely through the efforts of Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals (ASPCA). One of Bergh’s first efforts as head of the ASPCA was to draft a statute prohibiting cruelty to animals in New York state.

Joy Mench, *Animal Experimentation: An Overview*, in TAMARA L. ROLEFF, CURRENT CONTROVERSIES SERIES: THE RIGHTS OF ANIMALS 41, 42 (Hurley et al., 1999).

<sup>97</sup> Mench, *supra* note 95, at 44 (“These guidelines have been revised and expanded several times and now include a requirement for an institutional oversight committee similar to that required under the Animal Welfare Act.”).

<sup>98</sup> Animal Welfare Act, 80 Stat. 544 (1966).

<sup>99</sup> ROLEFF, *supra* note 95, at 14. Furthermore:

Researchers and scientists have come to accept, along with most other people, that all animals, whether used in experiments or not, should be treated humanely. What they do not accept, however, are the views of animal rights activists who claim that animals have the same moral rights as humans, and, therefore, denounce medical cures if they have been achieved through animal experimentation. *Id.* at 15.

Care and Use Committees, authorized to review the institution's research proposals involving animals.<sup>100</sup> As ethics began to sway society, the Associated Press conducted a 1995 survey that determined that two thirds of the participants surveyed agreed with the statement: "An animal's right to live free of suffering should be just as important as a person's."<sup>101</sup>

Consistent with this evolution in thinking, consumers have increasingly asked for disclosure of animal treatment in product testing, circuses, big-screen entertainment, and other fields. In the product testing realm, the industry responded by creating labeling to answer consumers concerns. However, consumers who purchase labeled products often do not understand the labels, and turn to the Food and Drug Administration (FDA) for guidance.<sup>102</sup> The Food, Drug, and Cosmetic Act (FDCA) tasked the FDA with supervising consumer products, like cosmetics, to ensure their safety and proper labeling.<sup>103</sup> Notably, the FDCA does not require animal testing to ensure cosmetic safety.<sup>104</sup> However, the FDA states that it "consistently advised cosmetic manufacturers to employ whatever testing is appropriate and effective for substantiating the safety of their products. It remains the responsibility of the manufacturer to substantiate the safety of both ingredients and finished cosmetic products prior to marketing."<sup>105</sup> The FDA supports companies using alternatives, as opposed to testing on animals.<sup>106</sup> The FDCA, related laws, rules,

<sup>100</sup> Mench, *supra* note 95, at 48 (indicating that these committees "generally follow the principles known as 'Three R's'—that experimental procedures should be *refined* to minimize pain and suffering, the number of animals used should be *reduced*, and animals should be *replaced* with animals lower on the phylogenetic scale or with nonanimal models whenever possible." (emphasis in original)).

<sup>101</sup> Peter Wilson, *Animals Have the Right to Live Free of Suffering*, in ROLEFF, *supra* note 95, at 18.

<sup>102</sup> "Cruelty Free"/ "Not Tested on Animals," FOOD & DRUG ADMIN. (Feb. 24, 2000), <https://www.fda.gov/cosmetics/labeling/claims/ucm2005202.htm>.

<sup>103</sup> *Animal Testing & Cosmetics*, FOOD & DRUG ADMIN (Apr. 5, 2006), <https://www.fda.gov/Cosmetics/ScienceResearch/ProductTesting/ucm072268.htm>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* ("Moreover, in all cases where animal testing is used, FDA advocates that research and testing derive the maximum amount of useful scientific information from the minimum number of animals and employ the most humane methods available within the limits of scientific capability.").

<sup>106</sup> *Id.* ("We also believe that prior to use of animals, consideration should be given to the use of scientifically valid alternative methods to whole-animal testing. In 1997, FDA joined with thirteen other Federal agencies in forming the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM). ICCVAM and its supporting center, the National Toxicology Program Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), coordinate the development, validation, acceptance, and harmonization of alternative toxicological test methods throughout the U.S. Federal Government.").

regulations, and statements by the FDA do not provide any definition or standard advice for the Labels; rather, these terms have derived from pure industry ingenuity.

