



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

From the Chair

Our focus in the Committee on Animals and the Law is on the legal protections that can be employed to help animals; it is often inspired by the stories we read about animal abuse, and the animal mistreatment that we hear about in our daily lives. Many days I read, with dismay, stories online about cases of animal abuse and cases where animals are abandoned or left behind by their human families. Sometimes there are legal solutions and sometimes there are not, but there is often something that can be done to help animals left in desperate situations, and we seek those resolutions.

Many of the recent stories of animals abandoned and left behind are about animals in Ukraine who have been left behind when their owners fled the country. Numerous organizations in Eastern Europe are working hard to rescue them and keep them safe in the middle of a war zone, and they are struggling to find the animals that have been left behind – intentionally or not -- and to feed and shelter them, to find them new homes if they cannot be reunited with their families and to provide other assistance. If you are interested in helping, many of these organizations have an online presence where they outline their needs, and how others can help.

While there is limited assistance that we in the U.S. can offer, to help the many animals left behind and the organizations in Ukraine and neighboring countries that have taken on the difficult work of helping the animals who remain in Ukraine, the Committee took on a project two months ago to try and help the citizens of Ukraine emigrating to the United States who were bringing their family pets with them to this country. Stories in the New York Times and other publications stressed the plight of facing some Ukrainians bringing their companion animals with them to the US, only to have those pets stopped at the border because they did not meet the qualifications for admittance to this country. The Committee has put together a comprehensive list of the criteria that must be met in order to bring

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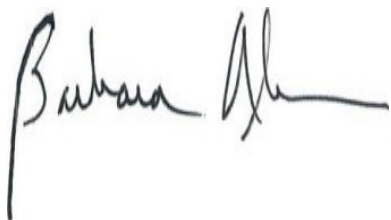
From the Chair (continued)

foreign pets into the US and into New York State, and how to meet those criteria. It is intended both for attorneys working with Ukrainians emigrating to NYS, and for the emigrés themselves. Our goal is to provide the information that will allow those companion animals to enter the country and settle with their families in New York State. They should not be left behind, lost in transit, or quarantined for long periods of time, when their families want to bring them to new homes in this country.

The informational document outlining the requirements that must be met for any pets seeking entrance to this country is provided for you in this issue of Laws and Paws. The Committee has reached out to some of the local organizations providing assistance to Ukrainians entering the US and settling in New York, and is also providing the information to them. If you know of other organization working with Ukrainians that can use this information, please pass on the information researched by the Committee.

The Committee on Animals and the Law, and its individual members, always work to make the lives of animals better. While the Ukraine Pet Project – and trying to help all the animals in Ukraine caught in a war zone – is a large undertaking, we cannot lose focus on the smaller efforts that also improve the lives of animals. This issue of Laws and Paws contains an update on one of the most popular CLEs sponsored by the Committee this year – the one with information on Pet Trusts, in which Jim Sarlis, Esq. outlined how attorneys can work with clients to be sure they are making the appropriate arrangements to ensure that their pets will be cared for after their human caretakers pass on. It is an important part of estate planning, but one often overlooked. Make sure you add it to the topics you discuss with every client who comes to you for assistance with their will and estate. You will be providing a valuable service to companion animals and their families.

The Committee is moving in many directions all at once, because there are so many opportunities to help animals – the ones in our households, the ones taken in by rescues and shelters, those in the wild and elsewhere outside our own homes. It is my honor and privilege to work with the members of this Committee on their many efforts to help all of those animals.

A handwritten signature in black ink, appearing to read "Barbara Ahern". The signature is fluid and cursive, with a long horizontal stroke at the end.

Barbara J. Ahern, Chair, NYSBA Committee on Animals and the Law



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NYSBA Volunteers Help Ukrainian Refugees Emigrate with their Pets*

By Jennifer Andrus

Lawyers with the Committee on Animals and the Law at the New York State Bar Association are helping Ukrainian refugees who are entering the United States with their family pets as they escape their war-torn homeland.

NYSBA members Nancy Volin and Fiona Farrell were moved to act after Helen LeBrecht emailed a video of police digging through the rubble to rescue a puppy from a bombed building in the city of Donetsk. The three of them immediately marshalled the help of fellow committee members including committee chair Barbara Ahern and the Ukraine Pet Project was born.

Working their network of sources in the animal welfare and immigration community, the lawyers assembled lists of government regulations and documents needed for pet owners to safely bring their animals into the United States.

“Our goal is to circulate this information to refugees who are still waiting to come to the U.S. so they will have all they need to emigrate with their pets,” Volin says. “We are focusing on the refugees who have lost everything but are holding onto the family pet. We know how traumatic losing an animal can be especially for children and we want to lessen that trauma. This information can help them navigate the legal process so they can hold onto their dogs and cats.”

Farrell says it's important to meet the health requirements to avoid a pet quarantine. “Both the U.S. and New York State have requirements that must be met. If they are not met, an animal could be quarantined or refused entry entirely,” she said.

