



THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW

From the Chair

Since our last edition of *Laws and Paws*, a lot has changed. The world has been experiencing something that, while many experts warned about, nobody was entirely prepared to live through. We all know the sadness, pain, grief, stress, and turmoil that COVID-19 has caused - some of us all too well. What not everybody knows, however, is how COVID-19 came to be.

COVID-19 is believed to have originated at a wet market that included a wildlife section in Wuhan, China, called the Huanan Seafood Wholesale Market. A wet market is a market that sells perishable foods such as meat, fish, fruits, and vegetables. Wet markets can be found around the world, but are especially common in China and Southeast Asia. The "wet" in wet market refers to the melting ice used to preserve fresh meats or the water used to clean their foods or hose down a store. People often use the terms wet market and wildlife market interchangeably, but there is a distinction. A wildlife market sells wildlife animals for meat or as pets. While a wet market can have a wildlife section, they often do not, and are more akin to what we would refer to as a farmers' market. Therefore, while many are calling for a ban on wet markets, they really are intending to ban wildlife markets.

There are still many unknowns and questions about the novel coronavirus, but scientists have pointed to evidence that a bat, which is a carrier of the coronavirus, spread it to an intermediate host animal - likely sold at the Huanan market in the wildlife section, which then transferred the virus to humans via handling or consumption. When a virus is spread from a non-human animal to a human, it is called a zoonotic disease.

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From the Chair (continued)

Zoonotic diseases have been the source of the deadliest outbreaks that have spread throughout human populations - SARS, Ebola, HIV/AIDS, MERS, avian flu, and now COVID-19 are the prime examples. About two-thirds of all diseases originate from animals. COVID-19 has highlighted an opportunity for scientists and lawyers to work together to prevent another zoonotic disease outbreak from happening again in the future by using proven facts and evidence to introduce meaningful legislation and regulations. It is certainly easier said than done, as there are many cultural considerations that need to be taken into account. Hopefully, our Committee will be able to provide an educational program on zoonotic diseases and wildlife markets in the near future.

The other concern about COVID-19, although the number of cases is small, is that humans can spread the disease to animals, including their companion animals. As of June 22, 2020, the United States Department of Agriculture has confirmed detection of COVID-19 in four cats and one dog. Another impact on companion animals that COVID-19 has brought to light is how we can make sure our pets are provided for when we become seriously ill, which is discussed in Debra Hamilton's article herein.

COVID-19 proves that human interaction with animals consists of more than just having a pet in your home. When people are asked about the first time they connected with an animal, many will answer about their first companion animal. They fail to mention the first time they ate a hamburger or hot dog, or the first time they wore leather sneakers. This is not surprising and I don't fault those individuals for responding as they do. Humans have been programmed to treat animals as lesser than, but this novel coronavirus has shown that animals have more power than we give them credit for. Perhaps a take away from the current pandemic is that we should be showing more respect to all animals, not just those that live in our homes.

My 5-year-old daughter keeps asking. "When will the sickness end?" I wish I could answer her question, but I can't. I wish I could tell her that she will be able to have a "normal" first day of kindergarten in September, but I can't. There are so many unknowns and uncertainties, but what I can do is continue to educate myself about how animals and humans interconnect and do my best to enlighten others about the relationship between animals and humans. I encourage all of you to do the same.

Before you continue on and read the outstanding articles in this edition of Laws and Paws, I also wanted to mention the issue of racial injustice in this country and how we, as animal lawyers and advocates, can make a difference. We need to aspire to make our field more diverse. I, myself, am still trying to figure out the best ways to do so, but in the meantime, I am focusing on listening and learning. We can also look further into areas of animal law that disproportionately impact Black people, such as breed specific legislation. We need to dig deeper and determine where we can help in making systemic change in our part of the world.

Let's continue to communicate with one another, build our community, and catalyze positive change for animals and people.

Best regards,

Ashlee

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MAAP--Navigating the Journey Your Pet Will Take if You Cannot Care for It
By Debra A. Vey Voda-Hamilton, Esq. Mediator
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When you share your life with an animal companion, planning for your loved ones' short-term and long-term care is imperative. They are counting on you to ensure their care no matter what. The older your pet is, the more they need a plan for future care. In recent months we have read about many beloved pets being taken to shelters due to their owner's long-term hospitalization or death due to COVID 19

Most people believe setting up directives in their will for the future care of their pet is enough. What happens to your pet if the will is inoperative because you are not dead, there is a delay in accessing your directives, or funds are in probate for six months to a year? What if the need to care for your pet is due to disaster, disability, disease, delay, divorce or pandemic? In these scenarios are you prepared? Have you answered key questions? By following these four steps, you will gain peace of mind for the future care of your beloved companion.

To create a future pet care plan that your pets can *live* with, start by drawing a MAAP.

- M**ake a plan outlining the care that you would like to have your pets receive.
- A**ddress each of your pets and their unique needs.
- A**ppoint at least three caregivers; only one can be a family member.
- P**ublish your plans and keep them readily available.

Make a plan outlining the kind of care you would like your pet to receive. This directive assumes that you are permanently or temporarily incapable of personally providing the care your pet needs to receive. Your pet caregiver will be grateful that you have provided this unique and individualized information.

Addressing your pet's individual uniqueness. List their identifying characteristics, including color, sex, age, and microchip number if applicable. This information will be invaluable to those left to care for your beloved companions. This outline should talk about their eating habits and personality traits. By creating this document, you enable the person caring for your pet to know its common and uncommon behavior. This would allow another to step into your shoes.

Appoint three pet caregivers to take over the current needs of your pet if life circumstances occur that limit your ability to care for them. Appointing three caregivers in succession helps hedge your bet that one will be able to take your pet. I recommend only one family member is appointed as a caregiver. *This is very important.* If you cannot care for your pets, chances are you will need the assistance of your family with your own care. As your family provides what you need, they will be grateful you enabled them to have someone else look after your pets. It is a welcome relief.

Due to the recent pandemic, now you will need to consider appointing a neighbor your first line of care since they may be the only one's who can get to your home to take care of your pet. Many family members are scattered around the country. What was normal to do, like jump on a

plane and be across country in a few hours, was not available during the height of the COVID shut down. Having a neighbor as your first responder for the care of your pet and then allowing others to support them or know where to get the pets if you do not come home is an imperative.

Make sure you check in often with your chosen pet caregivers. You want to confirm with the people you have appointed that they still can. People may agree to care for your dog or cat when circumstances permit such care. However, things change, and when called upon to take your pet, they may not be able to follow through. You need to know that before it occurs.

Publish the plans that you make. Publishing your plan with your executor, attorney, veterinarian and all appointed caregivers helps those who have assumed the responsibility of caring for your pets know the who, what, and where of your pet care plan. Make sure that everyone in your life knows where this pet directive is, so they can easily access this important information upon your death, disability, disaster, disease, delay, or divorce.

Did you know that sometimes it could take up to six months and often 12 months, to probate a Will? What happens to your pet in the meantime? Your Will does not protect your animals until it is read. Yet your pet needs those around you to know immediately how you want them cared for, who is available to help provide that care, and how they will get reimbursed for their generosity. You may consider setting aside funds to pay for this care. A pet trust or annuity can be a lifesaver for your pet when it comes to their future care. Ask your financial advisor or estate planner questions as to how to provide funding for this care in a pet trust or from an annuity.

If we learned anything during COVID 19 it was that our pets kept us sane. Assuring they do not end up in a shelter if we become ill is our greatest gift to them for their sustaining love during difficult times. Rescues are wonderful places of last resort. If you can navigate the journey your pet will take, why wouldn't you?

This **MAAP** of your pet's future care should be created *before* something happens to you. It is not just about end of life dispersal of your pet. If you trip, fall, and injure yourself, who will take care of you and your companion while you heal? You are still alive, yet you cannot care for your pet, and it needs care immediately. Having a MAAP for others to follow, taking these life saving steps now, will ensure that your pet is well cared for in the event you cannot provide that care yourself.

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**NYSBA COMMITTEE ON ANIMALS AND THE LAW
MEMBER SPOTLIGHT: STACEY TRANCHINA, ESQ.,**

**LEGISLATION SUBCOMMITTEE CHAIRPERSON/
RECIPIENT OF THE COMMITTEE'S 2020 EXEMPLARY SERVICE HONOR**

INTERVIEW BY MOLLY ARMUS, ESQ.

1. Why did you decide to become a lawyer?

I became a lawyer because I was always good with words and writing. It is as absurdly simple as that.

2. What would your career choice be if you were not a lawyer?

Becoming a veterinarian was my plan throughout my childhood and into high school until physics proved to be an unsolvable puzzle to me, so I thought that was no longer a realistic goal. Not pursuing that path haunted me, and in my forties, I looked into the requirements for veterinary school, including where I could fulfill them. Then at a feral spay/neuter clinic, I had a conversation with a veterinarian who had gone back to school in her forties which gave me an entirely new perspective.

She recounted how hard she had found it to go back for that degree at our age because our minds were not as clear from other things or as sharp as the students coming straight from college. She did not doubt my intelligence, desire or diligence but said that we have too much on our plates to devote all of the brain energy needed for veterinary school. She said, "Leave that to the kids. You are doing great work right here. And bringing your young daughters with you is teaching them more than you can imagine." Now I leave the medical care of my animals to those professionals, although I crave every bit of medical information about my cats (as one of their veterinarians will tell you, "Stacey can do anything. She's not afraid of anything"), and I focus on my area of expertise.

3. Has there been anyone in the past whose work inspired or influenced you?

I am very fortunate to have had multiple amazing role models and mentors, including non-lawyers (my father), veterinarians (Dennis Leon, DVM and Gay Senk, DVM) as well as attorneys. The attorneys are Don Rave, the man with whom I still work more than 30 years after he hired me right out of law school and who taught me everything about being an effective litigator, and two members of this Committee - James Gesualdi and Barbara Ahern. Jim and Barbara are both original members of this Committee and each has taught and continues to teach me every day how best to use my knowledge, training and skills to work effectively to bring about positive change for animals in a society that, make no mistake about it, is making progress in this respect.

4. How did you get involved in the NYSBA Committee on Animals and the Law?

I read a late 1994 Newsday article about Jim Gesualdi describing how he, formerly a member of a white-shoe New York City law firm, had left that practice to pursue his passion: working to

help marine mammals. That always had stuck with me. Years later I wrote to him, and from there Jim became my greatest supporter and advocate. Before I knew it, his assistant, Patty called congratulating me on being granted membership on the Special Committee on Animals and the Law (SCAOL). I don't recall exactly when that was other than early in the 2000s, but I do vividly recall that I was in the Florida Keys when I got that call. "Cool!" I thought, having no idea what that actually meant.

At that time, animal rights and animal welfare were not topics that fell within the boundaries of mainstream society's norms; they were "fringe" topics promoted by people who were often considered to have radical views. The SCAOL was also a different body than the Committee on Animal Law (COAL) is now, as was its place in the New York State Bar Association. We had only Special Committee status, granted for a discreet number of trial years. Jim, Barbara and the other members of the SCAOL worked very hard to gain full Committee status and continued working for many years until it gained the respect of the NYSBA that we now enjoy, which I never take for granted. It was a long journey and everyone worked hard to earn it. We did high profile work with topics that were not extreme or very controversial, but which in my view they are very, very important – for both animals and people.

For instance, we raised awareness of the importance of humane education in our schools (including dissection alternative mandates). We then notified all of the state's school districts of the humane education requirements and that dissection alternatives must exist. I continue this work every fall when I stand before our board of education, reminding its members that they must, by law, send letters to all parents of all students taking a class that may include an animal dissection, advising that students who object to witnessing or participating in such dissections must be offered an alternative without risking harm to their grade.

5. **What do you like most about being a part of NYSBA COAL?**

First of all, I am very proud to be a member of the COAL and grateful for all that it has given to me over the years. What I like most is the opportunity to use my education and experience to do things that really make a difference for animals. In my opinion, that includes educating the public about animals and their basic needs and working to try to have laws passed that will benefit animals. In addition, because the people on the COAL are like minded animal-loving people, it generally is a safe place to express thoughts that in some other circles may not receive universal understanding or respect. I also find that our membership (current and past) has strong bonds that transcend our work in animal law and extend to life, in general. Finally, and I think this is unique to our Committee, because our members are attorneys also practicing in a wide variety of other areas of the law, they are outstanding resources for help or referrals when I am looking to find a good attorney practicing in a particular area.

6. **What would you say is the biggest challenge in advocating for animals?**

The biggest challenge that I have seen over the years is (as I mentioned above) until very recently, concerns about animal welfare were not part of the "mainstream" of society. Instead, those concerns were considered a type of fringe area of concern, and therefore opinions and issues that pertained to them were not valued by society as a whole. I have seen a change in that respect as evidenced by the media coverage given to animal-related stories.

I think the primary way to see this continue is to bring animal welfare to children. And by that, I mean give children a deeper understanding about non-human living beings and the fact that they feel pain, feel fear, and care for their young, just like we do. If children grow up believing that it is not okay to hit a bird with a rock because that will hurt the bird and possibly take her from her family, then that child will grow up with those values. It is much harder to reach adults who have internalized other customs and mores to try to have them view animals differently. It is vital that we educate children at a very young age so that caring about and for animals is the norm to them.

7. **What do you think will change about animal law over the next decade?**

I see that society's perception of animals and matters that impact them have changed greatly over the past 10 or 15 years. I am hopeful that society will continue on the path of valuing animals and that as a result, the law will develop that way as well. When we tell our elected officials that animals are important to us and will drive our voting conduct, those officials will hear that and support more animal-related legislation. This has in fact happened in very recent years and has caught the attention of the press.

8. **How do you think New York measures up to the rest of the country in terms of animal protection? Do you think there are areas the state could improve on?**

It is hard to discuss matters relating to New York State as a whole because it includes such diverse interests, from agriculture and hunting, to horse racing, to providing food to pets of homeless people living on New York City streets. Nevertheless, I do think it is fair to say that New York State could do more in the area of measures to protect domestic animals. For example, by allowing people to remove animals from hot or cold cars in emergency situations to save their lives; by requiring restraints for animals riding in cars, thus preventing them from becoming projectiles potentially hurting human occupants as well; and by outlawing the use of wild animals traps in areas frequented by domestic animals, to name just a few specific items. But the good news is, I do think our legislators are listening, and that gives me hope for the future. A great example of this is that last year, New York State became the first state in the nation to ban declawing of cats.

9. **Any final thoughts?** Thank you for giving me this opportunity to express my gratitude to the NYSBA and to the past and present members of the Committee on Animals and the Law for being an important part of my life and my development as an attorney as a person.

Attorneys Provide Advice on How to Prevent Animal Shelters from Getting into Trouble



As part of the events for NYSBA's Committee on Animals and the Law at Annual Meeting was a Pet-A-Puppy adoption event on Jan. 29 co-sponsored with Bedford's RESCUE RIGHT.

A cat owner moves out of her apartment, leaving the pets behind. Her former roommate's family brings the cats to the animal shelter, and they are adopted. Then the original owner shows up at the shelter, demanding the cats back.

A rescue group gives a dog to a foster guardian for temporary care, but when it's time to return the dog, the foster guardian says she doesn't have it.

A dog is adopted, and becomes ill. The new owner claims that the shelter should be liable for the veterinary bills.

When it comes to animals, people can sometimes fight like cats and dogs. The Committee on Animals and the Law discussed some of these legal issues at a recent program during the 2020 annual meeting of the New York State Bar Association titled "From Theory to Practice: The Legalities of Animal Shelter and Rescue Operations."

Elinor Molbegott, a practitioner in East Williston who represents a number of shelters, told the audience that shelters and rescue organizations need sound legal documents to deal with incidents like the real cases listed above. Shelters need adoption, foster and surrender agreements, as well as waivers and releases. And they should require proof of ownership and proof of identity of the person surrendering the animal.

"How do you know the person is the animal's owner?" asked

Molbegott, who said she has seen animals euthanized after being turned over to shelters by landlords, neighbors or relatives of the owner.

Sometimes, pet owners surrender an animal and then change their minds. "If you have a good surrender form, you make it clear they are relinquishing all rights," Molbegott said.

Along with the right documents, Molbegott urged "common sense and a sense of humanity" on the part of animal organizations. And she recommended good insurance, saying that lawsuits are inevitable.

Judith L. Siegel, senior staff attorney of the Pro Bono Partnership in White Plains, laid out what people need to know to set up a nonprofit shelter or rescue operation in New York State. She warned that establishing and running an organization can be complicated, and funding can be scarce, and

recommended that advocates first look to see if another group is pursuing the same mission.

"People think every good idea deserves a nonprofit; that is not the case," Siegel said.

She also cautioned nonprofit organizations about pitfalls. "Can you engage in political activity? Absolutely not," she said. That will get your nonprofit status yanked.

How about a loan to a board member? "That's a hard no."

Jack Fein, president of the Dutchess County Society for the Prevention of Cruelty to Animals, traced the history of animal protection efforts, and the laws governing them, back to Colonial times. Animals generally are protected by three types of organizations – government-run shelters, private shelters and rescue groups.

Regulation of private shelters and rescue groups has been on the rise.

As of 2017, 35 states had laws requiring them to be licensed or registered, up from 20 in 2012, he said.

Some shelters have an open adoption policy, on the theory that any adoption is better than life in a shelter, Fein said. Others screen adoptive owners more carefully; they tend to have fewer animals returned, he said.

The panel also featured a visit by two dogs, Tangy and Hechi, rescued from China, where they were destined for the dog meat market. Their rescuer, Penelope Smith-Berk, owner of Northwind Kennels in Bedford, also brought the dogs to the main reception hall of the NYSBA annual meeting, where they gave lawyers a bit of puppy love.

Local Ballot Initiative: Sowing The Seeds To Free The Sow From Her Cage

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Abstract

America's widespread practice of confining mother pigs to gestation crates presents a variety of animal welfare, environmental, and public health concerns. However, efforts to stem the practice have been ineffective because farm animal welfare laws are weak, while the pork industry is powerful.