### *b. Terminology*

"Language is never fully trustworthy, but when it comes to eating animals, words are as often used to misdirect and camouflage as they are to communicate."<sup>107</sup> This is also true of the Labels (*i.e.*, vegan friendly, cruelty free, and not tested on animals), none of which have been defined legally. The FDA does not regulate the use of these terms, and has stated that "the unrestricted use of these phrases by cosmetic companies is possible because there are no legal definitions for these terms."<sup>108</sup> Moreover, the FDA recognizes that the terms confuse individuals, having regular queries about the labels' meanings.<sup>109</sup>

In fact, Consumer Reports' Greener Choices project developed a report on food labeling, "What Makes a Good Label? How We Rate Labels."<sup>110</sup> Greener Choices advocates that a "good label" and the company's process should have: 1) meaningful, verifiable standards; 2) consistency; 3) transparency; 4) independence; and 5) public comment.<sup>111</sup> First, meaningful standards should back the label's use, have stricter requirements than basic law and industry requirements, and be verifiable by a group or other independent organization.<sup>112</sup> Second, the label should have consistent usage across various products.<sup>113</sup> Third, any organization that creates a label should provide transparency into its organization and processes.<sup>114</sup> Fourth, any certifying or inspecting agency should not have any ties to, or receive funding from, any users of a label.<sup>115</sup> Fifth, when a label is developed, the organization should

<sup>107</sup> JONATHAN FOER, *EATING ANIMALS* 45 (2009) ("Some words, like *veal*, help us forget what we are actually talking about. Some, like *free-range*, can mislead those whose consciences seek clarification. Some, like *happy*, mean the opposite of what they would seem. And some, like *natural*, mean next to nothing." (emphasis in original)).

<sup>108</sup> "Cruelty Free"/ "Not Tested on Animals," *supra* note 101; see also Alexis Croswell, *How to Read a Cruelty-Free Cosmetics Label*, ONE GREEN PLANET (Feb. 5, 2014), <http://www.onegreenplanet.org/lifestyle/how-to-read-a-cruelty-free-cosmetics-label>.

<sup>109</sup> *Animal Testing & Cosmetics*, *supra* note 102.

<sup>110</sup> *What Makes a Good Label?*, CONSUMER REPORTS (Sept. 6, 2017), <http://greenerchoices.org/2016/03/08/make-another-good-label/#tab-3-5-content>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

allow public input on the label and its standards.<sup>116</sup> Analyzing the Labels with the Greener Choices standard, these Labels could be classified as misleading to consumers, which is useful to a propagandist. The following section analyzes each Label discussed above in further detail.

#### i. Vegan Friendly

When a product is labeled vegan friendly, society has recognized that this generally means the products does not have any animal ingredients or animal-derived ingredients.<sup>117</sup> Importantly, this is the usage that the label has come to represent over time, but not by any regulating body or legal definition. “To many, the term ‘vegan’ also means that a product is free from animal testing as well. Because the term is not regulated, it is often used to simply note that a product does not contain animal ingredients. Items that are tested on animals can claim to be ‘vegan.’”<sup>118</sup> Just because something is labeled vegan friendly does not mean that it has not been tested on animals.

#### ii. Cruelty Free

The label “cruelty free” has not been clearly defined by the law, allowing companies to use the term in almost any way it sees fit.<sup>119</sup> Moreover, another challenge is that some companies that do not label their products as “cruelty free” do not use animals for testing.<sup>120</sup> For a consumer product to really be cruelty free, no form of animal testing should have occurred at any point in creation of the product or its foundational components.<sup>121</sup> One of the ways that a company may test this understanding is when it allows other companies to test its final product or component parts. To this, some companies respond that they are required by law to conduct product testing on animals, and therefore, hire a third-party to perform the testing.<sup>122</sup>

A second example of the flexible use of this term is by companies that use the label to refer to the final product, but the component parts that comprise the final product have been tested on animals.<sup>123</sup> Companies

may also try to argue that if a product has not been tested on animals, it is not safe for human use.<sup>124</sup> However:

There are many reliable alternatives to using animals available, including cell and tissue cultures and sophisticated computer and mathematical models. Companies can also formulate products using ingredients already determined to be safe. Cruelty-free companies can use a combination of methods to ensure safety, such as employing in vitro tests and/or conducting clinical studies on humans.<sup>125</sup>

A third example of the use of the cruelty free label in a flexible manner is the uncertain nature of the understanding of animal suffering.<sup>126</sup> What one person may consider cruel, may not be cruel to another. For instance, ranchers make that argument that “red in tooth and claw” is cruel, that the animals are better on the farm, no matter the conditions, as opposed to the wild. However, others argue that a captive existence on a farm is cruel, while nature is never cruel.<sup>127</sup> The Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) has offered the following information to interpret the use of the cruelty free label.