Through contacts at the Center for Disease Control, Farrell has learned that the federal government is reducing red tape to fast track animal permits for pets accompanying refugees seeking entry to the U.S. through the U4U (United for Ukraine) program. Farrell says the CDC is waiving a waiting period and has granted over 500 permits for animals from Ukraine since the war began. Farrell's sources also tell her that most of the animals coming from Ukraine are healthy, in good condition and have few if any war injuries.

CDC Permit Process & Paperwork

Ukraine is one of more than 100 countries on the CDC list of high-risk countries for rabies. Having documentation of a rabies vaccine for imported pets is essential in the process of gaining a CDC permit. Domesticated animals, mainly dogs and cats, must follow these requirements for entry:

Importing Cats from Ukraine

1. Appear healthy
2. Rabies vaccine certificate
3. NYS requires certificate of veterinary inspection

Importing Dogs from Ukraine

1. Must be at least 6 months old; include photo of dog's teeth
2. Valid rabies vaccination certificate
3. Valid rabies serologic titer from an approved lab
4. ISO compatible microchip ID on rabies vaccination certificate
5. Appear healthy
6. NYS requires certificate of veterinary inspection

Three Options for U.S. Entry for Pets

Coordinating travel for animals coming into New York from a foreign country requires some planning and paperwork. When traveling by air, dogs must enter the U.S. at one of 18 ports of entry. In the NY metro region, it is best to use JFK airport because it has a CDC approved quarantine station for animals.

The best option for pet owners or those helping refugees is to apply for a CDC Dog Import permit. The permit is available for importing up to two dogs into the U.S. from a foreign country. This option avoids the need to reserve a space at a kennel or pay for a nearly month-long quarantine.

If a Ukrainian animal owner doesn't have time to get the CDC permit, they can work with the ARK Pet Oasis at JFK Airport. The center is CDC approved and will accept foreign issued rabies paperwork and results of a valid rabies serology titer test. They will have to pay for the pets to be examined by a veterinarian at the ARK and a revaccination for rabies.

The last option is for those pets with no CDC permit or rabies paperwork. Owners or those helping the owners must reserve and pay for a 28 day stay in quarantine at the ARK Pet Oasis at JFK Airport. The ARK staff will examine and revaccinate the animals for rabies at the owner's expense. A foreign issued rabies vaccine certificate is still needed for this option. If importing three or more dogs into the U.S., additional exams and vaccination will need to be given by a CDC approved provider. If an animal arrives without a CDC permit or kennel reservation, the animal will be denied entry into the U.S. The animal could then be returned to its home country at the owner's expense, although it doesn't seem to have been the case very frequently.

A Closer Bond

Farrell says an added benefit of this work has been developing closer friendships among committee members. "Sharing my passion for animals with this group of committee members is one of the great benefits of being a NYSBA member. I have enjoyed working with these members and getting to know them better through our work on this project."

Animals and the Law Committee Chair Barbara Ahern agrees that they all have a role to play in helping Ukraine. "The New York State Bar Association is working in many areas to help the

people of Ukraine. Our Ukraine Pet Project is providing that missing link to allow people to come here with their pets.”

For More Information:

The Ukraine Pet Project has an information sheet full of helpful links for documents and additional information at <https://nysba.org/app/uploads/2022/08/Pet-Travel-Regulations-Documents.pdf>

To learn more about the Animals and the Law Committee, please contact Leanne Evans at levans@nysba.org

*This article was originally published in the NYSBA Weekly email newsletter on August 10, 2022.

Requirements For Pets Entering the US and NYS from Ukraine

Prepared by the Committee on Animals and the Law, Ukraine Pets Project

Fiona Farrell, Esq.
Nancy Volin, Esq.
Helen LeBrecht, Esq.
Barbara Ahern, Esq.

Introduction: We researched and compiled these federal and New York State regulations and documents to aid Ukrainian war refugees entering the US with their pets. If the requirements are not met, pets may be quarantined for a month or refused entry entirely.

Canine Rabies: This disease is responsible for 98% of human deaths from rabies. Ukraine is a country where rabies is widespread. In response, the United States has banned importing dogs from Ukraine through January 31, 2023, unless the requirements below are met.

Airline health & rabies certificates for travel: Airlines will require this for travel

<https://www.iata.org/en/programs/cargo/live-animals/>

Federal Regulations for Rabies Vaccine and Titer Result paperwork: :

<https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/apply-dog-import-permit.html>.