To combat the issue, Denver County of Denver, Colorado should, through a ballot initiative, institute a tax on the distribution of pork that comes from factory farms, which are uniform in the practice of confining mother pigs to such crates.

Denver County is a viable target not just because it has the ability to institute tax measures, unlike the vast majority of American counties, but because Denver is home to consumers and voters who value animal welfare. Furthermore, because Denver is far from Washington, D.C., where pork industry lobbyists have a strong base, the ballot initiative is less likely to be unduly influenced by campaigns to block the vote. Finally, because the omnipotent presence of the pork industry looms not just at the federal level, but in the arena of state politics as well, enacting legislation at the municipal level where pork lobbyists are largely absent, is key.

I. INTRODUCTION

In September of 2018, Rudy the piglet made a prison break from an Iowan truck, escaping the impending doom of slaughter.¹ The event made local papers all across the state; Iowans loved the story of Rudy the pig, who before his escape, meant nothing to humans besides the meat he was destined to become months later.

Rudy's escape, leading to his fame and adoration state-wide, prompted the spending of hundreds of dollars on his housing and medical care.² It also sparked an Internet frenzy that attracted attention from animal welfare enthusiasts throughout the state. To the delight of his many fans, Rudy's sensationalized story led to his adoption into a loving family.³

¹ The Twisting Tale of Iowa's Little Piggy Who Didn't Go to Market but Went All the Way Home <https://www.desmoinesregister.com/story/news/2018/09/27/stray-hogs-iowa-twisting-tale-pig-fell-off-truck/1409187002/> (10:35) (Sep. 27, 2018).

² Id.

³ Id.

Yet, a happy ending like this is an anomaly for any pig raised in the United States. Rudy was lucky; the fate of most American pigs is extraordinarily bleak, as is their existence in general.

Despite a pigs' remarkable intelligence and ability to build strong social bonds, humans subject them to abuse and mistreatment from the moment they are born⁴ to when they are brought to slaughter.⁵ Although male pigs are also subject to great abuse,⁶ this note is confined to the treatment of sows, or “mother pigs”⁷ who spend their entire lives confined to gestation crates.

Gestation crates for sows are typically seven feet long to two feet wide.⁸ That is roughly the size of a twin bed, for a 500-pound animal, making it impossible for her to even turn around.⁹ The bottom of these crates typically have apertures so that feces and urine can seep through,¹⁰ exposing the sow to constant foul odors and high levels of ammonia, which in turn impairs her respiratory health.¹¹

These crates are designed to contain sows on factory farms, which is a farm on which “large numbers of livestock are raised indoors in conditions intended to maximize production at

⁴ See Pig Castration, Laboratory of Animal Behavior, Physiology and Welfare.

<http://www.depts.ttu.edu/animalwelfare/Research/PigCastration/> (in the United States, the vast majority of male piglets are castrated subsequent to birth without anesthesia).

⁵ *Pig Transport and Slaughter*, PETA, <https://www.peta.org/issues/animals-used-for-food/factory-farming/pigs/pig-transport-slaughter/> (last visited Apr. 8, 2019) (“The USDA documented 14 humane-slaughter violations at a processing plant where inspectors found hogs who ‘were walking around and squealing after being stunned [with a gun] as many as four times’”).

⁶ See Pig Castration, Laboratory of Animal Behavior, Physiology and Welfare,

https://www.avma.org/KB/Resources/LiteratureReviews/Documents/swine_castration_bgnd.pdf.

⁷ Pigs, Vegan Peace, http://www.veganpeace.com/animal_facts/Pigs.htm (last visited Apr. 8, 2019) (a female pig who has given birth is called a sow).

⁸ David Jackson & Gary Marx, *Pork Producers Defend Gestation Crates, But Consumers Demand Change*, CHICAGO TRIBUNE (Aug. 23, 2016).

⁹ Jenna Bardroff, *This is What Life Inside a Gestation Crate is like for a Pig*, ONE GREEN PLANET, <http://www.onegreenplanet.org/animalsandnature/this-is-what-life-inside-a-gestation-crate-is-like-for-a-pig/> (last accessed Apr. 9, 2019)

¹⁰ SUSAN L. BROCKMEIER, PATRICK G. HALBUR, EILEEN L. THACKER, POLYMICROBIAL DISEASES 1 (Janet M. Guthmiller, Kim A. Brogden 2002) <https://www.ncbi.nlm.nih.gov/books/NBK2481/?report=reader> (respiratory disease most important health concern for swine producers) (data collected from 1990-1994 showed 58% of pigs were infected with pneumonia at slaughter).

¹¹ J. Tillon & F. Madec, *Diseases Affecting Confined Sows: Data from Epidemiological Observations*, NCBI (1984), <https://www.ncbi.nlm.nih.gov/pubmed/6486691> (last accessed Apr. 9, 2019).

minimal cost.”¹² Yet, this neutral definition of “factory farm” was invented by the meat industry,¹³ and in turn fails to shed light on the large-scale abuse that happens from within. *All* factory farms “harm animals in ways that would be illegal according to even weak animal welfare legislation,”¹⁴ yet that is where 97% of pork consumed in the United States is raised.¹⁵

After giving birth, sows are separated from their young and brought to farrowing crates,¹⁶ which immobilize them and inhibit mutually beneficial interactions between the mother and her young.¹⁷

After separation, the sow is impregnated once again. She will give birth, or “farrow” about nine more times and then she is brought to slaughter.¹⁸ Sow pregnancy ranges from four to six months, and a sow will farrow an average of 10 piglets.¹⁹

Fortunately, this is an area of animal welfare law that has recently garnered public attention, and in response, nine states have passed legislation banning the practice from within.²⁰ In 2002, Florida passed a ballot initiative declaring it “unlawful for any person to confine a pig during pregnancy in an enclosure, or tether a pig during pregnancy, on a farm in such a way that

¹² *Factory Farm*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/factory%20farm> (last accessed Apr. 9, 2019).

¹³ JONATHAN SAFRAN FOER, *EATING ANIMALS*, 50 (2009).

¹⁴ *Id.*

¹⁵ Lynne R. Kasper, *Inside the Factory Farm, where 97% of U.S. Pigs are Raised* (May 6, 2015), <https://www.splendidtable.org/story/inside-the-factory-farm-where-97-of-us-pigs-are-raised>.

¹⁶ *The Farrowing Crate*, VIVA, <https://www.viva.org.uk/resources/campaign-materials/fact-sheets/farrowing-crate> (last accessed Apr. 8, 2019), (farrowing crate is small metal cage where sows are confined for weeks on end (metal frame of crate just centimeters bigger than sows body, making it impossible for her to turn around).

¹⁷ *See Id.* (physical barrier between sow and her young).

¹⁸ Tasha R. Gruhot *et al.*, “An Economic Analysis of Sow Retention in a United States Breed-to-Wean System,” *Journal of Swine Health and Production* 25, 238-246 (2017).

¹⁹ *Unit 26, Handling and Restraining Pigs*, Food and Agriculture Organization of the United Nations (FAO) (last accessed Apr. 8, 2019), <http://www.fao.org/3/t0690e/t0690e06.htm>.

²⁰ *See* Lindsay Patton, *9 States that have Banned Cruel Gestation Crates for Pigs*, ONE GREEN PLANET, <http://www.onegreenplanet.org/animalsandnature/states-that-have-banned-cruel-gestation-crates-for-pigs/> (states that have banned the use of gestation crates for sows include Arizona, California, Colorado, Florida, Maine, Michigan, Ohio, Oregon, and Rhode Island).

[prevents her] from turning around freely.”²¹ Yet, not one of these states is a top pork producer,²² thus just a small proportion of mother pigs residing in the United States are protected by these bans.

For example, according to the most recent census, Florida breeds 3,000 sows per year, while Iowa, whose practices are considered the most egregious,²³ breeds one million.²⁴ This calls for a solution that will stem the use of gestation crates where the population of pigs raised for slaughter is higher. However, passing legislation in these states is virtually impossible because the influence of meat industry is so strong.

Because legislation banning the confinement of sows to gestation crates is unlikely to pass in a top pork-producing state like Iowa, combating the practice can only be achieved by curbing the *demand* of pork that comes from factory farms engaged in this practice. As a solution to this problem, Denver County of Denver, Colorado should, through a ballot initiative, institute a distribution tax on pork that comes from these factories. Denver County is a viable target not just because it is unique in that it has the power to impose taxes²⁵ as well as the

²¹See Advisory Op. to the Att’y Gen. re. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597, 597 (Fla. 2002).

²²U.S. DEP’T OF AGRIC., HOG AND PIG FARMING – A \$22.5 BILLION INDUSTRY, UP 25 PERCENT SINCE 2007 (2014), https://www.nass.usda.gov/Publications/Highlights/2014/Hog_and_Pig_Farming/index.php (top pork producers are Iowa, North Carolina, Minnesota, Illinois, Indiana, Nebraska, Missouri, Ohio, Kansas, and Oklahoma).

²³Joe Loria, *Five of the Worst States to Be a Pig*, MERCY FOR ANIMALS (Oct. 27, 2017), <https://mercyforanimals.org/5-of-the-worst-states-to-be-a-pig> (in Iowa, “customary farming practices” were exempt from the state’s animal cruelty law in a 1994 amendment, giving farmers wide discretion in deciding what is or is not “customary”). See Iowa Code § 717.1.

²⁴USDA, QUARTERLY HOGS AND PIGS (2018).

²⁵Joseph Bishop-Henchman & Jason Sapia, Local Income Taxes: City-and County-Level Income and Wage Taxes Continue to Wane, TAX FOUNDATION (Aug. 31, 2011), <https://taxfoundation.org/local-income-taxes-city-and-county-level-income-and-wage-taxes-continue-wane/>.

power to pass ballot initiatives,²⁶ but because Denver is home to consumers and voters who value animal welfare.²⁷

Furthermore, because Denver is far from Washington, D.C., where pork industry lobbyists have a strong base,²⁸ the ballot initiative is less likely to be unduly influenced by campaigns to block the vote.

Finally, because the presence of pork lobbyists looms not just at the federal level, but in the arena of state politics as well, enacting legislation at the municipal level where pork lobbyists are largely absent, is key.

A. Roadmap.

This note will discuss mankind’s mistreatment of mother pigs by restricting them to gestation crates on factory farms. It will delve into the remarkable level of emotional and social intelligence all pigs have, and why that is important to consider when examining the anguish a sow endures as she lives each day in such conditions.

Next, the paper will examine the failure of the Animal Welfare Act²⁹ (“AWA”) to protect livestock animals, and why efforts to amend the AWA have been futile.

It will subsequently establish the link between the widespread use of gestation crates and harm to the environment, and how the consumption of pork implicates human health.

Finally, the note will delve into the need for a legislative solution that circumvents the strong influence of pork lobbyists at the federal and state level. A solution will be proposed that taxes factory farmed pork municipally, followed by an explanation of how that may be

²⁶Joseph Bishop-Henchman, Top State Tax Ballot Initiatives to Watch in 2018, TAX FOUNDATION (Oct. 22, 2018), <https://taxfoundation.org/2018-state-tax-ballot-initiatives/>.

²⁷2018 U.S. Animal Protection Laws State Rankings, ANIMAL LEGAL DEFENSE FUND, <https://aldf.org/project/2018-us-state-rankings/> (last accessed Apr. 8, 2019) (Colorado ranks in the top five for states with the best animal protection laws according to ALDF).

²⁸See below.

²⁹Animal Welfare Act of 1966, P.L. 89-544, 80 Stat. 350.

accomplished through a ballot initiative. Next, the qualifications of Denver County as a viable target city for this type of tax will be demonstrated.

Last, this paper will confront obstacles that may stand in the way of the successful implementation of this solution. These barriers include the Dormant Commerce Clause, and the potential for civilian pushback, in that such a tax such may have a disproportionate impact on impoverished peoples. This note will lay out how these challenges may be overcome.

II. BACKGROUND

A. Pigs are Intelligent and Deserve Humane Treatment

Pigs – an animal commoditized as “swine,” “hogs,” or “pork” – have a remarkably high level of intelligence.³⁰ They are a loquacious species, able to express more than twenty different sounds to communicate their location, state of mind, contentment, and desires.³¹

When tested on problem-solving skills, pigs have consistently surpassed three-year-old humans.³² They can also play video games,³³ and learn these games as fast as chimpanzees, demonstrating their ability to recognize abstract concepts.³⁴

The social intelligence of a pig is also remarkably high.³⁵ Pigs are equipped with the ability to empathize, communicate with one another,³⁶ and attribute mental states to their pig companions.³⁷ For example, if a mother pig notices that a fellow sow is overwhelmed, she will

³⁰ See *10 Facts You Didn't Know About Pigs*, WOODSTOCK SANCTUARY (Jan. 19, 2018), <http://woodstocksanctuary.org/10-facts-you-didnt-know-about-pigs/>.

³¹ *Id.*

³² New Slant on Chump Chops, CAMBRIDGE DAILY NEWS (Mar. 29, 2002).

³³ Miguel Helft, Pig Video Arcade Critiques Life in The Pen, WIRED (June 6, 1997).

³⁴ JONATHAN SAFRAN FOER, EATING ANIMALS, 65 (2009).

³⁵ *Pigs*, WOODSTOCK SANCTUARY. <http://woodstocksanctuary.org/factory-farmed-animals/pigs/> (last accessed Apr. 9, 2019).

³⁶ *Id.*

³⁷ *Id.*

assist with the weaning of her piglets.³⁸ Also, scientists have found that when a pig observes another in distress, it will come to her aid.³⁹

Pigs are akin to dogs in their love of giving and receiving affection.⁴⁰ When placed in a suitable environment, a pig can form deep and lifelong friendships not just with other pigs but humans and other species, too.⁴¹

Yet, pigs are rarely raised in an environment that allows them to express these traits. Instead, a sow will spend her entire life in a small crate where she is unable to stand up, walk, or turn around. And then she is slaughtered.⁴²

Because pigs possess such remarkable levels of sentience, humans have the moral obligation to treat them humanely. Yet sadly, the welfare of a pig has absolutely no role in how she is treated; the only two factors considered are the demands of the consumer and the profit-margins of the factory farmer. For example, the public's demand for lean pig meat "has led the pork industry to breed pigs that suffer not only more leg and heart problems, but greater excitability, fear, anxiety and stress."⁴³ Ironically, as humans develop the science necessary to understand just how intelligent a pig is, modern genetics is being used "to bring into being pigs who suffer more"⁴⁴ to satisfy consumer demands for cheap, "lean" meat.

³⁸Id.

³⁹Id.

⁴⁰Id.

⁴¹Id.

⁴²Tasha R. Gruhot, *An Economic Analysis of Sow Retention in a United States Breed-to-Wean System*, 25 J. OF SWINE HEALTH & PRODUCTION 238-246 (2017).

⁴³EATING ANIMALS, 157-58 (2009) (pigs became so stressed that "even driving a tractor too close to their confinement facility caused [them] to drop dead").

⁴⁴EATING ANIMALS at 159.

B. The AWA Fails to Protect Pigs, and Attempts to Amend it to Include Livestock Animals have been Futile.

The AWA is a federal animal cruelty statute that was passed in 1966.⁴⁵ In 1966, the statute's purpose was to protect pets that were stolen from homes and sold to research laboratories.⁴⁶ Prior to that year, there had been no law prohibiting animal cruelty at the federal level.⁴⁷ Congress enacted the AWA in response to public outcry that was generated after Life Magazine and Sports Illustrated published stories revealing the inhumane treatment of dogs used for biomedical research.⁴⁸ The 1966 statute set minimum requirements for the “handling, sale, and transport of cats, dogs, nonhuman primates, rabbits, hamsters, and guinea pigs held by animal dealers or pre-research in laboratories.”⁴⁹

Over time, American citizens felt that the AWA's scope was insufficient and demanded an expansion of animals the statute covered.⁵⁰ In response, Congress amended the AWA in 1970 to include *all* warm-blooded laboratory animals.⁵¹

Then, in 1976, another amendment to the AWA was passed after America responded in horror to businesses engaged in showcasing animal fights.⁵² This amendment banned the “interstate or foreign transport of animals used in fighting ventures,”⁵³ and was thus passed through Congress's powers under the Commerce Clause of the United States Constitution.⁵⁴

⁴⁵ Animal Welfare Act (AWA) (Laboratory Animal Act of 1966) Pub. L. 89-544, 84 Stat. 1560-1565 (1966).

⁴⁶ Katherine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J.L. Reform 937, 40 (2002).

⁴⁷ U.S. Dep't of Agric. LEGISLATIVE HISTORY OF THE ANIMAL WELFARE ACT, <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction>.

⁴⁸ *Id.*

⁴⁹ AWA Pub. L. 89-544, 84 Stat. 1560-1565 (1966).

⁵⁰ See LEGISLATIVE HISTORY OF THE ANIMAL WELFARE ACT.

⁵¹ Animal Welfare Act of 1970, 91 Pub. L. 579, 84 Stat. 1560 (1970) (“‘animal’ means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used... for research, testing, experimentation, or exhibition purposes”).

⁵² See LEGISLATIVE HISTORY OF THE ANIMAL WELFARE ACT.

⁵³ Animal Welfare Act Amendments of 1976 94 Pub. L. 279, 90 Stat. 417 (1976).

⁵⁴ U.S. CONST. art. I, § 8, cl. 3.

Under the same authority,⁵⁵ the most recent amendment to the AWA, The Animal Fighting Prohibition Act, was passed in May of 2007.⁵⁶ This amendment banned “knowingly selling, buying transporting, or delivering, in interstate or foreign commerce, a knife, a gaffe, or any other sharp instrument for attachment to the leg of a bird for use in an animal fighting venture.”⁵⁷

As demonstrated above, AWA amendments are typically predicated upon public outcry in response to media coverage of a particular practice of animal abuse. Yet, despite America’s horrified response to video footage of a Californian meatpacking company dragging, by machine, a non-ambulatory cow to slaughter,⁵⁸ the AWA has yet to incorporate livestock animals. In fact, all farm animals raised for food, including pigs, have been explicitly exempt from the AWA.⁵⁹

Through the AWA’s exemption of farm animals, 98% of American animals are rendered unprotected by the statute.⁶⁰ Attempts to protect farm animals under the AWA have been made, but unfortunately they have had limited impact.