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Neither the FDA nor the U.S. Consumer Product Safety Commission require animal testing for cosmetics or household products. There are sufficient existing safety data as well as in vitro alternatives to make animal testing for these products obsolete. While it is true that virtually every ingredient, even water, has been tested on animals in the past, we can help prevent future animal testing.

*Myths & Facts*, LEAPING BUNNY PROGRAM (2014), <http://www.leapingbunny.org/content/myths-facts>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> FOER, *supra* note 106, at 53 (“Cruelty depends on an understanding of cruelty, and the ability to choose against it. Or choose to ignore it.”).

<sup>127</sup> *Id.*; compare RICHARD RYDER, *Discrimination on the Basis of Species is Unjust*, in ROLEFF, *supra* note 95, at 24-25 (“One of the important tenets of pianism is that we should concentrate upon the individual because it is the individual, not the race, nation, or species, who do the actual suffering. . . . We can treat different species differently, but always we should treat equal suffering equally.”), with L. NEIL SMITH, *Animals Are the Property of Humans*, in ROLEFF, *supra* note 95, at 37-38 (“[H]uman liberty is being diluted by a process of moral inflation similar to that by which emotion, in our culture, replaces reason, in which absurd, unsupported asserts about ‘rights’—to state education, to government healthcare, to a clean litterbox—are used to render valueless the rights that really do exist. Where does it stop and on what principle?”).

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<sup>116</sup> *Id.*

<sup>117</sup> Tashina Combs, *What’s the Difference between Cruelty Free Cosmetics and Vegan Cosmetics?*, LOGICAL HARMONY (2017), <https://logicalharmony.net/cruelty-free-vs-vegan> (including “honey, beeswax, lanolin, collagen, albumen, carmine, cholesterol, gelatin, and many others.”).

<sup>118</sup> *Id.*

<sup>119</sup> *Cruelty-Free Labeling*, *supra* note 93.

<sup>120</sup> Combs, *supra* note 116.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Furthermore:

The challenge is that companies are not required to implement these concepts. “Cruelty free” can be used to imply that:

1. Neither the product nor its ingredients have ever been tested on animals;<sup>128</sup>
2. While the ingredients have been tested on animals, the final product has not;
3. The manufacturer itself did not conduct animal tests but instead relied on a supplier to test for them—or relied on another company’s previous animal-testing results;
4. The testing was done in a foreign country, where laws protecting animals may be weaker than in the United States;
5. Either the ingredients or the product have not been tested on animals within the last five, ten, or twenty years (but perhaps were before, and could be again);
6. As in the case of the CCIC’s Leaping Bunny Program—neither the ingredients nor the products have been tested on animals after a certification date and will not be tested on animals in the future.<sup>129</sup>

### iii. Not Tested on Animals

Similar to the cruelty free label, the “not tested on animals” label is not specifically regulated,<sup>130</sup> and companies may use the label despite any actual policies they may have.<sup>131</sup> Some companies use an alternative label that states “This finished product is not tested on animals.”

For example, both Bath & Body Works and Aveda use similar statements on their packaging, and neither company tests ingredients on animals. This statement is often used to meet language requirements when products marketed in both the United States and the United Kingdom use the same packaging in both countries.<sup>132</sup>

<sup>128</sup> This is highly unlikely, however, as almost all ingredients in use today have been tested on animals somewhere, at some time, by someone—and could be tested on animals again.

<sup>129</sup> *Cruelty-Free Labeling*, *supra* note 93.

<sup>130</sup> *Id.*

<sup>131</sup> Crosswell, *supra* note 107.