For example, in February of 2015, a group of legislators proposed the Animal Welfare in Agricultural Research Endeavors Act,⁶¹ which aimed to remove the AWA’s exemption of farm animals in laboratory testing. This amendment was prompted by a Times’ investigation of

⁵⁵ Id.

⁵⁶ See LEGISLATIVE HISTORY OF THE ANIMAL WELFARE ACT.

⁵⁷ Animal Fighting Prohibition Enforcement Act of 2007, 110 Pub. L. 22, 121 Stat. 88 (2007).

⁵⁸ Andrew Martin, Largest Recall of Ground Beef is Ordered, N.Y. TIMES: BUSINESS DAY (Feb. 18, 2008) (recall at Westland/Hallmark Meat Company upon public uproar in response to Humane Society’s distribution of undercover video depicting “workers kicking sick cows and use forklifts to force them to walk” to slaughter).

⁵⁹ AWA § (g). The term “animal” ... excludes horses not used for research purposes *and other farm animals, such as, but not limited to livestock or poultry*, used or intended for use as food or fiber, or livestock or poultry used or intended for use for animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. (Emphasis added).

⁶⁰ Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 Hastings L.J. 925 (2018), citing David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*.

⁶¹ Lawmakers Seek Expansion of Animal Welfare Regulations; The Animal Welfare in Agricultural Research Endeavors Act, 114 H.R. 746, as Introduced in the House; Date of Introduction Feb. 5, 2015 (not enacted).

a U.S. Meat Animal Research Center in Nebraska, where it was found that there had been large-scale abuse of farm animals for decades.⁶² As the AWA stands, a laboratory rabbit has the following protections when it comes to testing procedures that could induce pain:

- (i) that a doctor of veterinary medicine is consulted in the planning of such procedures;
- (ii) for the use of tranquilizers, analgesics, and anesthetics;
- (iii) for pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures;
- (iv) against the use of paralytics without anesthesia; and
- (v) that the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time.

AWA 7 U.S.C. 2143(a)(3)(c).

Yet, pigs, cows, and sheep, by their very nature of qualifying as “livestock,” have no such protections. Oregon Democrat Earl Blumenauer, who introduced the bill to the House, said that “when USDA research facilities experiment on farm animals, they should be held to the same standard as federal research facilities conducting lifesaving disease research with the same kind of animals...”⁶³ Unfortunately, the majority of the House felt differently, and the bill failed to pass - without enough votes to even continue to the second committee of Livestock and Foreign Agriculture.⁶⁴ This bill was also blocked at the first committee level when introduced to the Senate.⁶⁵

As of yet, the only federal restrictions on the treatment of farm animals are triggered at discrete points in these animals’ lives - when they are being transported,⁶⁶ and when they are

⁶²Michael Moss, U.S. Research Lab Lets Livestock Suffer in Quest for Profit, N.Y. TIMES (Jan. 19, 2015) (sows’ ovaries and brains routinely operated on, but no regulation to ensure procedures were conducted humanely) (in one incident, euthanasia of piglet pig prior to lung tissue extraction failed, pig thrashed and gagged in response to pain).

⁶³American Veterinary Medical Association (AVMA), Lawmakers Seek Expansion of Animal Welfare Regulations (Mar. 18, 2015) <https://www.avma.org/News/JAVMANews/Pages/150401f.aspx>.

⁶⁴Lawmakers Seek Expansion of Animal Welfare Regulations; The Animal Welfare in Agricultural Research Endeavors Act, 114 H.R. 746, as Introduced in the House; Date of Introduction Feb. 5, 2015.

⁶⁵Animal Welfare in Agricultural Research Endeavors Act, 114. S. 388 (2015).

⁶⁶Livestock Transportation Act, 59 Pub. L. 340, 34 Stat. 607, 59 Cong. Ch. 3594 (1906), but see

being slaughtered.⁶⁷ Nothing in the AWA regulates the treatment of these animals while housed on factory farms, which is how they subsist for the vast majority of their lives. If America is not prepared to expand the AWA to livestock even in the realm of laboratory testing, it becomes doubtful that any AWA amendment erasing the exemption of protection of livestock animals in factory farms would be successful.

C. Confinement Facilities Harm Public Health and the Environment, too.

Although the horrors of abuse on factory farms are largely shielded from the public eye,⁶⁸ the wide-scale confinement of sows to gestation crates has detrimental effects on public health and the environment.

When confined to such small spaces, the unsanitary living conditions subject the sow to a variety of chronic diseases.⁶⁹ To ward off such infections, sows are administered a large amount of antibiotics.⁷⁰ These antibiotics are not just administered when an animal is diagnosed with a disease, but are given preemptively, to prevent disease altogether. This has led to the mass consumption of antibiotics by animals on factory farms. In fact, livestock animals ingest 80% more antibiotics than human beings,⁷¹ giving the pharmaceutical industry an economic interest in factory farms continuing to engage in this practice.

⁶⁷ Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 (2006), but see Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before the H. Oversight and Gov't Reform Comm., March 4, 2010 (testimony of Stan Painter, Chairman, National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO), available at <https://www.govinfo.gov/content/pkg/CHRG-111hhrg65127/html/CHRG-111hhrg65127.htm>.

⁶⁸ *What is Ag-Gag Legislation?*, ASPCA (last accessed Apr. 8, 2018), <https://www.asPCA.org/animal-protection/public-policy/what-ag-gag-legislation> (ag-gag laws are bills designed to silence whistleblowers revealing animal abuses on factory farms) (ag-gag legislation has been introduced in more than half of state legislatures in U.S.).

⁶⁹ Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming is Harming our Health, the Environment, and the Economy*, 4 Ky. J. Equine Agric. & Nat. Resources L. 31 (2012).

⁷⁰ Id.

⁷¹ Id.; see also JONATHAN SAFRAN FOER, EATING ANIMALS, 140 (2009) (in the U.S., three million lbs. of antibiotics are given to humans each year, while 17.8 million lbs. are fed to livestock).

In turn, human consumption of meat coming from animals who have ingested these antibiotics are making consumers resistant to antibiotics that could protect them when they become sick. At least 23,000 Americans die each year as a result of these infections,⁷² costing the United States over twenty billion dollars per year.⁷³

In addition, emissions from such confinement facilities impair the health of those who live nearby,⁷⁴ particularly affecting “the elderly, those with compromised respiratory systems or chronic conditions that limit their mobility, and children⁷⁵.”⁷⁶ Pollution emanating from these factories also have consequences for people who do *not* live nearby through the contamination of water with “harmful levels of nutrients and toxins, as well as bacteria, fungi, and viruses.”⁷⁷

The contamination of the water supply⁷⁸ has catastrophic effects on the environment, too. Pigs produce four times the amount of waste as humans,⁷⁹ and a substantial portion of that manure ends up in our water,⁸⁰ with “local studies finding that it contributes more than half of

⁷²*Drug-Resistant Bacteria: On the Edge of a Crisis*, NIH MEDLINE PLUS, 2018, at 8, available at <https://medlineplus.gov/magazine/issues/winter18/articles/winter18pg8-11.html>.

⁷³See *Cheap Meat* at 45, citing Alliance for the Prudent Use of Antibiotics, *The Cost of Antibiotic Resistance to U.S. Families and the Health Care System* (Sept. 2010).

⁷⁴This affects not just their health, but the value of their homes. See John A. Kilpatrick, *Animal Operations and Residential Property Values*, THE APPRAISAL JOURNAL, 2015, at 44 (1996 study finding that homes within 0.5 mile of factory farm decrease in value by 40%, homes within one mile decrease in value by 30%, homes within 1.5 miles decrease by 20%, and homes within two miles decrease by 10%).

⁷⁵EATING ANIMALS, 195 (2009) (children raised near factory farms twice as likely to develop asthma).

⁷⁶PEW COMMISSION ON INDUSTRIAL FARM ANIMAL PRODUCTION, *Putting Meat on the Table: Industrial Farm Animal Production in America* (last accessed Apr. 8, 2019), available at http://www.pewtrusts.org/~media/assets/2008/pcfifap_exec-summary.pdf.

⁷⁷*Id.*

⁷⁸“The EPA is largely responsible for the regulation and monitoring of waste and runoff from factory farms, however, the federal Clean Water Act of 1977, which was designed to regulate runoff and protect the nation’s waterways, has provided a virtual safe haven from enforcement. Rather than the federal government issuing and monitoring permits to approximately two million farms, the role of issuing permits ... has fallen on the states.” Unfortunately, states have ... chosen not to regulate environmental hazards of large-scale animal operations, favoring instead the revenue that factory farms generate.” Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming is Harming our Health, the Environment, and the Economy*, 4 Ky. J. Equine Agric. & Nat. Resources L. 31 (2012).

⁷⁹John D. Burns, *The Eight Million Little Pigs – Cautionary Tale: Statutory and Regulatory Responses to Corporate Hog Farming*, 31 Wake Forest L. Rev. 851, 52 (1996).

⁸⁰*Id.* at 858-59.

the pollutants that enter the nation's rivers and lakes.”⁸¹ For example, in 1995, 25 million gallons of hog manure spilled in North Carolina, killing 10 million fish, and prompting the closure of 364,000 acres of wetlands to shell fishing.⁸²

Water contamination is not the only environmental concern that stems from sow confinement. Pigs release large amounts of methane during digestion, as does their manure when it decomposes.⁸³ Between 1990 and 2006, methane emissions from pig manure increased by 34%.⁸⁴ According to the EPA, this increase is a “result of the shift toward confining pigs... in larger facilities using... manure lagoons.”⁸⁵ Studies indicate that emissions from factory farms account for roughly the same amount of anthropogenic greenhouse gas emissions as cars, trucks, trains, boats and airplanes combined.⁸⁶

Because factory farms and the widespread use of gestation crates causes such harm to public health and the environment, stemming the practice must be a priority, regardless of whether one values animal welfare.

D. The meat industry and its lobbyists create legislative obstacles that are difficult to circumvent.

Although antibiotic-fed livestock causes great harm to human health, legislation has not been passed to prohibit the practice. The reason a total ban on nontherapeutic use of

⁸¹ *Cheap Meat* at 40, citing Id. at 860.

⁸² Ted Williams, Assembly Line Swine, AUDOBON, Mar.-Apr. 1998, at 28.

⁸³ See THE HUMANE SOCIETY OF THE UNITED STATES, *Greenhouse Gas Emissions from Animal Agriculture* (last accessed Apr. 8, 2019), available at <https://www.humanesociety.org/sites/default/files/archive/assets/pdfs/farm/hsus-fact-sheet-greenhouse-gas-emissions-from-animal-agriculture.pdf>.

⁸⁴ Id.

⁸⁵ EATING ANIMALS, 177, 178 (2009) (these toxic lagoons cover as much as 120,000 square feet and are sometimes 30 feet deep) (“a worker in Michigan... was overcome by the smell and fell in. His 15-year-old nephew dived in to save him but was overcome, the worker’s cousin went in to save the teenager but was overcome, the worker’s older brother dived in to save them but was overcome, and the worker’s father dived in. They all died in pig shit.”)

⁸⁶ *Animal Agriculture’s Impact on Climate Change*, CLIMATE NEXUS, <https://climatenexus.org/climate-issues/food/animal-agricultures-impact-on-climate-change/> (last accessed Apr. 8, 2019).

antibiotics has yet to pass is because the factory farm industry and the pharmaceutical industry “currently [have] more power than public-health professionals.”⁸⁷

Furthermore, America’s current federal nutritional guidelines come from the same government whose goal is to support big industry and in turn, factory farms: the USDA.⁸⁸ The two main responsibilities of the USDA are to create guidelines that serve public health and promote big industry.⁸⁹ This conflict of interest puts the USDA in an untenable position; it can either set up factory farms for economic failure or encourage American citizens to poison their bodies with unnatural amounts of meat, growth hormones, and antibiotics. The USDA has chosen the latter.

Another example is the National School Lunch Program, which has spent more than “half a billion of our tax dollars ... [on] dairy, beef, egg and poultry industries to provide animal products to children despite the fact that nutritional data would suggest we reduce these foods in our diets.”⁹⁰

Meat lobbyists target a small number of lawmakers who have direct influence over the meat industry.⁹¹ Over the past fifty years, the meat industry has obtained powerful allies at the United States Department of Agriculture (“USDA”).⁹²

Michael Taylor, former head of the Food Safety and Inspection Service (“FSIS”) has said that his experiences have taught him USDA views the meat industry as the “customer rather

⁸⁷JONATHAN SAFRAN FOER, EATING ANIMALS, 141 (2009).

⁸⁸JONATHAN SAFRAN FOER, EATING ANIMALS, 146 (2009).

⁸⁹Id.

⁹⁰EATING ANIMALS at 146.

⁹¹Steve Johnson, Modern Meat. The Politics of Meat, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/> (last accessed Apr. 8, 2019).

⁹²Id.

than the consumer” and was more concerned with expedient, cost-effective inspection than to safeguard public health.⁹³

The formidable power of meat lobbyists can be demonstrated through the National Pork Producers Council, a pork lobbying body whose mission is to “ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets.”⁹⁴ Yet despite this mission, Neil Dierks, CEO of the National Pork Producers Council testified to Congress that “pork producers, not animal rights activists, lawmakers or regulators” should be the ones to decide which methods are “best” for their pigs and for producing safe food.⁹⁵ This statement loses credibility once it is recognized that pork producers are the ones whose profit margins depend on their ability to confine their pigs to small cages with minimal oversight. The National Pork Producers Council has two offices based in Des Moines, Iowa and Washington, D.C.⁹⁶

The North American Meat Institute (NAMI) is another pork lobbying firm, whose mission is to support the meat and poultry industry.⁹⁷ NAMI has complained that consumers are being *mised* by animal rights activists who “are not simply encouraging consumers to reduce meat consumption but are also opposing consumers’ right to eat meat cheese and dairy, all as part of the ‘liberal vegan agenda.’”⁹⁸ NAMI is also headquartered in Washington, D.C.⁹⁹ The American Farm Bureau Federation, another lobbying firm which works to “enhance and

⁹³ Id.

⁹⁴ National Pork Producers Council: About Us. <http://nppc.org/about-us/> (last accessed Apr. 8, 2019).

⁹⁵ *Legislation to Stop States from Dictating Production Practices in Other States*, NATIONAL HOG FARMER (Jul. 25, 2017) Quoting his congressional testimony on July 25, 2017.

⁹⁶ See National Pork Producers Council.

⁹⁷ One Unified Voice for Meat and Poultry Companies, Large & Small, NORTH AMERICAN MEAT INSTITUTE, <https://www.meatinstitute.org/index.php?ht=d/sp/i/204/pid/204> (last accessed Apr. 8, 2019).

⁹⁸ Ted Genoways, Close to the Bone: The Fight over Transparency in the Meat Industry, N.Y. TIMES (Oct. 5, 2016), <https://www.nytimes.com/interactive/2016/10/09/magazine/meat-industry-transparency-fight.html>.

⁹⁹ See One Unified Voice.

strengthen the lives of rural Americans and to build strong, prosperous, agricultural communities”¹⁰⁰ is headquartered in D.C. as well.¹⁰¹

The omnipotent presence of these pork lobbying firms in Washington is no coincidence. Lobbyists base themselves in the nation’s capital to influence Congress, and block any federal legislation that threatens the economic prosperity of meat producers who engage in the practice of large-scale factory farming. The failure of the AWA to protect livestock, and the ineffectiveness of the CWA to curb pollution from factory farms, can be attributed to the influence of meat lobbyists in D.C.

III. ANALYSIS.

A. Because the meat industry is so powerful at the federal and state level, legislation must be enacted municipally to combat the problem.

Because federal statutes are useless in stemming the practice of confining pregnant pigs to gestation crates, an alternative route must be taken to accomplish this goal. In addition, any legislative solution must circumvent the political influence of pork lobbyists in Washington, D.C. and state-level government. This is because lobbyists would make it their mission to block any piece of legislation with the purpose or effect of stemming the practice of confining sows to small crates. Because of these hindrances, the only chance of success lies at the municipal level.

However, passing law locally will do little to curb the practice if all the legislation does is prohibit the use of gestation crates from within. For a law combating gestation crates to be effective at the municipal level, it needs to regulate not just the practice of gestation crates, but the *selling* of pork that comes from factories that uses gestation crates, too. This can be accomplished by levying a tax on pork that comes from such factories.

¹⁰⁰ AMERICAN FARM BUREAU FEDERATION, OVERVIEW, <https://www.fb.org/about/overview>.

¹⁰¹ Id.

B. The Sweetened Beverage Tax of Seattle, Washington, provides a good model.

The Sweetened Beverage Tax (“SBT”), which took effect in January of 2018 in King County of Seattle, Washington, provides a good model. The SBT imposed a tax on all sweetened beverages¹⁰² in Seattle at 1.75 cents per ounce¹⁰³ to protect public health by curbing the amount of soda and other sweetened beverages consumed by Seattle locals, specifically children.¹⁰⁴

Distributors of sweetened beverages are the parties subject to the tax, yet they may apportion all, or a fraction to consumers as they see fit.¹⁰⁵ Furthermore, this tax is not a “use tax or other excise on the sale, consumption, use or gross receipts of sweetened beverages,”¹⁰⁶ but a tax that is levied on the practice of *distributing* sweetened beverages in Seattle.¹⁰⁷

To examine how the SBT influenced adult perceptions and attitudes regarding the consumption of soda, researchers used adult surveys of norms and attitudes.¹⁰⁸ Prior to the implementation of the tax, it was anticipated that the SBT would prompt media attention, exposing the general public to the consequences of consuming sweetened beverages to a person’s health.¹⁰⁹ To determine whether the tax had this effect, researchers conducted surveys in three different languages via phone.¹¹⁰

¹⁰² Ordinance 125324. Seattle Municipal Code Section 5.53.020 (“sweetened beverage includes all drinks and beverages commonly referred to as soda, pop, cola, soft drinks, energy drinks, sweetened ice teas and coffees, and other products with added caloric sweeteners...”)

¹⁰³ SEATTLE GOV’T: BUSINESS LICENSES AND TAXES, *Sweetened Beverage Tax*, <http://www.seattle.gov/business-licenses-and-taxes/business-license-taxes/other-seattle-taxes/sweetened-beverage-tax> (last accessed Apr. 8, 2019).

¹⁰⁴ Annie Bradshaw, The Seattle Sugar-Sweetened Beverage Tax: A Case Study in Policy, http://nutr.uw.edu/wordpress/wp-content/uploads/2018/08/Bradshaw_Poster.pdf (tax supported by Childhood Obesity Prevention Coalition and Seattle Healthy Kids Coalition).

¹⁰⁵ <http://www.seattle.gov/Documents/Departments/FAS/BusinessLicenseTax/SBT-distributor-FAQ.pdf>.

¹⁰⁶ SEATTLE GOV’T, *Sweetened Beverage Tax: A Quick Guide for Distributors*, <http://www.seattle.gov/Documents/Departments/FAS/BusinessLicenseTax/SBT-distributor-FAQ.pdf>.

¹⁰⁷ See *A Quick Guide for Distributors*.

¹⁰⁸ SEATTLE GOV’T, *The Evaluation of Seattle’s Sweetened Beverage Tax*, (Aug. 2018), <http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/SBTBaselineReport.pdf>.

¹⁰⁹ Id.

¹¹⁰ Id.

These surveys found that most Seattle participants supported the SBT and “believed the tax [would] help improve [the] health and wellbeing of children,” as well as public health in general.¹¹¹ In addition, the majority of Seattle reported they had no intent of traveling outside of the city to purchase cheaper sweetened beverages.¹¹²

However, support for the tax was highest among wealthy participants, and lowest among poor participants, particularly among Black people.^{113 114}

Thus far, the SBT can largely be considered a success. Survey data has demonstrated that soda consumption in Seattle is lower than comparison cities, and well below the national average.¹¹⁵

In addition, the tax generated more revenue for the city than was expected.¹¹⁶ On Friday, September 7, 2018, members of the City Council met with the Community Board of the SBT to discuss what to do with the extra money. Christina Wong, Co-Chair of the Community Advisory Board said that the Board has objectives to “help improve health outcomes for people through education about sugary beverages [and] provide more equitable investments in programs and services that will help reduce food insecurity.”¹¹⁷

The success of the SBT makes Seattle appear to be a viable target for the implementation of a tax on factory-farmed pork. Not only is the state of Washington one of 26

¹¹¹Id.

¹¹²Id.

¹¹³Id.

¹¹⁴Concerns about the disproportionate effect a tax on factory-farmed pork may have on low-income residents will be addressed below.

¹¹⁵Id.

¹¹⁶Id. (the city had anticipated an annual revenue of \$14.8 million, but just six months in, the tax generated more than \$10 million).

¹¹⁷Nick Turner, *Seattle’s Sweetened Beverage Tax Producing Healthier than Expected Returns*, CAPITOL HILL SEATTLE BLOG (Sep. 9, 2018, 7:03 AM), <http://www.capitolhillseattle.com/2018/09/seattles-sweetened-beverage-tax-producing-healthier-than-expected-returns/>.

U.S. states that offers a direct ballot initiative,¹¹⁸ which is how the SBT was passed, but it is also a self-executing home-rule state,¹¹⁹ meaning it delegates power “from the state to its sub-units of governments, including counties, municipalities, [and] towns.”¹²⁰ Furthermore, it is likely that King County residents would be amenable to such legislation, with Washington ranking in the “top-tier” of the Animal Legal Defense Fund’s (“ALDF”) 2018 rankings of U.S. animal protection laws by state.¹²¹

Unfortunately, when soda and energy drink lobbyists caught word of the SBT, they took swift action. In response to the tax, the Coca-Cola Company, PepsiCo, Inc., Keurig-Dr. Pepper, Red Bull North America, and the Washington Food Industry contributed more than 20 million dollars to a ballot initiative entitled “Yes! To Affordable Groceries,” otherwise known as Initiative 1634 (“1634”).¹²² The purpose of 1634 was, on the surface, to block local governments from levying a “new tax, fee, or other assessment” on groceries¹²³ after January 15, 2018.¹²⁴ However, the fact that 1634’s five aforementioned donors contributed to 98.57% of the funding¹²⁵ illuminates that its true purpose was to block other Washington countries from following Seattle’s lead, and enacting legislation that may similarly tax sweetened beverages.

¹¹⁸ *States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum (last accessed Apr. 8, 2019).

¹¹⁹ Jon D. Russel & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, ALEC (Jan. 2016) <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

¹²⁰ *Cities 101 – Delegation of Power*, NATIONAL LEAGUE OF CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-delegation-of-power>.

¹²¹ *2018 U.S. Animal Protection Laws State Rankings*, ANIMAL LEGAL DEFENSE FUND, <https://aldf.org/project/2018-us-state-rankings/> (last accessed Apr. 8, 2019).

¹²² *Washington Initiative 1634, Prohibit Local Taxes on Groceries Measure*, BALLOTPEDIA (2018), [https://ballotpedia.org/Washington_Initiative_1634_Prohibit_Local_Taxes_on_Groceries_Measure_\(2018\)](https://ballotpedia.org/Washington_Initiative_1634_Prohibit_Local_Taxes_on_Groceries_Measure_(2018)) (last accessed Apr. 8, 2019)

¹²³ *Washington Initiative 1634, Prohibit Local Taxes on Groceries Measure* (“groceries include but are not limited to meat, produce, grains, dairy, seasonings, and condiments”)

¹²⁴ *Washington Initiative 1634* (this initiative did not have an effect on the SBT, which was implemented on January 1, 2018).

¹²⁵ *Id.*

Because 1634 passed on November 6, 2018,¹²⁶ 11 months after the January 15 cut off, King County is unable to levy a tax on factory-farmed pork.

C. Denver City County of Colorado will Probably Be Successful in Implementing a Tax on Factory-Farmed Pork.

The county of Denver City of Colorado, on the other hand, is a viable target municipality to enact such an initiative. This is because Colorado is also a self-executing home-rule state,¹²⁷ and one of 26 U.S. states that provides for a direct ballot initiative.¹²⁸

Furthermore, because Colorado ranks even higher than Washington¹²⁹ on ALDF's 2018 ranking of U.S. animal protection laws by state, Denver residents are likely to vote "yes" on an initiative that combats the mistreatment of animals. Colorado's stance on the unacceptability of gestation crates is further supported by its *own* ban on the use of such crates. Article 50.5 of title 35, Colorado Revised Statutes ("Confinement of Calves Raised for Veal and Pregnant Sows") stipulates that a "gestating sow shall be kept in a manner that allows [her] to stand up, lie down, and turn around without touching the sides of its enclosure."¹³⁰ Anyone who violates this statute is subject to a minimum of "three months of imprisonment, or a \$250 fine, or both" and a maximum of "12 months of imprisonment, or a \$1,000 fine, or both."¹³¹

Finally, it is likely that the tax initiative will have the support of Colorado's Governor, Jared Polis, who is endorsed by the Humane Society Legislative Fund, and is a member of the Congressional Animal Protection Caucus.¹³²

¹²⁶ *Id.*

¹²⁷ Jon D. Russel & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, ALEC (Jan. 2016) <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

¹²⁸ *States with Initiative or Referendum*.

¹²⁹ *2018 U.S. Animal Protection Laws State Rankings*.

¹³⁰ Colo. Rev. Stat. § 35-50.2-102(1)(b) (2018).

¹³¹ Colo. Rev. Stat. § 18-1.3-501 (2004).

¹³² *Humane Society Legislative Fund Endorses Rep. Jared Polis in Primary for Governor of Colorado*, HUMANE SOCIETY OF THE UNITED STATES (June 1, 2018), <http://www.hslf.org/news/press-releases/hslf-endorses-jared-polis-co-gov-primary.html>.

Although Colorado does have a *sales* tax exemption for groceries “intended for human consumption,”¹³³ it does not prohibit a tax on *distribution* of certain types of food. Just like Seattle’s SBT, the tax would not be a “use tax or other excise on the sale, consumption, use or gross receipts”¹³⁴ imposed on factory-farmed pork, but would rather be a tax on the practice of *distributing* factory-farmed pork in Denver.

D. Challenges to the Dormant Commerce Clause Can Be Overcome.

The most likely challenge pork lobbyists will raise against this tax is the dormant Commerce Clause. The dormant Commerce Clause is derived from the Commerce Clause in the Constitution,¹³⁵ and infers a prohibition of state legislation that improperly burdens or discriminates against interstate commerce. However, the Supreme Court has held in Maine v. Taylor that “states retain authority to regulate matters of legitimate local concern, even though interstate commerce may be affected.”¹³⁶

The pork industry will argue that, despite this, a tax on factory-farmed pork has the effect of directly regulating commerce occurring wholly outside the state’s borders because the use of gestation crates in Colorado is already prohibited. Indeed, according to the Court in Brown-Forman Distillers Corp. v. New York State Liquor Authority,¹³⁷ a municipal tax that has the effect of directly regulating commerce occurring wholly outside a state’s borders is unconstitutional. However, this argument will fall flat because although the tax may have an *effect* on commerce occurring outside the state’s borders, the only commerce the tax would directly regulate is the distribution of factory-farmed pork in the city of Denver.

¹³³ Colo. Rev. Stat. § 39-26-707 (2018).

¹³⁴ SEATTLE GOV’T, *Sweetened Beverage Tax: A Quick Guide for Distributors*, <http://www.seattle.gov/Documents/Departments/FAS/BusinessLicenseTax/SBT-distributor-FAQ.pdf>.

¹³⁵ U.S. CONST. art. I, § 8, cl. 3.

¹³⁶ See Maine v. Taylor, 477 U.S. 131, 138 (1986).

¹³⁷ See Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986).

Furthermore, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,¹³⁸ the Court found that a state has a “legitimate government interest in... preventing animal cruelty.” This principle comports with the principle stated above in Maine, holding that states retain authority to regulate matters of legitimate local concern, even though interstate commerce may be affected.¹³⁹ Because of these holdings, the tax on the distribution of factory-farmed pork in Denver, Colorado, which aims to stem the cruel practice of confining sows to gestation crates, should be considered a legitimate local concern not constitutionally barred by the Commerce Clause.

In 2007, the Illinois Restaurant Association (“Plaintiff”) sued the City of Chicago after Chicago passed an ordinance banning the sale of foie gras¹⁴⁰ within its borders.¹⁴¹ The plaintiff challenged that the ordinance exceeded Chicago’s home rule powers, and that the ordinance violated the dormant Commerce Clause of the U.S. Constitution.¹⁴²

The plaintiff also alleged that the ordinance was not within the home rule powers of Chicago because it was “not aimed at a legitimate local problem” and it had “an impermissible extraterritorial effect since [the ban was] meant to affect the production process of foie gras, which only occurs outside Chicago.”¹⁴³ However, the court held that because a home rule unit may regulate the protection of “public health, safety, and morals,”¹⁴⁴ and a unit has “broad discretion to determine... what the public interest and welfare require,”¹⁴⁵ the ordinance banning

¹³⁸Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

¹³⁹See Maine v. Taylor at 138.

¹⁴⁰Foie gras is “fatty liver” from a goose who has been “kept in solitude and darkness, and forced to eat until they were led to an unnatural state of fatness.” Illinois Restaurant Ass’n v. City of Chicago, 492 F.Supp.2d 891 (2007), citing *Pshysiologie du gout* (The Physiology of Taste), sec. III (1825).

¹⁴¹Illinois Restaurant Ass’n v. City of Chicago, 492 F.Supp.2d 891 (2007).

¹⁴²See Illinois Restaurant Ass’n v. City of Chicago, 492 F.Supp.2d 891, 892 (2007).

¹⁴³Illinois Restaurant Ass’n at 894.

¹⁴⁴Id., citing Ill. Const. Art. VII § 6(a).

¹⁴⁵Illinois Restaurant Ass’n at 895, citing Chicago Nat’l League Ball Club, Inc. v. Thompson, 108 Ill.2d 357, 364 (Sup. Ct. Ill. 1985).

the sale of foie gras was a valid application of Chicago’s home rule power. Because Article 20, Section 4, Chapter 4 of the Colorado Constitution stipulated that “referendum power shall be guaranteed... [when] such ordinance is necessary for the immediate preservation of the public peace, health, and safety,”¹⁴⁶ and Colorado is also a home-rule unit, a Court will likely find that Denver’s implementation of a tax on the distribution of factory-farmed pork does not exceed its authority.

The plaintiff claimed that the Chicago ordinance violated the dormant Commerce Clause because, although the ordinance was “facially neutral, it was meant to create an economic boycott and thereby negatively affect the foie gras industry.”¹⁴⁷ However, the court found that despite the fact that the ordinance had an “economic effect on out-of-state foie gras production,” it did not violate the Commerce Clause because it did not regulate “foie gras production or pricing.”¹⁴⁸ Because the Illinois court held that an absolute prohibition of the sale of foie gras did not violate the dormant Commerce Clause, it is unlikely that a Colorado court will hold that an ordinance that, albeit taxes factory-farmed pork, still allows the *sale* of it, violates the dormant Commerce Clause.

Unfortunately, the Chicago ban on foie gras was ultimately repealed, and the appeal of this case was rendered moot. However, the opinion of the court provides a helpful model as to how constitutional challenges against a tax on the distribution of factory-farmed pork will be assessed.

E. Lower-income Residents Will Probably Not Push Back Against the Tax.

As demonstrated through the SBT, an ordinance that imposes a tax on groceries can generate discontent among poorer communities, where it may be felt that such taxes hurt them

¹⁴⁶ Colo. Const. art. XX.

¹⁴⁷ Illinois Restaurant Ass’n at 899.

¹⁴⁸ Id.

more than the upper-class.¹⁴⁹ However, the revenue generated through the SBT is being put to use in “programs and services that will help [to] reduce food insecurity.”¹⁵⁰ In effect, the SBT does not just make Seattle healthier, but it also works to sponsor initiatives that feed hungry residents.

A tax on factory-farmed pork has the potential to do the same. Revenue generated from the tax could be distributed to local nonprofits, such as “Impact Locally,” a 501(c)(3) whose mission is to “help individuals and families who are in [financial] need.”¹⁵¹ One of Impact Locally’s programs is called “Sack Lunches,” which distributes lunch food to the homeless downtown.¹⁵² As long as Impact Locally agrees to avoid including factory-farmed meat in the food they distribute, a large proportion of the revenue from the tax could go to funding these meals. In effect, Denver’s tax on factory-farmed pork coming from factories which use gestation crates would not just protect animal welfare, but could sponsor initiatives that feed low-income residents.

Furthermore, survey studies have found that those “experiencing greater financial hardship were significantly more concerned about human use and treatment of animals” than upper-class respondents.¹⁵³ It is surmised that this is because lower income people can more easily empathize with the suffering of farm animals because they suffer, too.¹⁵⁴ Therefore, even if low-income Denver residents feel that the tax disproportionately affects them, they may yet be in favor of the tax, especially if revenue from the tax is redistributed to help them.

¹⁴⁹ *The Evaluation of Seattle’s Sweetened Beverage Tax.*

¹⁵⁰ *Seattle’s Sweetened Beverage Tax Producing Healthier than Expected Returns.*

¹⁵¹ *Mission Statement, IMPACT LOCALLY, <https://www.impactlocally.org/>.*

¹⁵² *Sack Lunches, IMPACT LOCALLY, <https://www.impactlocally.org/sacklunches>.*

¹⁵³ Danielle Deemer, *Why Poor People Care more about Animal Welfare*, THE BLUE REVIEW (Oct. 5, 2015), <https://thebluereview.org/why-poor-people-care-more-about-animal-welfare-than-wealthy-shoppers/>, *citing* 2002 survey of Ohio households conducted by Holli A. Kendall, Linda M. Lobao, and Jeff S. Sharp.

¹⁵⁴ *Id.*, *citing* 2010 study published in *Psychological Science* by Michael W. Kraus.

IV. CONCLUSION

Stemming the practice of confining sows to gestation crates will not cure all suffering pigs endure on factory farms, nor will a local tax on factory-farmed pork eliminate the use of gestation crates on a national scale. However, this tax does have the power to curb the *demand* of pork raised in these factories, and that is better than nothing.

A radical solution like amending the AWA to include farm animals is appealing, but federal law has proven unyielding, and one must be practical in the field of animal law. Precedent has taught animal lawyers and activists that accomplishments in this arena require many small steps, and a municipal tax on factory-farmed pork is a small step that fits the bill.

Hopefully, one day pigs like Rudy will not have to jump off a truck destined for a slaughterhouse to grow up in an environment where he is able to socialize, breathe clean air, and turn around. For now, there is work to be done.

**Finding a Middle Ground: Can We Maximize the Welfare of
Captive Animals Without Abolishing Zoos and Aquariums?**

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Introduction

You walk into an aquarium and are amazed by the visual displays. You first notice the penguin exhibit, which is in the center of the facility and attempts to mimic the penguins' natural environment. There are man-made rocks, glaciers, and a shallow pool. You next spot an interactive exhibit that allows you to point a fish-shaped laser into the water for the penguins to "catch." This is meant to stimulate the penguins and give them an opportunity to "hunt" like they would in the wild. After moving the laser around the tank, a penguin swims over but is relatively unresponsive. It chases the red laser for a few seconds but gives up quickly and swims back to the other penguins. You sense something wrong about this response; the penguin must know that you're toying with it. This scenario embodies the dilemma faced when considering the value of zoos and aquariums. Is it ethical for humans to hold animals captive for educational and entertainment purposes? If so, are there ways to regulate zoo and aquarium facilities to minimize animal suffering? This paper seeks to reconcile the competing interests between the human practice of animal exhibition and its detrimental effects on animal welfare. It recommends several policy improvements to regulate zoo and aquarium institutions with the primary goal of maximizing animal welfare.