<sup>132</sup> *I’ve seen a few products with labels that say, “This finished product not tested on animals.” Does that mean that the individual ingredients have been tested on animals?*, PETA, <https://www.peta.org/about-peta/faq/ive-seen-a-few-products-with-labels-that-say-this-finished-product-not-tested-on-animals-does-that-mean-that-the-individual-ingredients-have-been-tested-on-animals/> (last visited Mar. 28, 2018).

England does not allow companies to label any products with “no animal testing,” since, at some point in time, some part of the product has been tested on animals, even if the current company has not used animals for testing.<sup>133</sup>

### c. The Propaganda Hook

More and more, consumers care about the impact their purchases have had, do have, or will have on the world around them.<sup>134</sup> A recent study by Morgan Stanley showed that 51% of survey takers indicated that when shopping for apparel, the retailer’s ethical credential was either “somewhat or very important,” compared to 13% that indicated it was “somewhat unimportant or not at all important.”<sup>135</sup> In the same study, results showed that younger consumers (ages 16-24 years old) emphasized ethics at 58% importance, compared to adults aged 55 years or older, who emphasized ethics at 49% importance.<sup>136</sup> Some have branded this form of buying power as part of the “conscious capitalism” movement.<sup>137</sup> At the same time, people are learning more about, and believing in, the consciousness of animals.<sup>138</sup>

<sup>133</sup> *Id.*

<sup>134</sup> See Marya Hannun, *When it comes to ethics, why do consumers care more about coffee than clothes?*, FOREIGN POLICY (May 10, 2013), [foreignpolicy.com/2013/05/10/when-it-comes-to-ethics-why-do-consumers-care-more-about-coffee-than-clothes/](http://foreignpolicy.com/2013/05/10/when-it-comes-to-ethics-why-do-consumers-care-more-about-coffee-than-clothes/); D’Jamila Salem, *Human Rights Group Targets Disney, Kathie Lee Apparel Lines*, L.A. TIMES (Apr. 20, 1996), [http://articles.latimes.com/1996-04-30/business/fi-64267\\_1\\_kathie-lee](http://articles.latimes.com/1996-04-30/business/fi-64267_1_kathie-lee); Thomas Honeyman, *The Uber Effect: How Companies Are Using The Consumer To Scale Return*, ELITE DAILY (Sept. 29, 2015), <http://elitedaily.com/money/companies-use-consumer-success/1193401/>; but see Jack Torrance, *Do consumers really care about ethics in fashion?*, MANAGEMENT TODAY (Apr. 21, 2016), <https://www.managementtoday.co.uk/consumers-really-care-ethics-fashion/article/1392154>.

<sup>135</sup> *Research: Do Consumers Care About Ethical Retailing?*, MORGAN STANLEY (July 29, 2016), <https://www.morganstanley.com/ideas/ethical-retailing-consumers-survey>; see also *Can Doing Good Be Good for Business*, NIELSEN (Aug. 19, 2013), <http://www.nielsen.com/us/en/insights/news/2013/can-doing-good-be-good-for-business.html> (indicating 43% of consumers are willing to spend more for a product or service if it supports a cause, after surveying 29,000 Internet users in 58 countries).

<sup>136</sup> *Research: Do Consumers Care About Ethical Retailing?*, *supra* note 134, at 4.

<sup>137</sup> Jeff King, *Only Conscious Capitalists Will Survive*, FORBES (Dec. 4, 2013), <https://www.forbes.com/sites/onmarketing/2013/12/04/only-conscious-capitalists-will-survive/#3847f49a3464>; see also CONSCIOUS CAPITALISM, [HTTPS://WWW.CONSCIOUSCAPITALISM.ORG/](https://www.consciouscapitalism.org/) (last visited Mar. 25, 2018).