Part I of this paper examines the physical and psychological suffering experienced by captive animals and how stronger federal regulations under the Animal Welfare Act could alleviate these negative effects. Part II discusses the balance between community and educational values and how organizational conservation efforts are overstated and relatively ineffective. Part II also recommends that the Endangered Species Act be amended to limit exhibition to certain critically endangered species since these animals require conservation methods only humans can administer. Part III recommends animal sanctuaries as an alternative to traditional zoos and aquariums because they offer educational value and specialized care for living in captivity.

I. Captive Animals are Deprived of the Right to a Higher Quality of Life

A. Proven Mental and Psychological Effects on Animals in Captivity

Zoos and aquariums can be considered prisons for animals because they are taken away from their natural habitats and communities and confined in artificial environments for indefinite periods of time. There are many proven detrimental effects caused by confinement: psychological and physical stress due to physical isolation, restricted living space, and lack of proper stimulation.¹ For example, one study demonstrated that young monkeys separated from their mothers experience long-term brain dysfunction and behavioral abnormalities, including peak cortisol responses to stressors such as capture and restraint.² The young monkeys paced around their cages, sucked their fingers and toes, and grabbed parts of their bodies more often than maternally-reared monkeys.³ Even after up to three years of “normal” social life with other monkeys, the abnormal behavioral patterns induced by maternal separation persisted.⁴ Other psychological side effects such as anxiety and depression were also prominent and long-lasting.⁵

This study provided an understanding about how early adversity can stunt primate brain development, much like humans who experience childhood trauma.⁶ “Zoochosis” refers to these abnormal behaviors found in animals that are removed from their natural habitats.⁷ Zoochosis can include “self-mutilation, vomiting, excessive grooming, coprophagia (consuming excrement), along with anxious ties . . . such as rocking or swaying, excessive[] pacing back and

¹ See generally Xiaoli Feng, et al., *Maternal separation produces lasting changes in cortisol and behavior in rhesus monkeys*, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S.A. Abstract (Aug. 11, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3161556>.

² *Id.*

³ Daily Mail Reporter, *Monkeys separated from their mothers grow up 'suffering from stress, depression and poor social skills'*, DAILYMAIL.COM (Aug. 18, 2011), <https://www.dailymail.co.uk/sciencetech/article-2027485/Monkeys-separated-mothers-grow-suffering-stress-depression-poor-social-skills.html> (citing Feng, *supra* note 1).

⁴ Feng, *supra* note 1, at Discussion.

⁵ Daily Mail Reporter, *supra* note 3.

⁶ Feng, *supra* note 1, at Discussion.

⁷ Ariel Garlow, *Zoochosis and the Many Ways We Have Failed Zoo Animals*, One Green Planet (2014), <https://www.onegreenplanet.org/animalsandnature/zoochosis-and-the-many-ways-we-have-failed-zoo-animals>.

forth, random biting, and twisting or nodding of the neck and head.”⁸ These behaviors have been observed in elephants, tigers, polar bears, zebras, rhinos, and bears, among others.⁹ Zoochosis almost never occurs in the wild and is primarily associated with the diminished quality of life that comes with zoo confinement.¹⁰

B. Unnatural Environments Further Aggravate Zoochosis Symptoms

Many other animals are social creatures that react adversely to physical isolation and limited living space. In the wild, gorillas and elephants live and travel in close-knit groups.¹¹ Elephants and many other animals such as hyenas, polar bears, and wolves are also known to roam far distances in the wild.¹² African elephants roam about seven miles per day; spotted hyenas twenty-four miles.¹³ Wolves travel up to thirty miles a day to hunt and patrol as far as 2,450 square miles.¹⁴ Zoo enclosures are unable to accommodate these natural ranges. It is nearly impossible to replicate an animal’s natural environment considering how much land would be required. For example, polar bear zoo enclosures are one-millionth of the size of the animal’s roam range, while elephant enclosures are 60-100 times smaller than the smallest known range.¹⁵

⁸ *Id.* (citing Last Chance for Animals, Campaigns, Animals in Entertainment, Zoos, <https://www.lcanimal.org/index.php/campaigns/animals-in-entertainment/zoos>).

⁹ Melissa Cronin, *The “Cute” Zoo Animal Behaviors That Are Actually Signs of Zoochosis* (June 23, 2014), <https://www.thedodo.com/the-cute-zoo-animal-behaviors--601643824.html>.

¹⁰ TEMPLE GRANDIN, *ANIMALS MAKE US HUMAN* (2010).

¹¹ Laura Smith, *Zoos Drive Animals Crazy*, SLATE (June 20, 2014), <https://slate.com/technology/2014/06/animal-madness-zoochosis-stereotypic-behavior-and-problems-with-zoos.html> (citing generally LAUREL BRAITMAN, *ANIMAL MADNESS: HOW ANXIOUS DOGS, COMPULSIVE PARROTS, AND ELEPHANTS IN RECOVERY HELP US UNDERSTAND OURSELVES* (2014)).

¹² Barbara Smuts, *Nowhere to Go; Nothing to Do*, Center for Humans & Nature, <https://www.humansandnature.org/nowhere-to-go-nothing-to-do> (citing Chris Carbone, et al., *How far do animals go? Determinants of day ranges in mammals*, 165 *THE AMERICAN NATURALIST* 290–291 (2005), <https://www.jstor.org/stable/10.1086/426790>).

¹³ *Id.*

¹⁴ *Id.* (citing L. David Mech, et al., *Wolves: Behavior, Ecology & Conservation*, UNIVERSITY OF CHICAGO PRESS (2003)).

¹⁵ *Id.* (citing Ross Clubb et al., *A REVIEW OF THE WELFARE OF ZOO ELEPHANTS IN EUROPE: A REPORT COMMISSIONED BY THE RSPCA*, OXFORD: ANIMAL BEHAVIOUR RESEARCH GROUP, DEPARTMENT OF ZOOLOGY, UNIVERSITY OF OXFORD (2002)).

Many animals in captivity become despondent and display uncharacteristic behaviors. For example, in the 1990s, a polar bear in the Central Park Zoo was seen “compulsively swimming figure eights in his pool, sometimes for [twelve] hours a day.”¹⁶ He became known as “the bipolar bear” and was treated with Prozac and behavioral therapy.¹⁷ Other specific observations include: elephants repetitively swaying back and forth, coyotes pacing by their enclosure fence, and lonely orcas bouncing their bodies on pool ledges.¹⁸ To combat these stereotypic behaviors, drug administration is an increasingly common treatment. In 2010, the animal pharmaceutical industry brought in almost six billion dollars in sales in the United States.¹⁹ Instead of addressing the underlying cause of zoochosis, medication is used to placate animals and continue to use them for entertainment purposes.

Environmental enrichment is used to provide animals with stimulation and variation in their daily lives. It is the process of manipulating the animal’s environment to increase its physical and psychological well-being.²⁰ Some examples include giving animals “distracting toys or puzzles to play with, food that takes longer to eat, or more complex additions to their enclosures.”²¹ Environmental enrichment reduces zoochosis symptoms around 53 percent of the time.²² These methods, however, are not required by law. As discussed below, regulations aimed at primates require environmental enrichment,²³ but those requirements are not mandatory for other animal species. Although not entirely effective, environmental enrichment is one tool that

¹⁶Smith, *supra* note 11.

¹⁷*Id.*

¹⁸PETA, 9 Animals Driven Insane, <https://www.peta.org/features/animals-driven-insane-zoochosis>.

¹⁹Animal Health Institute, About Animal Medicines, Industry Statistics, <https://www.ahi.org/about-animal-medicines/industry-statistics>.

²⁰THE OHIO STATE UNIVERSITY, COLLEGE OF VETERINARY MEDICINE, *What is environmental enrichment?*, https://indoorpet.osu.edu/dogs/environmental_enrichment_dogs.

²¹Smith, *supra* note 11 (citing Ronald R. Swaisgood, et al., *Scientific approaches to enrichment and stereotypies in zoo animals: what's been done and where should we go next?*, 24 ZOO BIOLOGY 499–518 (July 22, 2015), <https://doi.org/10.1002/zoo.20066>).

²²*Id.*

²³*See* 9 C.F.R. § 3.81 (2019).

can provide an understanding about why animals experience zoonosis and how facilities can improve their practices to solve this prevalent problem.

II. The Animal Welfare Act Must Be Amended to Require Higher Living Standards on a Species-by-Species Basis

A. The Animal Welfare Act Regulates Certain Exhibition Animals

In 1966, the United States passed the Animal Welfare Act (AWA) to protect the welfare of animals used in research. In 1970, the Act was amended to insure humane care and treatment of animals in exhibition.²⁴ The AWA only protects certain warm-blooded animals and excludes reptiles, fish, and other cold-blooded animals.²⁵ In 2002, Congress amended the AWA to protect birds used in exhibition.²⁶ Under the AWA, facility owners must provide animals with “adequate housing, sanitation, nutrition, water and veterinary care, and they must protect their animals from extreme weather and temperatures.”²⁷ These requirements include the minimum standards necessary to ensure that animals are not neglected, but do not provide for animal welfare.

The Animal and Plant Health Inspection Service (APHIS), an agency within the United States Department of Agriculture (USDA), is responsible for drafting and implementing regulations to administer the AWA.²⁸ These regulations set standards for enclosure sizes, animal separation, and basic feeding, watering, and sanitation.²⁹ Enclosures must provide “sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.”³⁰ These minimum standards do not require enclosures that mimic or closely resemble the animal’s natural habitat. They require only that the animal not be confined

²⁴ 7 U.S.C. § 2131(1) (2012).

²⁵ See 7 U.S.C. § 2132.

²⁶ Benjamin Adams et al., *Legislative History of the Animal Welfare Act: Introduction*, Animal Welfare Information Center, <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction>.

²⁷ U.S. DEPT. OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, Animal Welfare Act (last updated Jan. 30, 2019), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA.

²⁸ *Id.*

²⁹ 9 C.F.R. § 3 (2019). The USDA prescribes minimum standards for zoo animals (subpart F), primates (subpart D), and marine animals (subpart E).

³⁰ 9 C.F.R. § 3.128.

in a cage that prevents it from moving freely. Indoor and outdoor housing facilities must also be “structurally sound and shall be maintained in good repair” to protect the animals from injury and to keep them contained.³¹ This regulation primarily protects humans over animals; the structural integrity of an enclosure prevents animals from escaping and attacking zoo staff and visitors.

The APHIS requires higher living standards for non-human primates in captivity. This is largely due to an evolution in thought regarding the treatment of primates in research facilities.³² Lab facilities are often overseen by Animal Care Committees, so scientists must justify their proposals to the Committee before starting an experiment.³³ Scientists are thus less able to conduct their experiments behind closed doors and may be more accountable and transparent about their treatment of primates. The government has been more willing to adopt regulations to protect primates because of the general awareness of issues associated with primate housing before and after experiments.³⁴

With regard to primates in exhibition, AWA regulations mandate environmental enhancement to promote the primates’ psychological well-being.³⁵ This requirement is met by drafting a plan that includes proper housing needs and social activities.³⁶ The plan must be “in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.”³⁷ It must address the social group needs of nonhuman primates and provide noninjurious species-typical activities including: perches, swings, mirrors, and other increased cage complexities; objects to

³¹9 C.F.R. § 3.125.

³²David Favre, *Overview of U.S. Animal Welfare Act*, Animal Legal & Historical Center (2002), <https://www.animallaw.info/article/overview-us-animal-welfare-act>.

³³*Id.*

³⁴*Id.*

³⁵9 C.F.R. § 3.81.

³⁶*Id.*

³⁷*Id.*

manipulate; varied food items; foraging or task-oriented feeding methods; and interaction with the care giver or another familiar and knowledgeable person consistent with personnel safety precautions.³⁸ These species-specific activity requirements give primates a higher quality of life, although other species do not receive these same types of protections.

Compared to primate regulations, the general exhibition regulations do not address the unique physical and psychological needs of each species. Further, none of these regulations address the necessity for larger enclosures more akin to each animal's natural environment. The federal government should thus use the primate regulations as a basic model in drafting species-specific regulations. As discussed in detail below, these regulations should also account for each species' unique housing needs, including larger roaming spaces and variety in their enclosures. Although the primate regulations could be improved to require larger enclosures, they can be used as a basis for determining each animal's environmental enrichments needs.

B. The Marine Mammal Protection Act Provides No Protection to Marine Animals in Zoos and Aquariums

The Marine Mammal Protection Act (MMPA) protects all marine mammals, including cetaceans (whales, dolphins, and porpoises), pinnipeds (seals and sea lions, sirenians (manatees and dugongs), sea otters, and polar bears within the waters of the United States.³⁹ While the MMPA makes it illegal to “take” marine mammals from the wild, it does not provide standards for marine animal treatment in zoos and aquariums.⁴⁰ The AWA thus remains the only federal law in the United States that provides minimum acceptable standards for the treatment of animals in exhibition.

³⁸ 9 C.F.R. §§ 3.81(a), (b).

³⁹ 16 U.S.C. § 1362(6) (2012).

⁴⁰ 16 U.S.C. § 1371.

The AWA regulates “marine mammals,” which includes sea otters, polar bears, manatees, and dolphins, among others.⁴¹ It mainly prescribes pool surface area requirements that are dependent on the species’ body measurements.⁴² As mentioned previously, the AWA excludes reptiles, fish, and other cold-blooded animals from its definition of “animals.”⁴³ These animals receive no protection and must be regulated under the AWA to ensure uniform welfare standards.

C. Proposed Animal Welfare Act Amendments to Address Captive Animal Welfare

Congress can combat zoochosis by amending the AWA to require innovative enclosures that closely replicate the animal’s wild habitat and provide enriched environments. This would require species-specific regulations much like those that exist for primates. There are several facilities that can be studied to determine what types of enclosures and enrichment activities promote animal well-being. The National Zoological Park in Washington D.C. developed an enclosure that allows orangutans to travel across the zoo on overhead ropes to visit friends and potential mates.⁴⁴ In Europe, rotating exhibits allow animals to visit several areas each day.⁴⁵ Some zoos in the United States have used this rotating concept, allowing animals to rotate in and out of varied habitat spaces at unpredictable times.⁴⁶ The Louisville Zoo provides its gorillas with the choice between “large, naturalistic outdoor habitats or a circular arrangement of indoor rooms.”⁴⁷ The Philadelphia Zoo gives its monkeys and tigers greater freedom of movement with

⁴¹ 16 U.S.C. § 1362(6).

⁴² 9 C.F.R. § 3.104.

⁴³ See 7 U.S.C. § 2132.

⁴⁴ R. Scott Nolen, Veterinary Medical Association, Animal Welfare Forum, *Designing zoo habitats that promote animal-wellbeing* (Nov. 5, 2002), <https://www.avma.org/News/JAVMANews/Pages/021201k.aspx>.

⁴⁵ *Id.*

⁴⁶ The Louisville Zoo, Rotational Exhibits, Rotational Exhibit Strategy, <https://louisvillezoo.org/rotational-exhibits>.

⁴⁷ Nolen, *supra* note 44.

walkways between enclosures.⁴⁸ The Zoo has “hundreds of met[ers] of mesh tubes, which monkeys can walk along and substantial raceways that tigers can track along.”⁴⁹ Additionally, the Philadelphia Zoo allows social species to choose which animals they want to socialize with.⁵⁰ The animals can also rotate between exhibit spaces, allowing them to explore and exercise and not be confined to a single space for their whole lives.⁵¹ Although these innovations do not replicate the animal’s natural environment or home range, they provide a key step towards improved captive animal welfare.

It is also important that academic researchers devote sufficient resources to support animal research. This research would provide expertise for the government to determine the environmental enrichment needs of each animal species. Congress should promote research and development by providing incentives to increase interest in animal welfare research and development. Today, the vast majority of graduate programs in behavior analysis offer degrees primarily for studying the treatment of autism and other human developmental disabilities.⁵² The financial burden of maintaining animal facilities and priority expansion into human cognitive neuroscience have resulted in inactive animal research labs.⁵³ Still, “behavioral research protocols [should] be developed to further the objectives of animal welfare.”⁵⁴ New findings regarding animal welfare would give zoo and aquarium professionals a valuable resource to evolve their facilities and fully understand the detrimental effects of captivity. It would also encourage the development of innovative exhibits and increased living conditions.

⁴⁸Robert John Young, *Zoos of the future break down the enclosure walls*, THE CONVERSATION (May 13, 2014), <https://theconversation.com/zoos-of-the-future-break-down-the-enclosure-walls-26605>.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²Terry L. Maple et al., *Advancing Behavior Analysis in Zoos and Aquariums*, 38 BEHAV. ANAL. 77–91 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4883490>.

⁵³*Id.*

⁵⁴*Id.*

III. Animal Exhibition Provides Societal Value by Promoting Positive Human-Animal Relationships

A. Zoos and Aquariums are Valued for Education and Community Purposes

While captive animals suffer from diminished living conditions, zoos and aquariums also have positive human impacts: they provide venues for children and adults to see and learn about animals; they promote the idea that humans and animals are interconnected; and they generate money for local economies.⁵⁵ There is abundant evidence that “these [informal] settings . . . contribute to people’s knowledge and interest in science.”⁵⁶ In 2008, a National Audience Survey found that the general public places a high value on the role of zoos and aquariums as an educational resource.⁵⁷ Those studied, however, did not think that animal captivity is wrong or that facilities should increase living standards. Only nine percent of the general public adamantly felt that zoos are inhumane and that animal captivity is wrong, while six percent felt this way about aquariums.⁵⁸ Another four to seven percent of the public are sympathetic to these ideas.⁵⁹ While the general public values these facilities as educational tools that can bring families together, most people do not see any issues with animal captivity. Without strong public support, it is less likely that facilities will change their organizational model. The status quo may prevail until captive animal welfare becomes a recognized problem that needs to be addressed by the government.