<sup>138</sup> See generally Jeffery Kluger, *Inside the Minds of Animals*, TIME (Aug. 16, 2010) (“There are a lot of obstacles in the way of our understanding animal intelligence—not the least being that we can’t even agree whether nonhuman species

The law urges company decision-makers to improve profit. However, decision-makers know that a significant portion of the buying population factors sustainability into its buying choices. When a company decision-maker avoids factoring this concept into the company's product marketing, the decision-maker is not doing his job. For some company propagandists, sustainability is a "check-the-box" approach to improving the company image.<sup>139</sup> Use of the Labels becomes a valuable tool in their tool box, especially because: 1) the Labels are not defined by law; and 2) the Labels are not specifically regulated by the government.<sup>140</sup> Each company has flexibility in determining the meaning of each Label it uses.<sup>141</sup> Consequently, many people, including scientists, view these Labels as meaningless.<sup>142</sup>

Given the state of the fungible Labels, one must explore the representations made by the company beyond the immediately-visible label. For example, Neutrogena—one of the largest skin care companies in the world—launched a "Neutrogena Naturals" brand with the label "Not Tested on Animals." However, the company sold its product in China, which requires animal testing by law.<sup>143</sup> Further, the policies of the parent company of Neutrogena—Johnson & Johnson—are noteworthy. Neutrogena's decision-makers must make decisions in accord with profit incentives for its owners, which is primarily Johnson & Johnson, a company that is not cruelty-free and tests on animals.<sup>144</sup>

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are conscious."); JEFFREY M. MASSON & SUSAN MCCARTHY, *WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS* (1995); NICHOLAS DODMAN, *THE DOG WHO LOVED TOO MUCH: TALES, TREATMENTS AND THE PSYCHOLOGY OF DOGS* (1996); TEMPLE GRANDIN & CATHERINE JOHNSON, *ANIMALS MAKE US HUMAN: CREATING THE BEST LIFE FOR ANIMALS* (2009); MELANIE JOY, *WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS: AN INTRODUCTION TO CARNISM* (2010); HAL HERZOG, *SOME WE LOVE, SOME WE HATE, SOME WE EAT: WHY IT'S SO HARD TO THINK STRAIGHT ABOUT ANIMALS* (2010).

<sup>139</sup> King, *supra* note 136.

<sup>140</sup> To date, the author is unaware of any instance where the use of the Labels has been determined to rise to the level of consumer misrepresentation or shareholder misrepresentation to trigger federal regulatory interest.

<sup>141</sup> *Cruelty-Free Labeling*, *supra* note 93.

<sup>142</sup> *Id.*

<sup>143</sup> Aly Laughlin, *Neutrogena Claims Not To Test On Animals, Sells Products In China*, CRUELTY-FREE KITTIE (Mar. 20, 2017), <https://www.crueltyfreekitty.com/news/is-neutrogena-cruelty-free/>.

<sup>144</sup> *Id.* When Cruelty-Free Kitty (CFK) contacted Johnson & Johnson, CFK received the following response:

The Johnson & Johnson Family of Consumer Companies does not conduct testing of our cosmetic or personal care products on animals and we do not ask others to test on our behalf, except when testing is required by law or specific government regulation. When it comes to the development of medicines, medical devices and other regulated health products, where animal use is often required, our policies

Encouragingly, consumer demand has created a niche market for products that use no animal ingredients and safety-test without the use of animals. Companies such as Avalon Organics, Burt's Bees, Beauty Without Cruelty, Kiss My Face, and Tom's of Maine emerged to meet the demand for these products. Additionally, stores such as Whole Foods and Trader Joe's have adopted policies of selling personal care products that have not been tested on animals. Larger grocery store chains have also begun incorporating these products into their personal care aisles.<sup>145</sup>

In addition to consumers conducting their own product research, there are also organizations that provide oversight. For instance, the Leaping Bunny organization established a Corporate Standard of Compassion for Animals, and audits companies that use the Leaping Bunny logo.<sup>146</sup> The Leaping Bunny standard bans all animal testing, and requires companies to monitor suppliers for breach of label requirements.<sup>147</sup> Additionally, the Leaping Bunny provides a constantly-updated list of compliant brands.<sup>148</sup>

## V. CONCLUSION

There is currently no solution that would lead to the removal of all animal testing. Medical research differentiates itself in this topic. However, consumers hold the reigns in conscious capitalism. Companies should be convinced that using alternatives to animal testing would make good business sense. Whether it be about animal testing or the environment, whatever the sustainability issue, the consumer must be informed about: 1) the power of effective propaganda; and 2) how to avoid falling victim to propaganda. Due to the changes Edward Bernays first experienced in the early 1900s<sup>149</sup> and the changes we experience now, public opinion and consumer buying power holds a great influence over decision-making within a company. Consumers need to be aware that

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reflect the highest animal welfare standards and meet or exceed all applicable local and national laws and regulations.

*Id.*

<sup>145</sup> *Cruelty-Free Labeling*, *supra* note 93.

<sup>146</sup> *The Corporate Standard of Compassion for Animals*, LEAPING BUNNY, <http://www.leapingbunny.org/about/the-standard> (last visited Mar. 25, 2018).

<sup>147</sup> *Id.*

<sup>148</sup> *Leaping Bunny Approved Brands*, LEAPING BUNNY, <http://www.leapingbunny.org/guide/brands/list> (last visited Mar. 25, 2018).

<sup>149</sup> BERNAYS, *supra* note 25, at 63-64.

they can control the actual conduct of the company and its propaganda decisions. Both aspects, the conduct and the propoganda, exist because of the legal dynamic within the organization—shareholder primacy and profit maximization—which guide the company’s propagandist in his determination of the campaigns.

“Each year, an estimated 25-35 million animals worldwide serve as models for testing the safety of a wide range of consumer products, including cosmetics, drugs and vaccines, household cleaning products, pesticides, industrial chemicals, automobiles, and toys.”<sup>150</sup> First, consumers need to be aware that many more products than just household cleaners and cosmetics may be tested on animals. When the option exists, forego purchasing a product that was tested on animals. Second, consumers should not rely only on labels—many products without labels were not tested on animals, and many products with labels were tested on animals. Third, consumers need to do their research and understand that labels are often misleading.<sup>151</sup> Consumers should consider calling the company and asking what the label means, and what steps the company takes to use alternatives to animal testing.<sup>152</sup> Consumers need to pressure companies and the government to ensure certain standards so that consumers understand what they are spending their money on.<sup>153</sup> Finally, consumers need to be mindful that labels alone, without further inspection, are merely a marketing scheme.<sup>154</sup>

<sup>150</sup> *Lab Animal Alternatives-The Three Rs*, MSPCA, [https://www.mspca.org/animal\\_protection/lab-animal-alternatives-the-three-rs/](https://www.mspca.org/animal_protection/lab-animal-alternatives-the-three-rs/) (last visited Mar. 28, 2018).

<sup>151</sup> *Cruelty-Free Labeling*, *supra* note 93; Combs, *supra* note 116 (“If you aren’t sure about a product, it’s always a good idea to contact the company itself and ask flat-out if they test on animals in any way during the creation of the process. Most companies [that] do not test on animals and whose suppliers do not test will give you a prompt reply stating so. If you do not receive a reply, or if the reply gives you an unclear answer, then it’s best to not purchase products from this company just to be safe.”); *Myths & Facts*, *supra* note 122.

<sup>152</sup> *Cruelty-Free Labeling*, *supra* note 93.

<sup>153</sup> *Id.* (“First, some personal-care product manufacturers will aim both to develop sound alternative test methods and to convince the government to accept these methods as evidence of product safety. Second, pressure on these companies and the government from concerned consumers, like you, to validate and utilize these alternatives will ensure continued progress.”).

<sup>154</sup> Scheler, *supra* note 39.