B. Well-Trained Zoo and Aquarium Caregivers Can Increase Living Conditions

⁵⁵The National Academies of Science, Press Release, *Museums, Zoos, Other Informal Settings Can Boost Science Learning, Says Report, Which Offers Guidance For Improving These Experiences* (Jan. 14, 2009), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12190%20%20>.

⁵⁶*Id.*

⁵⁷John Fraser & Jessica Sickler, *Why Zoos & Aquariums Matter Handbook* 12 (2008), http://www.informalscience.org/sites/default/files/Why_Zoos&Aquariums_Matter_Handbook.pdf.

⁵⁸*Id.* at 13.

⁵⁹*Id.*

The intricate relationship between zookeepers and animals can promote positive human-animal interactions and stewardship. Zoo and aquarium staff must have a positive attitude towards animals in their care and extensive experience and knowledge about the species.⁶⁰ Studies show that animals who are treated by positive and caring zookeepers display behaviors indicative of increased welfare.⁶¹ A positive relationship between animals and their keeper has been shown to reduce animal stress and increase positive behavioral responses in a range of exotic species, including zebras and rhinos.⁶²

Zookeepers should be closely monitored to ensure that they are providing the best care and ensuring that their animals are treated as well as possible. The Association of Zoos and Aquariums (AZA) can provide oversight and training for these caregivers. The AZA is an organization that inspects and certifies facilities and ensures that accredited facilities meet higher standards of animal care than required by law.⁶³ Unfortunately, less than ten percent of the approximately 2,800 animal exhibitors licensed by the USDA are AZA-accredited,⁶⁴ so more facilities would need to become AZA certified to make an impact. Overall, if zookeepers are held accountable, animals will receive the highest quality of care in a more nurturing environment, which will lead to an incremental increase in animal welfare. Further, the staff will be more informed when an animal requires special treatment or exhibits symptoms of zoonosis.

IV. Zoos and Aquarium Institutions Falsely Boast Animal Stewardship Which Can Be Resolved by Amending the Endangered Species Act

A. Conservation Efforts by Zoos and Aquariums are Overstated

⁶⁰Samantha J. Ward & Vicky Melfi, *Keeper-Animal Interactions: Differences between the Behaviour of Zoo Animals Affect Stockmanship*, PLOS ONE (2015), <https://doi.org/10.1371/journal.pone.0140237>.

⁶¹*Id.*

⁶²*Id.*

⁶³Association of Zoos & Aquariums, About AZA Accreditation, <https://www.aza.org/what-is-accreditation>.

⁶⁴*Id.*

Zoo and aquarium administrations have competing priorities: “to entertain; to engage and inspire the public to love the natural world and support conservation; to ensure revenue is created to pay for running costs, reinvestment, and conservation project support; and to provide the animals in their care with a life worth living and ideally a good life.”⁶⁵ These goals are highly differentiated, which can lead to an imbalance in prioritization. For example, because many zoos receive some or most of their funding from visitor fees,⁶⁶ those zoos may focus on updating exhibits and breeding animals. Profit generation can compromise the goal of increased animal welfare practices. Facilities may focus more on keeping their exhibits fresh and exciting, rather than developing better standards for animals already on exhibition.

The conservation of endangered and threatened species is supposedly a driving force for zoos and aquarium institutions.⁶⁷ Zoo breeding programs are designed to protect animals with decimated populations.⁶⁸ However, a study by the AZA revealed that claims that zoo exhibits contribute to conservation “were not substantiated or validated by actual research.”⁶⁹ Among zoos accredited by the AZA, almost half of all reporting organizations spend less than one percent of their revenues on conservation.⁷⁰ Another finding estimated that less than three percent of the budgets of accredited zoos go towards conservation efforts.⁷¹ These statistics are alarming. If zoos and aquariums provide little funding for conservation, then it is highly unlikely that their programs are effective at protecting endangered and threatened species.

⁶⁵ Sarah Wolfensohn et al., *Assessment of Welfare in Zoo Animals: Towards Optimum Quality of Life*, ANIMALS: MDPI (BASEL) (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6071229>.

⁶⁶ Kelli B. Grant, *10 Things Zoos Won't Tell You*, MARKETWATCH (May 31, 2011), <https://www.marketwatch.com/story/10-things-zoos-wont-tell-you-1306528026434>.

⁶⁷ Association of Zoos & Aquariums, Conservation, <https://www.aza.org/conservation>.

⁶⁸ *Id.*

⁶⁹ PETA, *Zoos: An Idea Whose Time Has Come and Gone*, <https://www.peta.org/issues/animals-in-entertainment/zoos>.

⁷⁰ PETA, *Zoos May Actually Hurt Conservation Efforts, Not Help Them*, <https://www.peta.org/features/zoo-conservation-captive-breeding>.

⁷¹ Laura Fravel, *Critics Question Zoos' Commitment to Conservation*, NATIONAL GEOGRAPHIC (Nov. 13, 2003), <https://www.nationalgeographic.com/animals/2003/11/news-zoo-commitment-conservation-critic>.

This data demonstrates that conservation is often exaggerated or over-emphasized. Although many institutions claim that species conservation is a primary goal, most animals in zoos and aquariums are not endangered.⁷² Only eighteen percent of land animals in zoo collections are threatened or endangered.⁷³ While there are an estimated 4,000 species in captivity, 691 of those species maintain that critical status.⁷⁴ The vast majority of zoo animals are “generic” animals and have little or no value in conservation terms.⁷⁵ Based on these observations, it is necessary to evaluate whether zoos and aquariums are taking adequate steps to protect endangered species.

It is more plausible that zoos and aquariums use their breeding programs to create the next generation of captive animals. In some instances, facilities move individual animals to other zoos and match them with mates. “Zoo breeding programs, which are overseen by the [AZA’s] Animal Exchange Database, move animals around the country when they identify a genetically suitable mate.”⁷⁶ For example, a gorilla named Tom was moved hundreds of miles away because he was a “good genetic match for another zoo’s gorilla.”⁷⁷ At the new facility, he was abused by the other gorillas and lost a third of his body weight.⁷⁸ When Tom’s old zookeepers visited him, he ran toward them sobbing and crying, following them until visitors complained that the zookeepers were “hogging the gorilla.”⁷⁹ The Milwaukee Zoo, as another example, boasts that it

⁷²PETA, *Zoos May Actually Hurt Conservation Efforts, Not Help Them*, <https://www.peta.org/features/zoo-conservation-captive-breeding>.

⁷³*Id.* Dalia A. Conde, et al., *Zoos through the Lens of the IUCN Red List: A Global Metapopulation Approach to Support Conservation Breeding Programs*, PLOS ONE (Dec. 11, 2013), <https://doi.org/10.1371/journal.pone.0080311>.

⁷⁴Conde, *supra* note 73.

⁷⁵Freedom for Animals, *10 Facts About Zoos*, <https://www.freedomforanimals.org.uk/blog/10-facts-about-zoos>; Nicholas Gould, Editorial, 49 INTERNATIONAL ZOO NEWS 5 (2002).

⁷⁶Smith, *supra* note 11.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

continuously shifts its animal populations to keep its collections “fresh and exciting.”⁸⁰ Selective animal breeding is described on the Milwaukee Zoo’s website as a “negotiation.”⁸¹ It does not consider the psychological effects on the animals; nor does it further conservation goals.⁸²

B. The Endangered Species Act Should Be Amended to Only Allow Exhibition and Captive Breeding for Certain Threatened and Endangered Species

The Endangered Species Act (ESA) provides a strong regulatory framework to address concerns about the role of animal stewardship in zoos and aquariums. Established in 1973, the ESA was designed to “protect wildlife and their habitats for the sake of biodiversity.”⁸³ It is known as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁸⁴ The Supreme Court emphasized that the goal of the ESA is to prevent species extinction regardless of the cost.⁸⁵ The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are authorized under the ESA to list species as endangered or threatened based on the “best scientific and commercial data available.”⁸⁶ There are currently 1,662 species protected by the ESA—718 animals and 944 plant species.⁸⁷ Once a species is listed, the ESA makes it illegal for the government or private parties to “take” that species.⁸⁸ The ESA defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, *trap, capture or collect*, or attempt to engage in any such conduct.”⁸⁹

⁸⁰Zoological Society of Milwaukee, How New Animals Come to the Zoo, <https://www.zoosociety.org/About/AcquiringAnimals.php>.

⁸¹*Id.*

⁸²*Id.*

⁸³Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, Animal Legal & Historical Center (2004), <https://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos>.

⁸⁴Anne Haas, *Interpreting “Enhancement Of Survival” In Granting Section 10 Endangered Species Act Exemptions To Animal Exhibitors*, PACE ENVTL. L. REV. 956, 961 (2015).

⁸⁵*Id.* See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

⁸⁶*Id.* 16 U.S.C. § 1533(b)(1)(A) (2014).

⁸⁷U.S. FISH & WILDLIFE SERV., *Listed Species Summary (Boxscore)*, <https://ecos.fws.gov/ecp0/reports/boxscore-report> (last updated Mar. 20, 2019).

⁸⁸16 U.S.C. § 1538(a)(1)(B).

⁸⁹16 U.S.C. § 1532(19) (emphasis added).

The ESA's "taking" prohibition applies to captive animals but excludes "[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act," including exhibition, breeding procedures, and "provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife."⁹⁰ Although animal exhibitors are prohibited from importing or exporting any listed species,⁹¹ there are exceptions. The FWS can grant a permit when an exhibitor shows that he or she is "enhanc[ing] the propagation or survival of the affected species."⁹² Regarding this permitting process, the FWS has expressed "sincere doubts" about the conservation benefits from public exhibitions of wildlife and no longer accepts education as a basis for issuing ESA permits.⁹³

In 2015, a study published in the *Journal of Applied Ecology* concluded that "unless animals in the wild are protected, captive breeding won't make a difference."⁹⁴ This study found that captive breeding programs should be considered a "last resort to guard against extinction of critically endangered species."⁹⁵ Captive breeding programs fail for many reasons, including: (1) delays in achieving successful breeding; (2) failure to build up a self-sustaining population; (3) domestication and loss of genetic diversity; and (4) poor performance after releases into the wild.⁹⁶ Ex situ conservation can increase the success of breeding programs by using the legal framework of the ESA. "Ex situ," or off-site, conservation is an approach that removes and

⁹⁰Haas, *supra* note 84. 50 C.F.R. § 17.3 (2014).

⁹¹16 U.S.C. § 1538(a)(1)(A).

⁹²16 U.S.C. § 1539(a)(1)(A).

⁹³An Idea Whose Time Has Come and Gone, *supra* note 69.

⁹⁴University of East Anglia, *Critically endangered species should be left to breed in the wild* (June 4, 2015), <https://www.sciencedaily.com/releases/2015/06/150604203450.htm> (citing Paul Dolman et al., *Arc or park: the need to predict relative effectiveness of ex situ and in situ conservation before attempting captive breeding*, *JOURNAL OF APPLIED ECOLOGY* (2015)).

⁹⁵*Id.* Some species, including the "golden lion tamarin, Arabian oryx, Przewalski's horse, European bison, and the common dormouse have at some point been reliant upon captive breeding to prevent their extinction." Samantha Ward, *In defense of zoos: how captivity helps conservation*, *THE CONVERSATION* (June 2, 2016), <https://theconversation.com/in-defence-of-zoos-how-captivity-helps-conservation-56719>.

⁹⁶*Id.*

relocates part of a species' population from a threatened habitat to a protected one, which may be wild or one cared for by humans, such as a zoo or aquarium.⁹⁷ Because the ESA prohibits the federal government from destroying or adversely modifying designated critical habitat,⁹⁸ zoos could potentially work with the government to coordinate its ex situ conservation efforts. Once a species' population is high enough for release into the wild, that species will have a protected habitat awaiting its arrival.

The ESA's permitting system should also be amended to provide extensive safeguards to ensure that breeding programs meet their stated goals. These goals include the propagation of endangered or threatened species populations and successful release into the wild. This can be accomplished with more detailed applications that describe the facility's program and success stories. In other words, the applicant should have to list the specific actions taken to conserve a species and detail the effectiveness of those efforts. Further, the FWS should expend more resources to closely monitor exhibitors and penalize those not using breeding programs to save animals in danger of extinction.

The ESA can further promote conservation efforts by mandating that only certain endangered or threatened species be exhibited. A "specialist zoo" is a facility that only houses one or two endangered or threatened species that are involved in conservation programs.⁹⁹ Specialist zoos directly correspond to the goal of animal conservation, since generic species would not be displayed. The general public would still benefit from the community and educational role of zoos and aquariums. In addition, animals held in captivity would be properly cared for and bred for future release into the wild.

⁹⁷Zoo New England, Types of Conservation, <https://www.zoonewengland.org/protect/types-of-conservation>.

⁹⁸16 U.S.C. § 1536(a)(2).

⁹⁹C. Newton, *Zoochosis: the animals have gone bananas!*, THE UNIVERSITY OF MELBOURNE, Scientific Scribbles (Aug. 16, 2013), <https://blogs.unimelb.edu.au/sciencecommunication/2013/08/16/zoochosis-the-animals-have-gone-bananas-3>.

V. Animal Sanctuaries Provide an Alternative to Conventional Zoos and Aquariums

A. Differences Between Zoos and Aquariums and Animal Sanctuaries

Animal sanctuaries provide a way to preserve the educational value of animal exhibition without the need for zoos and aquariums. While zoological facilities are businesses with the primary purpose of public exhibition, sanctuaries are non-profit organizations that “maintain a stationary collection of rescue animals for the primary purpose of providing them a permanent home.”¹⁰⁰ Their collections can include domestic, native, and/or exotic animals.¹⁰¹ All of the animals are rescued and not traded commercially or bred; the animals in sanctuary are given a permanent home at that facility.¹⁰² Because sanctuaries are not commercial facilities, they do not rely on profits to keep their doors open. Instead, sanctuaries are funded by membership programs and fundraising events.¹⁰³ Sanctuaries do not need to worry about being shut down if they do not profit from visitor fees since their priority is to rescue animals from exploitation and abuse.¹⁰⁴

B. Animal Sanctuaries Offer Greater Protections While Allowing Human Interaction and Education

Animals bred in captivity have little to no chance of survival in the wild because captivity conditions cause them to lose their instincts and survival skills.¹⁰⁵ Sanctuaries provide a haven for those animals that have never lived in their natural habitat, and they often experience better living conditions. Reputable sanctuaries “make every effort to replicate an animal’s natural

¹⁰⁰Rachel Garner, *The Difference Between A Zoological Facility And A Sanctuary*, Why Animals Do the Thing (Oct. 3, 2017), <https://www.whyanimalsdothething.com/the-difference-between-zoos-sanctuaries>.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³Faith Maloney, *How to Start an Animal Sanctuary*, BEST FRIENDS ANIMAL SOCIETY, <https://resources.bestfriends.org/article/how-start-animal-sanctuary#Fundraising>.

¹⁰⁴Lori Marino, *Emphasizing Animal Well-Being and Choice: Why Zoos and Aquariums Should Become Sanctuaries* (2016), <https://www.humansandnature.org/emphasizing-animal-well-being-and-choice>.

¹⁰⁵AnimalsAsia, *Tragic legacy: Why can't captive animals be released back into the wild?* (Nov. 28, 2017), <https://www.animalsasia.org/us/media/news/news-archive/tragic-legacy-why-cant-captive-animals-be-released-back-into-the-wild.html>.

habitat.”¹⁰⁶ They offer expansive structures for chimpanzees to climb, ponds or pools for bears, and large fields for grazing.¹⁰⁷ For example, the elephant sanctuaries in Hohenwald, Tennessee and San Andreas, California offer hundreds of acres of land for elephants to roam.¹⁰⁸ Further, true sanctuaries have animal residents who act as “rehabilitators” and teach rescue animals how to “get back in touch with their instincts and embrace their new environment.”¹⁰⁹ Most sanctuaries that care for domesticated and rescued animals allow visitors to observe the animals.¹¹⁰ However, they do not allow any kind of hands-on interactions or photography, since this can frighten the animals.¹¹¹ Animal sanctuaries can thus provide a meaningful way for humans to see animals up close in a safe and caring environment.

Conclusion

As a society, we must gain a new perspective on our understanding of animal behavior and welfare to improve the quality of life for captive animals. Federal regulations do not prescribe higher standards for animals on a species-by-species basis; nor do they require breeding programs to accomplish what they set out to do. Furthermore, the general public places such a high value on these facilities that they are unwilling to adjust their traditions to fight for increased animal welfare. Animal sanctuaries can provide the same educational tools that are found in zoos and aquariums with the added benefit of true stewardship. If the policy recommendations in this paper are promulgated and implemented, captive animals will receive greater protections and receive the treatment they deserve.

¹⁰⁶PETA, *How to Tell if a Place Is a Real Animal Sanctuary*, <https://www.peta.org/features/real-animal-sanctuary-zoo>.

¹⁰⁷*Id.*

¹⁰⁸Michael Hutchins, *Zoo Vs. Sanctuary: An Ethical Consideration* (Oct. 2004), <https://www.all-creatures.org/articles/ar-zoo-aza.html>.

¹⁰⁹Real Animal Sanctuary, *supra* note 106.

¹¹⁰*Id.*

¹¹¹*Id.*

**ANIMAL WELFARE AND INDIA'S CONSTITUTION: A BLUEPRINT
FOR THE UNITED STATES AND THE WORLD**

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ANIMAL WELFARE AND INDIA'S CONSTITUTION: A BLUEPRINT FOR THE UNITED STATES AND THE WORLD

“The greatness of a nation and its moral progress can be judged by the way its animals are treated.” – Mahatma Gandhi

If society were to judge every country based solely on the institutional protections they afford their animals, few would be considered *great*. In fact, based on the condition animals face worldwide, few would even come close to greatness. However, a few have risen to near-greatness through bold actions, such as enshrining the fundamental rights of animals to their fundamental welfare in national constitutions. Presently, there are six countries in the world that have extended the constitutional protections typically only provided for humans to animals. These six are Switzerland, Germany, Brazil, Serbia, Egypt, and India.¹ Of these six, India's is among the oldest and most impactful. India's constitution mandates broad protections for the welfare of all animals.² As a result, India's constitutional provisions enshrining animal rights may provide a blueprint for animal welfare activists seeking to enhance legal protections for animals across the world, including in the United States.

While constitutional provisions guaranteeing animal welfare and animal rights are rare,³ such provisions are oftentimes preferred over their statutory counterparts by animal welfare activists worldwide.⁴ Compared to statutory protections, which can more easily be amended, interpreted and applied in different ways, and even ignored, the legal strength of constitutional

¹ *Existing Situation Examined*, World Animal Net (Dec. 2014), <http://worldanimal.net/resources/constitution-project-resources/53-animal-protection-and-constitutions> (last visited May 5, 2019) (hereinafter “*Existing Situation Examined*”).

² *Id.*; INDIA CONST. art. 51(A)(g).

³ See *Existing Situation Examined*, *supra* note 1.

⁴ See Bridget M. Kuehn, *Animal Rights Groups Pressure European Lawmakers*, AM. VETERINARY MED. ASS'N (Sept. 1, 2002) <https://www.avma.org/News/JAVMANews/Pages/020915b.aspx> (last visited May 5, 2019).

provisions generally a much more effective and significant way of protecting animal welfare.⁵

As a result, there has been a growing movement worldwide in recent years to introduce animal protection amendments to constitutions. This movement has most recently been successful in Germany, which approved a constitutional amendment providing animal welfare protections in 2002,⁶ and Egypt, which recently adopted a new constitution in 2014 that committed the state to “the protection of plants, livestock, and fisheries; the protection of endangered species; and the prevention of cruelty to animals.”⁷

Recognizing the need for strong institutional protections for animal welfare, this essay seeks to (1) examine the successes, and failures, of India’s constitution in protecting animal welfare, (2) show why India’s constitutional protections for animals are superior to current animal welfare laws in the United States, and (3) highlight how India’s constitutional law can provide a guide for animal welfare activists in the United States seeking to amend the Animal Welfare Act to better protect animals.

I. Animal Welfare Laws in India

A. The Constitution of India

The Republic of India is one of just six countries in the world that currently recognize fundamental legal protections for animal well-being in its constitution.⁸ Protections for animals are found throughout the Indian constitution. As later court decisions will show, perhaps the most significant of these protections is Article 51A(g) of the Constitution of India, which provides “[i]t shall be the duty of every citizen of India . . . to have compassion for living

⁵ See generally Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006) (discussing why the U.S. Constitution is legally superior to statutes and other types of federal law).

⁶ Kate Connolly, *German Animals Given Legal Rights*, THE GUARDIAN (Jun. 21, 2002) <https://www.theguardian.com/world/2002/jun/22/germany.animalwelfare>.

⁷ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Article 45, 18 Jan. 2014.

⁸ See *supra* n. 1 and accompanying text.

creatures.”⁹ Additional references to animals are found throughout the Indian constitution, including provisions that mandate a governmental commitment to ensuring “the prevention of cruelty to animals,”¹⁰ impose protections for animals used in scientific research,¹¹ and protect wildlife and the environment by requiring the government to take actions to ensure safeguards and protections for the “wild life [sic] of the country.”¹²

In addition to these constitutional protections of fundamental animal welfare, India has gone even further with the enactment of the Prevention of Cruelty to Animals Act (the “PCA”), which extend even stronger statutory protections to animals.¹³ Enacted in 1960, the PCA broadly defines and criminalizes acts of animal cruelty in India.¹⁴ In addition to its overarching prohibition of acts of animal cruelty, the PCA has separate provisions that allow the government broad powers to protect animals in a range of circumstances. For example, the PCA grants the government the specific authority to regulate animal experimentation and the use of animals in performances and exhibitions.¹⁵ The PCA also mandates that government officials investigate and prosecute acts of animal cruelty and outlines the appropriate procedures for doing so.¹⁶

While the Constitution of India and the PCA are distinct sources of law, they have generally been intertwined in practice. Through legal decisions in animal welfare cases, the Supreme Court of India has generally recognized this interdependence of the PCA and the

⁹ INDIA CONST. art. 51(A)(g).

¹⁰ INDIA CONST. art. 246, List III (17).

¹¹ INDIA CONST. art. 51(A)(h).

¹² INDIA CONST. art. 48(A).

¹³ The Prevention of Cruelty to Animals Act, INDIA CODE (1960). Aside from the PCA, there are other statutes protecting animals and wildlife in India; however, understanding every animal welfare statute in India is beyond the scope of this essay, particularly because the constitution and PCA already protect all animals in India.

¹⁴ *Id.*

¹⁵ The Prevention of Cruelty to Animals Act § 14–27, INDIA CODE (1960).

¹⁶ The Prevention of Cruelty to Animals Act § 29–40, INDIA CODE (1960).

Constitution, particularly Article 51A(g).¹⁷ In fact, as a result of these decisions, it is generally accepted that “the PCA *must* be read in conjunction with . . . the Constitution of India.”¹⁸

B. The Cultural Basis for These Legal Protections

India’s strong institutional protection of animal welfare is not surprising given “India’s ancient culture in respecting the rights of all species.”¹⁹ Throughout India’s history, cultural, religious, and philosophical thought and practices have elevated the status of animals in Indian society.²⁰ Unlike Western culture, which has a tendency to place a higher value on human life than that of animals, Indian culture and values have historically recognized that all life should be, nearly, equally valued.²¹

Perhaps the most significant cultural influences on India’s animal law are the result of the religious beliefs many in India hold. By far, the most widely followed religion in India is Hinduism.²² The roots of Hinduism in India can be traced back to as early as the year 1500 B.C.²³ This long history of Hinduism in India has directly influenced the perception of animals in society. One principle of Hinduism is the practice of ‘ahimsa,’ which is the “ethical principle of

¹⁷ See generally Abha Nadkarni and Adrija Ghosh, *Broadening the Scope of Liabilities for Cruelty Against Animals: Gauging the Legal Adequacy of Penal Sanctions Imposed*, 10 NUJS L. REV. 1 (2017) (hereinafter “*Broadening the Scope*”).

¹⁸ *Id.* at 10 (emphasis added).

¹⁹ Geetanjali Sharma and Shivam Singh, *Regulating India’s Bloodsport: An Examination of the Indian Supreme Court’s Decision in Animal Welfare Board of India v. A. Nagaraja*, 6 JINDAL GLOBAL L. REV. 113, at 116 (2015).

²⁰ See generally Shivendra B. Kadgaonkar, *The Role of Animals and Birds in Ancient Indian Art and Culture*, Bulletin of the Decan College Research Institute, Vol. 68/69 2008-2009, pp. 163-165 (discussing the role animals have played in Indian culture, art, and religion).

²¹ See generally M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L.J. 3(2002) (hereinafter “*Dissecting American Animal Protection Law*”).

²² Approximately 80% of Indians are Hindu. The World Factbook, CENTRAL INTELLIGENCE AGENCY, India <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>.

²³ Chandola, *Dissecting American Animal Protection Law*, *supra* n. 21 at 22.

not causing harm to other living things,” including animals.²⁴ As a result, followers of ahimsa are encouraged to follow a vegetarian diet to ensure they do not cause animals harm through their food choices.²⁵ In addition to Hinduism, other religions prevalent in India also teach nonviolence and compassion for animals. Like Hinduism, Buddhism promotes “the directive not to kill or injure living things” and has resulted in a greater appreciation of animal life in India.²⁶ The third significant religion in India that prohibits followers from harming animals is Jainism.²⁷ Jainism originated in India as early as the year 850 B.C. and prohibits followers from harming any living beings (including insects and plants).²⁸ The combined effects of these three religions in India have contributed to a wholesale respect for animal life in Indian society. This respect for animals is reflected in Indian diets and laws. Approximately 28-30% of India’s population is vegetarian.²⁹

Historical influences and traditions have also significantly contributed to the current institutional respect for animals in India. Some of the earliest recorded legal protections for animals in India were implemented by Emperor Ashoka, who ruled from 269 to 232 B.C.³⁰

Like present Indian animal welfare laws, the animal protection edicts enacted by Ashoka were

²⁴Berkley Center for Religion, Peace & World Affairs, *Ahimsa*, Georgetown University <https://berkeleycenter.georgetown.edu/essays/ahimsa> (last visited Apr. 30, 2018),

²⁵*Id.*

²⁶Chandola, *Dissecting American Animal Protection Law*, *supra* n. 21 at 24.

²⁷*Id.* at 22–24 (2002).

²⁸*Id.*

²⁹Baseline Survey 2014, Government of India (2014) available at http://www.censusindia.gov.in/vital_statistics/BASELINE%20TABLES07062016.pdf (last visited May 5, 2019); *see also* Shalini Dasgupta, *India Waking up to Veganism: The vegan movement growing in stature*, MEDIA INDIA GROUP (May 6, 2017) available at <https://mediaindia.eu/lifestyle/india-waking-up-to-veganism> (discussing how veganism is a growing trend in India in recent years; however, a much smaller percent of the Indian population follows a strict vegan diet, in part due to the widespread cultural use of fish, milk, butter, and ghee in Indian diets.). Cf. with the 3.2% of Americans that follow a vegetarian diet <https://www.vegetariantimes.com/uncategorized/vegetarianism-in-america>.

³⁰Chandola, *Dissecting American Animal Protection Law*, *supra* n. 21 at 25.

the direct result of his religious beliefs and general morals. Ashoka applied his Buddhist faith to rule and implemented “several laws requiring the compassionate treatment of animals.”³¹ Examples of these edicts include banning the slaughter of certain animals and creating “hospitals and homes” for animals.³² Other Indian rulers also implemented similar legal protections for animals in early Indian history. Emperor Harsha “allegedly enforced vegetarianism by banning the slaughter of animals” and “[v]arious kings in the Indian state of Gujarat were so profoundly influenced by Jainism that they not only prohibited the killing of animals, but also set up special courts to prosecute cruelty to them.”³³ The current state of India’s animal law reflected in the constitution and PCA show that these historical examples of animal welfare law have endured the test of time and greatly influenced modern animal protection laws.

II. Real-World Applications of These Legal Protections

There can be no doubt that India’s animal welfare laws are among some of the most comprehensive in the world. What really matters, however, is whether these broad animal welfare protections are effectively applied to protect animals in real-world circumstances. In many instances, the application and enforcement of India’s animal protection laws are equally as groundbreaking as the laws themselves.

The responsibility to regulate the enforcement of the Indian Constitution and PCA falls on the courts and the Animal Welfare Board. The Animal Welfare Board of India is a branch of India’s Ministry of Environment, Forest and Climate Change that was specifically established by the PCA to investigate alleged animal cruelty, advise the government on the overall state of animal welfare in India, and assist in the enforcement of constitutional and PCA animal cruelty

³¹ *Id.* at 25.

³² *Id.*

³³ *Id.* at 26.

prohibitions.³⁴ The Animal Welfare Board also provides guidance to individuals seeking to form animal welfare organizations and educates individuals about proper ways to humanely treat and care for animals.³⁵ As part of its enforcement responsibilities, the Animal Welfare Board has, on occasion, also brought claims in Indian courts to interpret and enforce animal welfare protections afforded by the Indian Constitution and PCA.³⁶

A. Successes of India's Animal Protection Laws

According to the Animal Protection Index (“Index”), which is a ranking-system created by World Animal Protection to classify “50 countries around the world according to their commitments to protect animals and improve animal welfare in policy and legislation.”³⁷ India is among the highest ranked countries for animal welfare.³⁸ Under the Index’s methodology, each of the fifty countries surveyed is given a score ranging from an ‘A’ (the best possible score) to a ‘G’ (the worst possible score) on both individual categories and animal welfare overall.³⁹ Per this Index, India receives a ‘C’ for overall animal welfare.⁴⁰ Although not the best, India’s ‘C’ places it in the top ten globally and ahead of the United States, which received a ‘D’ score.⁴¹

While these rankings help illustrate the general successes of India’s animal welfare laws, a more beneficial measurement of the success of India’s constitutional animal welfare

³⁴The Prevention of Cruelty to Animals Act §9(a), INDIA CODE (1960).

³⁵Information about The Animal Welfare Board of India can be located at <http://www.awbi.org>.

³⁶For example, *see* Animal Welfare Board of India v. A. Nagaraja & Ors, (2014) 6 SCALE 468 (India).

³⁷World Animal Protection is an international animal welfare non-profit that was founded in 1981 in London to promote worldwide animal welfare protections. *About Us*, WORLD ANIMAL PROTECTION, <https://api.worldanimalprotection.org/about> (last visited May 2, 2019).

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* (as of January 2019, only four countries (Austria, New Zealand, Switzerland, and the U.K. received an ‘A’ score and only five countries (Chile, Denmark, Germany, Netherlands, and Sweden) received a ‘B’ score.). Two of these countries (Switzerland and Germany) also recognize constitutional protections for animal welfare, which supports the present conclusion that animal welfare is more successfully achieved when there is constitutional recognition. *See also supra* n. 1 and accompanying text.

protections is seen through examining the application of the law in courts of law. Through a significant series of cases brought forth on behalf of animals by India's Animal Welfare Board, animal welfare organizations, and even private individuals, a significant body of progressive animal welfare decisions has developed. Many of these decisions have set groundbreaking legal precedent in India that animal welfare activists in other parts of the world can only dream of one day achieving. Time and time again, the Supreme Court of India and other Indian courts have interpreted the protections for animals outlined in the Indian Constitution and PCA to enforce protections for animals in a range of circumstances.

One of the most significant animal welfare cases in India is *Animal Welfare Board of India v. A. Nagaraja & Ors*, which was decided by the Supreme Court of India in 2014.⁴² In *Nagaraja*, the Supreme Court of India addressed whether the constitution and the PCA prohibited jallikattu, a form of bull racing.⁴³ The Supreme Court of India ultimately decided that jallikattu violated the constitution because the training of bulls for use in jallikattu was in violation of "the fundamental duties on human beings towards every living creature."⁴⁴ The court further stated that the 'sport' violated the constitution because "[a]ll living creatures have inherent dignity and a right to live peacefully and right to protect their well-being which encompasses protection from beating, kicking, over-driving, over-loading, tortures, pain and suffering etc. . . . animals have also got intrinsic worth and value."⁴⁵ This decision to prohibit jallikattu was of special importance given the historical significance of jallikattu in India, as the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

sport has strong cultural roots and has been practiced in India for at least 2,000 years.⁴⁶ In banning an activity with such a long history in Indian culture, the court showed how serious it, and Indian law, is about protecting the fundamental rights and dignities of animals. This decision has served as a strong legal precedent in guiding other courts' analyses in cases involving animal welfare violations.

In *N.R. Nair v. Union of India*, another major case decided by the Supreme Court of India, the Court upheld a ban on the “training and exhibition of bears, monkeys, tigers, and panthers under § 22(ii) of the PCA.”⁴⁷ The ban that was in question was imposed on travelling circuses to prevent them “from either training or exhibiting” the animals in question.⁴⁸ Although the court would not address whether it had the authority to prohibit the circus owners from owning the animals in question, particularly because section 22 of the PCA does not regulate ownership, the Court found that the PCA prevented the training and exhibition of animals.⁴⁹ The court reached this decision by determining that the training and exhibition of animals for circuses “would result in unnecessary pain or suffering being inflicted on them.”⁵⁰

Other courts throughout India have also decided ground-breaking animal welfares cases. For instance, although the Supreme Court of India did not address the issue of ownership or confinement of animals in *N.R. Nair*, other courts in India have spoken to the issue, in part. In *People for Animals v. Md. Mohazzim*, the Delhi High Court addressed the fundamental right

⁴⁶Daniel Grushkin, *Ringling in the New Year by Wrestling Bulls*, NEW YORK TIMES (Mar. 22, 2007), <http://www.nytimes.com/2007/03/22/travel/21webletter.html>.

⁴⁷Abha Nadkarni and Adrija Ghosh, *Broadening the Scope*, *supra* n. 17 at 10 (2017) (citing *N.R. Nair Others v. Union of India and Others* (2001) 6 SC 84 (India)).

⁴⁸*N.R. Nair Others v. Union of India and Others* (2001) 6 SC 84 (India).

⁴⁹*Id.*

⁵⁰*Id.*

of birds to be free from captivity.⁵¹ People for Animals, an animal welfare nonprofit, brought this suit against a commercial bird seller who was keeping birds for sale in tiny cages.⁵² Here, the Delhi High Court relied on the Supreme Court of India’s decision in *A. Nagaraja v. Animal Welfare Board of India* that animals have a fundamental right to their dignity.⁵³ Following that reasoning, the court held that it was a violation of the PCA to cage birds because birds have “the fundamental right . . . to fly in the sky” and that “human beings have no right to keep them in small cages for the purposes of their business or otherwise.”⁵⁴ While the court specifically limited this decision’s application to birds, it shows the potential of Indian law to continue to expand new protections for animals.

In *Animals and Birds Charitable Trust v. Municipal Corporation of Greater Mumbai*, the High Court of Bombay addressed a claim brought by an animal welfare organization that horse carriages “being used in the City of Mumbai only for joyrides and not as a mode of public conveyance” was a violation of the fundamental rights of animals.⁵⁵ Relying on *Nagaraja*, the court upheld the ban on horse-driven carriages for joyrides in Mumbai imposed by the city Traffic Police as necessary “to prevent the horses from being subjected to unnecessary pain and suffering.”⁵⁶ The court reached this decision by weighing the “immense physical harm and mental agony” the rides caused the horses, such as subjecting them to diseases and physical injuries like tendonitis, against the seemingly minor benefit the joyrides provided humans.⁵⁷

⁵¹ Abha Nadkarni and Adrija Ghosh, *Broadening the Scope*, *supra* n. 17 at 10 (citing *People for Animals v. Md. Mohazzim*, 2015 SCC OnLine Del. 9508 (India)).