## 2018 ANIMAL AND NATURAL RESOURCE LAW CASE REVIEW

JESSICA RUNDLE

### Tighe v North Shore Animal League Am., 142 A.D.3d 607 (N.Y. Sup. Ct. 2016).

SUMMARY OF THE FACTS	SUMMARY OF THE LAW
<p>Plaintiff adopted a dog from Defendant in May 2012 after being warned that the dog was possessive of food. The dog then displayed aggressive tendencies once Plaintiff brought it home. In July of 1012, the dog bit Plaintiff’s hand as Plaintiff attempted to pick up a cookie, and Plaintiff was then hospitalized for several days due to swelling and blood loss. That September, the dog bit Plaintiff’s face, and Plaintiff allegedly suffered severe injuries. Plaintiff then sued Defendant, claiming negligence, breach of the implied warranty of merchantability, intentional infliction of emotional distress, and a claim for punitive damages. The lower court granted summary judgment dismissing the intentional infliction of emotional distress claim but denied the parts of the motion covering the other claims, and Defendant appealed.</p>	<p>The court began by stating that if an owner of an animal knows that it could be dangerous, that the owner is responsible for damage caused by the animal, reasoning that informing a person who takes possession of an animal that the animal could be dangerous allows them to take precautionary measures. In this case, even though the shelter failed to inform Plaintiff that the dog had bitten a previous owner’s face, the court stated that the fact that the dog had displayed dangerous behavior for months before the face-biting incident gave Plaintiff notice of the dog’s propensities. The court then stated that the previous court’s decision concerning negligence, breach of the implied warranty of merchantability, and punitive damages was incorrect and that the causes of actions should be dismissed.</p>

<b>Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017).</b>	
<b>SUMMARY OF THE FACTS</b>	<b>SUMMARY OF THE LAW</b>
<p>Petitioner was a child with cerebral palsy, which limited her mobility and motor skills. When she was five years old, her parents obtained Wonder, a trained service dog, to assist her in living independently. When petitioner went to kindergarten, her parents sought the school’s permission to bring Wonder. The school refused, citing the human aide that was provided under petitioner’s Individualized Education Program who was able to meet all of petitioner’s needs. At one point in the year, Wonder was allowed in the classroom for a trial, but had to remain in the back, and was not welcome after the trial period. Petitioner’s parents filed a complaint with the US Department of Education’s Office for Civil Rights, and after the office agreed that the school’s actions discriminated against children with disabilities, the school agreed to let petitioner bring Wonder to school. Petitioner’s parents worried that the transition back to the school would be made difficult by the administration and found petitioner a different school. Petitioner then filed suit in federal court claiming that the school district violated Title II of the ADA and §504 of the Rehabilitation Act.</p>	<p>The Court reasoned that a Plaintiff must exhaust procedures under the Individuals with Disabilities Education Act before filing an ADA action. The Court stated that the petitioner’s complaint did not suggest an inadequacy of education. The Court vacated and remanded the judgment, stating that on remand, the court needed to examine to what extent the petitioner underwent dispute resolution under the Individuals with Disabilities Education Act before filing the suit.</p>

<b>Animal Legal Def. Fund, Inc. v. Vilasack, 237 F. Supp. 3d 15 (D. D.C. 2017).</b>	
<b>SUMMARY OF THE FACTS</b>	<b>SUMMARY OF THE LAW</b>
<p>The Cricket Hollow Zoo had custody of 200 animals, though it had a history of issues with the Animal and Plant Inspection Service (APHIS), including a warning for failing to uphold the animals’ living conditions and fines. In 2014, Animal Legal Defense Fund (ALDF) sued the zoo, alleging the taking of protected animals covered under the Endangered Species Act. APHIS initiated enforcement action against the zoo, citing previous issues and violations of Animal Welfare Act provisions and regulations regarding veterinary care. ALDS offered aid to APHIS regarding evidence from ALDS’s previous action against the zoo, though APHIS declined. ALDF then filed a motion to intervene under Section 555(b) of the APA, though a Judicial Officer denied the motion on the basis that even though ALDF qualified as an “interested person,” involvement in the proceeding would “disrupt the orderly conduct of public business.” ALDF then filed suit challenging the ruling.</p>	<p>The court interpreted “interested person” under § 555(b) of the APA as anyone with standing to seek judicial review of the agency’s decision, though Article III of the Constitution does not constrain the definition. The reasoning of the court for a lower threshold was to allow groups to ensure that agency proceedings value the public interest. Here, the court found that ALDF’s interests exceeded the proceeding’s scope and should not have analyzed if the organization’s involvement would impede “the orderly course of public business.” The court went on to say that the agency should analyze how much ALDF’s involvement would assist its decision making and pointed out that participation by a third party did not necessarily mean a complete intervention. The ruling was vacated, and the case was remanded to the agency to consider ALDF’s motion with consideration to APA § 555(b)’s factors.</p>

<p><b>Miller v. Fortune Commercial Corp.,</b> 15 Cal. App. 5th 214 (Cal. Ct. App. 2017).</p>	
<p><b>SUMMARY OF THE FACTS</b></p>	<p><b>SUMMARY OF THE LAW</b></p>
<p>Plaintiff possessed Roxy, a service dog, to assist him in becoming independent despite having intellectual disabilities. The dog had been purchased from a pet store, then trained by Plaintiff’s family to be a service animal. Plaintiff sued Seafood City markets as well as several other Defendants after allegedly being denied service upon attempting to enter Seafood City stores with his service dog, citing a violation of the Unruh Civil Rights Act, a violation of the Disabled Persons Act, and a claim for intentional infliction of emotional distress. The lower court granted Defendant’s motion for summary judgment, and Plaintiff appealed.</p>	<p>In its analysis of the Unruh Civil Rights Act, the court pointed out that it outlawed arbitrary discrimination, though it did not specifically address service dogs. Instead, the court turned to the ADA’s regulations, which defined a service animal as a dog trained to do tasks benefitting an individual with a disability. The court pointed out that the word “trained” denotes that the dog must be trained, not in the process of training, and extended this definition to its interpretation to the Unruh Civil Rights Act, interpreting it to cover trained service dogs, but not those in training. Under the Disabled Persons Act, there are three types of service animals, specifically dogs, including guide dogs, signal dogs, and dogs for other disabled persons. The DPA recognizes service dogs that were in training, and the court held that a person must have some enabling authority to engage in training.</p>

<p><b>Friends of Animals v. Phifer,</b> 238 F. SUPP. 3D 119, (D. ME. 2017).</p>	
<p><b>SUMMARY OF THE FACTS</b></p>	<p><b>SUMMARY OF THE LAW</b></p>
<p>The Canada Lynx is a wild cat protected under the Endangered Species Act, and the State of Maine prohibits trapping a Canada Lynx. However, Maine allows the regulated trapping of other animals of similar sizes, and Canada lynx can get caught in traps set up to catch other animal species. Friends of Animals filed suit against Daniel M. Ashe, the director of the Fish and Wildlife Service, and Paul Phifer, Assistant Regional Director of Ecological Services for the Northeast Region Office of the Fish and Wildlife Service. The case was then consolidated with another in which Ashe was sued by three environmental advocacy organizations.</p>	<p>Under the Endangered Species Act, it is unlawful to take an animal that is an endangered species, and it is unlawful by regulation to take an animal that is a threatened species, though an exception exists if the taking is incidental to a lawful activity. The court said that while Plaintiffs had standing to sue, by approving Maine’s Incidental Take Permit, the Fish and Wildlife Service did not act “arbitrarily and capriciously,” and fulfilled the requirements of the ESA.</p>

<p style="text-align: center;"><b>People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium,</b> 189 F. Supp. 3d 1327 (S.D. Fla. 2016).</p>	
<b>SUMMARY OF THE FACTS</b>	<b>SUMMARY OF THE LAW</b>
<p>Lolita is a Southern Resident killer whale residing at the Seaquarium. She was captured legally off the coast of Washington State in 1970. She was then purchased by Seaquarium and is older than the median life expectancy of Southern Resident Killer Wales. SKRW's were recognized as protected under the ESA in 2005, though whales in captivity were excluded until Plaintiffs successfully petitioned the National Marine Fisheries Service to remove the exception and include Lolita as protected. Plaintiffs then filed suit asserting that Seaquarium committed an unlawful taking with regard to Lolita, citing the conditions in which Lolita is kept to support their claims.</p>	<p>In evaluating whether Plaintiff had standing, the court evaluated the mission of Plaintiff's organization, that is to protect animals. Finding that the purported taking of Lolita conflicts with Plaintiff's mission, the court found that Plaintiff had standing, as it had suffered actual injuries. In evaluating the accusation of a taking, the court states that a taking occurs when the conduct of a licensed exhibitor "gravely threatens or has the potential to gravely threaten the animal's survival." With this definition, the court concluded that the actions of Defendants did not rise to the level of a taking under the Endangered Species Act.</p>