⁵² *People for Animals v. Md. Mohazzim*, 2015 SCC OnLine Del. 9508 (India).

⁵³ *Id.*

⁵⁴ Abha Nadkarni and Adrija Ghosh, *Broadening the Scope*, *supra* n. 17 at 10.

⁵⁵ *Animal and Birds Trust*, 2015 SCC OnLineBom 3351 at ¶1 (India).

⁵⁶ *Id.* at ¶39.

⁵⁷ *Id.* at ¶28(8).

Other decisions have guaranteed the rights of pets to use elevators and other facilities in their owner's residence,⁵⁸ required filmmakers using animals to gain approval and certification from the Animal Welfare Board of India before using animals during filming,⁵⁹ approved the confiscation of animals from accused abusers until the charges were resolved,⁶⁰ and prohibited the transport of cattle for use in animal sacrifices.⁶¹ The result of the many legal victories for animals in India is a strong body of legal precedent to supplement the constitutional and statutory protections for animal welfare. In most instances, such legal victories would be impossible to achieve in the United States because these same levels of legal protections for animal welfare simply does not exist under current U.S. law.

B. Failures of India's Animal Protection Laws

Despite the major successes of India's animal protection laws in safeguarding the dignity and fundamental rights of animals in numerous contexts, the application of India's animal protection laws has not proven to be universally successful. To date, animal abuse is still a significant issue in parts of the country. While some cite enforcement as the reason for these failures, others argue that the real problem lies with the lack of severity in punishing acts of animal cruelty.⁶² The current punishment for an animal abuse conviction in India is just fifty rupees, which is less than one U.S. dollar.⁶³

⁵⁸Shri. Ajay Madhusudan Marathe v. New Sarvodaya CHS Ltd, (2010) Bombay High Court (India) available at <https://indiankanoon.org/doc/48829808/>.

⁵⁹People for Ethical Treatment of Animals v. Union of India (2005) Bombay High Court (India).

⁶⁰State of U.P v. Mustakeem and Others, (2010) Allahabad High Court (India) available at <https://indiankanoon.org/doc/1795367/>.

⁶¹Gauri Maulekhi v. Union of India and Ors (2016) High Court of New Delhi (India) available at <https://www.elaw.org/system/files/century.pdf>.

⁶²See generally Abha Nadkarni and Adrija Ghosh, *Broadening the Scope*, *supra* n. 17.

⁶³*Id.* at 1; The Prevention of Cruelty to Animals Act § 11, INDIA CODE (1960).

As one might expect, the failures of India's animal protection laws most frequently occur where human interests and animal rights conflict.⁶⁴ One example of this is the conflict between human religious practices and animal welfare. Despite general religious beliefs in India that call for nonviolence, there are certain religious practices that sanction animal sacrificial slaughter.⁶⁵ Indian law recognizes that religious sacrifice is one area where human interests trump animals' basic rights to live.⁶⁶

India also faces the widespread challenges of acts of animal cruelty being committed by individuals, as opposed to industries and organizations.⁶⁷ Because of the low punishment imposed on individuals convicted of animal abuse, animal abusers are not easily deterred by India's robust legal recognition of animal rights.⁶⁸ One example of this type of abuse committed by individuals in spite of India's animal protection laws is the frequency with which individuals abuse and murder stray dogs.⁶⁹ On the surface, these instances of abuse may seem minor when compared with the numerous successes of Indian animal protection laws; however, individual acts of animal cruelty are shockingly high in India. Between the years 2011 and 2016, the Bombay Society for Prevention of Cruelty to Animals recorded 19,028 acts of abuse

⁶⁴ See Jessamine Therese Mathew and Ira Chadha-Sridhar, *Granting Animals Rights Under the Constitution: A Misplaced Approach? An Analysis in Light of Animal Welfare Board of India v. A. Nagaraja*, 7 NUJS L. REV. 349, 359 (2014).

⁶⁵ Chandola, *Dissecting American Animal Protection Law*, *supra* n. 21 at 26.

⁶⁶ The Prevention of Cruelty to Animals Act § 28, INDIA CODE (1960) (stating "Nothing contained in this Act shall render in an offence to kill any animal in a manner required by the religion of any community." While this exception was a legislative compromise in the PCA to protect human religious freedom, the outcome of allowing human desires to trump animals' rights to life generally conflicts with the rest of India's animal welfare laws— a conflict that has not yet been resolved.).

⁶⁷ *Cruelty Against Stray Animals on the rise in India Amid Lack of Effective Laws*, SOUTH CHINA MORNING POST (June 17, 2016), <http://www.scmp.com/news/asia/south-asia/article/1976563/cruelty-against-stray-animals-rise-india-amid-lack-effective> (discussing the difficulty of preventing abuse of stray dogs in India).

⁶⁸ *Id.*

⁶⁹ *Id.*

committed against animals.⁷⁰ More shockingly, none of these acts resulted in arrests or convictions of the perpetrators.⁷¹ It is cases like these that show that despite the generally positive religious and cultural perceptions towards animals in India, other societal factors have negated the positive view of animals in the minds of some in India.⁷² As a result, India's constitutional protections for animal welfare are failing to meet their fullest potential.

III. India's Constitution as a Guide for Animal Welfare Law in the United States

A. The Current State of Animal Welfare Law in the U.S.

Despite the relative weaknesses of India's animal welfare laws at actively eliminating all animal abuse throughout the country, it is apparent that India's animal protection laws are much more advanced and effective than those of the United States. The clearest distinction between India's and the United States' animal welfare laws is that India's animal protection laws are enshrined in the constitution, whereas animal welfare laws in the U.S. are found in sporadic federal and state statutes. The lack of constitutional rights for animals was recently illustrated by the 2012 case of *Tilikum v. Sea World Parks and Entertainment*,⁷³ where People for the Ethical Treatment of Animals, Inc. ("PETA"), brought a suit on behalf of five orca whales that were held in captivity at Sea World's Orlando and San Diego parks as forced to perform in entertainment shows, alleging a violation of the Thirteenth Amendment of the U.S. Constitution.⁷⁴ There, the court held "the plain language of the Thirteenth Amendment, its historical context, and judicial interpretations" establish that the Thirteenth Amendment, and the

⁷⁰Badri Chatterjee, *19,028 Animal Cruelty Cases in Mumbai Over 5 Years; Not a Single Arrest*, HINDUSTAN TIMES (June 3, 2017), <https://www.hindustantimes.com/mumbai-news/19-028-animal-cruelty-cases-in-mumbai-over-5-years-not-a-single-arrest/story-71BzHW03ONSXiKhu8FN0HL.html>.

⁷¹*Id.*

⁷²See Chandola, *Dissecting American Animal Protection Law*, *supra* n. 21 at 26–28.

⁷³842 F. Supp. 2d 1259 (S.D. Cal. 2012).

⁷⁴*Id.*

constitution more generally, does not contain legal protections for animals.⁷⁵ Instead, any protections for animals in the U.S. are the result of statute.

On the federal level,⁷⁶ the most significant animal protection law is the Animal Welfare Act (“AWA”), which was enacted in 1966.⁷⁷ Broadly, the AWA was initially enacted by Congress to remedy the gaps in state-based legal protections that resulted from interstate transport and use of animals.⁷⁸ However, the more specific goal of the act was to “prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats, and other laboratory animals” at a time when pets were frequently being stolen and sold to research laboratories.⁷⁹ In its current state, the AWA regulates “the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or persons or

⁷⁵*Id.* at 1263–64 (further stating “Here, there is no likelihood of redress under the Thirteenth Amendment because the Amendment only applies to humans, and not orcas. Because Plaintiffs are without standing to bring this action, no ‘case’ or ‘controversy’ exists and this court lacks subject matter jurisdiction.”). *See also* Matter of Nonhuman Rights Project, Inc. v. Presti, 124 A.D.3d 1334, 1335 (N.Y. App. 4th 2015) (discussing the inapplicability of state *habeas corpus* laws to non-human primates held in captivity).

⁷⁶Of course, many animal welfare laws in the U.S. are found under state law because animals are generally classified as property, which is governed by state law. However, federal animal welfare law oftentimes supersedes state law or governs where there are gaps in existing state laws. *See* Remarks, David S. Favre, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 3 (2002).

⁷⁷7 U.S.C. § 2131. Other federal statutes providing protection for animals include the Endangered Species Act (16 U.S.C. § 1531 et seq.), the Humane Slaughter Act (7 U.S.C. §1901)), the Wild Bird Conservation Act (106 Stat. 2224)), the Bald and Golden Eagle Protection Act (16 U.S.C. § 668)), the Marine Mammal Protection Act (16 U.S.C. § 1361)), the Fur Seal Act (16 U.S.C. §1151), and the Wild Free-Roaming Horses and Burros Act (16 USC § 1331)).

⁷⁸*See* 7 U.S.C. § 2131 (stating “The Congress finds that animals and activities which are regulated under this Act are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof. . .”).

⁷⁹Tadlock Cowan, *The Animal Welfare Act: Background and Selected Animal Welfare Legislation*, CONGRESSIONAL RESEARCH SERVICE (Jan. 5, 2016) available at <https://fas.org/sgp/crs/misc/RS22493.pdf>; Validity, Construction, and Application of Animal Welfare Act, 74 A.L.R. Fed. 2d 275, at *2.

organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.”⁸⁰

However, unlike India’s constitution, the AWA fails to protect many of the animals who need its protections the most. For those activists that feel all animals deserve equal legal protections for their basic welfare, the combined body of existing federal animal welfare laws are inadequate. This is particularly when looking at the overall lack of protections for most agriculture animals and many animals used in scientific research and entertainment (such as Tilikum). Under the current language of the AWA, an animal is defined as:

any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; *but such term* [“animal”] *excludes* (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber⁸¹

This definition arbitrarily excludes many animals from protection, including many of those used in scientific research⁸² and agriculture.⁸³ However, even for animals that

⁸⁰ 7 U.S.C. § 2131.

⁸¹ 7 U.S.C. § 2132 (g) (emphasis added).

⁸² For example, “[i]t is estimated that ninety-three to ninety-seven percent of all animals used in research are mice and rats. Thus, the overwhelming majority of animals used in research are not protected under the Animal Welfare Act.” Leslie Rudloff, *Failure to Launch: The Lack of Implementation and Enforcement of the Animal Welfare Act*, 67 SYRACUSE L. REV. 173, 177 (2017) (further stating “It is estimated that over 100 million birds, rats, and mice are used in research each year but are afforded no protection under the Animal Welfare Act.”) (internal citations omitted).

⁸³ Farmed Animals and the Law, ANIMAL LEGAL DEFENSE FUND https://aldf.org/focus_area/farmed-animals/ (last visited May 5, 2019).

are protected species under the AWA, the protections only apply in specific instances, such as during transport, purchases and sale by dealers, research and experimentation, and exhibition.⁸⁴

This lack of protections for many animals is even more apparent when examining the actions of the federal agencies that are tasked with enforcing the AWA and other animal welfare laws. Current animal welfare statutes provide agencies with the broad discretion to enforce animal welfare protections. For example, the U.S. Department of Agriculture has the discretion to determine what animals are protected under the AWA.⁸⁵ Similarly, the Endangered Species Act grants the Departments of Interior and Commerce the discretion to determine what animal species are endangered or threatened, what habitats are critical, and what regulations to impose to protect them,⁸⁶ which allows for certain species to be denied the protections they need.

These gaps in existing animal welfare laws in the United States are just a few of the reasons why existing animal welfare laws are not sufficient. To remedy this problem, the U.S. should look to India's constitutional protections for animals as a guide to remedy these deficiencies.

B. Amending U.S. Law Based on India's Constitution

There are countless procedural, societal, and political realities that almost certainly make it impossible for the U.S. to even go so far as to amend the Constitution to establish constitutional animal welfare protections similar to those found in India. Perhaps, however, the U.S. could use India's broad animal welfare protections as a guide for future amendments to the

⁸⁴ 7 U.S.C. § 2131.

⁸⁵ 7 U.S.C. § 2132(g).

⁸⁶ 16 U.S.C. § 1533.

AWA. The reform that is needed is relatively simple, yet the results would be a tremendous step forward for animal welfare.

Using India's comprehensive animal rights laws as a model, the United States should reform its existing federal animal welfare laws to extend protections for the well-being of all animals. Currently, Indian law recognizes the "inherent dignity" of all animals,⁸⁷ while animal welfare laws in the United States are inherently rooted in speciesism. The AWA discriminates against certain species of animals, such as mice and rats, and circumstantially discriminates against animals in specific circumstances, such as in the agriculture industry. The most sensible solution to fill this gap in animal welfare law would be to amend the Animal Welfare Act to extend its protections to all animals, which would put the United States on equal footing with India's progressive, comprehensive approach to animal welfare. Therefore, to achieve legal recognition of comprehensive animal welfare protections. The AWA should be amended to extend protections to all animals.

This could be done through amending the definition of "animal" under the AWA to include all animals and, therefore, eliminate the exclusion of birds, rats, horses, farm, and all other animals.⁸⁸ Examples of alternative, more inclusive, definitions can be found throughout current state statutes. One alternative is found in Tennessee's anti-cruelty statute, which defines an animal as "a domesticated living creature or a wild creature previously captured."⁸⁹ Another state has even more broadly defined animal as "any nonhuman member of the animal kingdom."⁹⁰ These definitions much more accurately reflect the plain meaning of the term

⁸⁷Animal Welfare Board of India v. A. Nagaraja & Ors, (2014) 6 SCALE 468 (India).

⁸⁸*See generally* Animal Legal Defense Fund v. Madigan, 781 F. Supp. 797, 801 (D. D.C. 1992) (holding that the exclusion of certain species of animals from AWA protections was "arbitrary and capricious").

⁸⁹Tenn. Code Ann. § 39-14-201(1).

⁹⁰Del. Code Ann. tit. 12, § 3555 (g).

‘animal.’ Having such a broad definition of what is considered an animal under the AWA is the best way to strengthen the scope of the AWA and extend its protections to numerous animals not currently protected by federal law. It would also put the United States in a much closer position to the legal protections for *all* animals under Indian constitutional law.

Of course, despite how necessary and simple this reform proposal seems, it would be naive to think it would be simple to implement. Despite strong public support for animal welfare laws among the American public,⁹¹ the reality is that the animal welfare lobby is not strong and there is currently little political motivation to make any such an amendment to the AWA. Although Congress has successfully amended the AWA several times to better protect animal welfare, most proposed amendments have failed to garner enough support to pass.⁹²

Even if such an amendment to the AWA were to pass Congress and become enacted law, it would almost certainly face significant legal challenges in courts across the country, just as the AWA and the Endangered Species Act have.⁹³ Most likely, this amendment would similarly be subjected to constitutional claims of being overbroad applications of the Commerce Clause. However, federal courts have been consistently ruled that the AWA does not violate the Commerce Clause because the act specifically focuses on “animals and activities . . . either in interstate or foreign commerce or substantially affect[ing] such commerce or the free flow

⁹¹ See generally Rebecca Riffkin, In U.S., More Say Animals Should Have Same Rights as People, Gallup (May 18, 2015) <http://news.gallup.com/poll/183275/say-animals-rights-people.aspx> (stating the majority of Americans support strengthening animal welfare laws).

⁹² See (P.L. 89-544, § 2 (Aug. 24, 1966), 80 Stat. 350; P.L. 91-579, § 3 (Dec. 24, 1970), 84 Stat. 1560; P.L. 94-279, §§ 3, 4 (April 22, 1976), 90 Stat. 417, 418; P.L. 99-198, Title XVII, Subtitle F, § 1756(a), 99 Stat. 1650 (Dec. 23, 1985); P.L. 107-171, Title X, Subtitle D, § 10301, 116 Stat. 491 (May 13, 2002)); see also P.L. 112-261, § 1, 126 Stat. 2428 (Jan. 10, 2013); P.L. 113-79, Title XII, Subtitle C, § 12308(a)(1), 128 Stat. 990 (Feb. 7, 2014).

⁹³ See e.g., *Palila v. Hawaii Department of Land & Natural Resources*, 471 D. Supp. 985 (DC. Hawaii 1979); *Shields v. Babbit*, 229 F. Supp. 2d 638 (West. Texas D.C. 2000).

thereof”⁹⁴ Based on the numerous court decisions analyzing the constitutionality of the AWA, even a broader definition of animal could likely be implemented under the Commerce Clause powers.⁹⁵ Yet, even in spite of these challenges, there can be little doubt that reform is needed and, therefore, this reform would be worth the challenges it would bring about.

Conclusion

Under the Constitution of India, all Indian animals are provided significant legal protections for their basic welfare. In numerous instances, the government of India and the Indian courts have enforced these protections, even to the detriment of human interests. Despite continued cases of animal cruelty in India, the country is striving to ensure it respects and protects the “inherent dignity” of all animals in all instances.⁹⁶ In stark contrast, existing federal law in the U.S. fails to protect many species of animals who are most susceptible to harm and exploitation. To remedy this, the AWA should be reformed to follow the approach reflected under India’s laws and to extend protections to all animals in the U.S., regardless of species.

⁹⁴7 U.S.C. § 2131. This is why the Tennessee statute (Tenn. Code Ann. § 39-14-201(1)) likely provides a suitable alternative definition of animal to supplement the existing AWA definition, because it defines animals as all domestic and captive animals, as opposed to simply every animal alive.

⁹⁵For a comprehensive list of cases involving AWA applications, see *Animal Welfare Act: Related Cases*, ANIMAL LEGAL & HISTORICAL CENTER, available at https://www.animallaw.info/cases/topic/animal-welfare-act?order=field_primary_citation&sort=asc (last visited Apr. 16, 2018).

⁹⁶*Animal Welfare Board of India v. A. Nagaraja & Ors*, (2014) 6 SCALE 468 (India).



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