US Customs & Border Entry Options

Option #1 CDC PERMIT

- Apply for a CDC Dog Import Permit BEFORE travel: <https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/apply-dog-import-permit.html>.
- Arrange for dogs to arrive at JFK airport in New York with their CDC Dog Import Permit

Option #2 RABIES TITER TEST RESULT WITH NO CDC PERMIT

1. Make a **reservation in advance** to arrive at The ARK Pet Oasis at JFK airport. The ARK Pet Oasis is the CDC-approved and required animal care facility. Request a reservation by emailing: Reservations@arkjfk.com or calling 1-212-973-8275. See <https://www.arkpetoasis.com/>
2. Present on arrival a **valid foreign-issued rabies vaccination certificate** for each dog
3. Present on arrival the results of a **valid rabies serology titer test** from an approved laboratory for each dog, drawn at least 45 days to 12 months prior to arrival
4. Dog will be examined by a USDA-accredited veterinarian working at The ARK at owner expense
5. Dog will be revaccinated at The ARK at owner expense

Option #3 NO RABIES TITER TEST RESULT AND NO CDC PERMIT

1. Make a **reservation in advance** to arrive at The ARK Pet Oasis at JFK airport. (see above)
2. Present on arrival a **valid foreign-issued rabies vaccination certificate** for each dog
3. Present on arrival the results of a **valid rabies serology titer test** from an approved laboratory for each dog, drawn at least 45 days to 12 months prior to arrival
4. Dog will be examined by a USDA-accredited veterinarian working at The ARK at owner expense
5. Dog will be quarantined at the ARK for 28 days after revaccination

Dogs arriving without a permit, or an ARK reservation will be denied entry and returned to the country of departure at owner expense.

Importing Dogs and Cats into New York State

All dogs and cats entering New York State must meet the two requirements below. Dogs must also meet CDC requirements listed above.

1. A Certificate of Veterinary Inspection (CVI) or a Health Certificate issued 30 days or less prior to entry. If the country of origin does not have a CVI form or Health Certificate, New York accepts the required information on the veterinarian's letterhead. All information must be in English including:

- NY destination address
- Veterinary exam showing no evidence of infection, communicable disease, parasites, or fungi
- Statement from vet that animal has not been exposed to infectious disease

2. Rabies Certificate:

- Proof of a current rabies vaccination for animals 3 months of age and older.
- Rabies vaccine product name & date of vaccination on the CVI or vet letter (above)
- New York does not accept serology titer tests in lieu of rabies vaccinations
- New York does not accept European Union (EU) or other Pet Passports.

For dogs and cats in transit from another state. Dogs and cats traveling into New York State from another state within the United States must meet the same requirements as importing them from outside the United States. However, a Certificate of Veterinary Inspection or Health Certificate is not required if the animal is staying in New York for less than 30 days.

Federal Information. The following link includes CDC information on importing a pet into the United States summarized in this document: <https://www.cdc.gov/importation/bringing-an-animal-into-the-united-states/dogs.html>.

New York State Information. The following link includes NYS Department of Agriculture and Markets information on importing a pet into New York State summarized in this document: <https://agriculture.ny.gov/animals/companion-animals#:~:text=the%20Pet%20Passport.-,The%20requirements%20for%20importing%20dogs%20and%20cats%20into%20New%20York,the%20use%20of%20electronic%20CVIs>.

This information is current as of July 2022.

NYSBA COMMITTEE ON ANIMALS AND THE LAW
MEMBER SPOTLIGHT: DEBRA VEY VODA-HAMILTON, ESQ.

INTERVIEW BY BREANNA C. REILLY, ESQ.

What made you decide to become an attorney?

I came from a law enforcement household. My dad was a lieutenant in the NYPD and my uncle was the first 4 star chief in 3 positions, Patrol, Organized Crime Control Bureau, and Personnel.

In what areas of law have you practiced?

I was an Assistant Advocate at the NYPD in the Advocate's office-we prosecuted police officers in house for offenses coming out of the CCRB. I was a Westchester Assistant District Attorney under Carl Vigari, Esq.; a Securities and Exchange Commission attorney at a small firm for a year-not my cup of tea; and an Assistant Inspector General for the Metropolitan Transportation Authority Inspector General. I then took 13 years off to be home with my kids. I returned to the practice of law in 2008 as Debra Hamilton and Associates. This morphed into Hamilton Law and Mediation in 2010. Now that I am in North Carolina it is becoming Hamilton ADR-NC this summer.

What does your current law practice consist of?

I help people in conflict over animals using ADR, conscious conversations, and contracts. Understanding what everyone is feeling, saying, and meaning when they are in conflict is key to keeping conflicts at on track to resolve. Often defensiveness and reactivity become prevalent and so the conflict ignites; like a snowball running downhill. I help keep snowballs from forming.

How did you get into the animal law field?

I always helped people deal with contract violations as breeders or owners and helped with complaints before the American Kennel Club. I joined the Animal Law Committee for NYSBA, NYC, NYCLA and ABA and found there was a whole world of animal law issues I had never thought about and that I thought about differently. I now work to help people speak with others, especially those who think differently, so that the animals move forward.

Was there any specific event or person in your life that inspired you to pursue a career in animal law?

Yes indeed. A client who adopted a dog, gave it a great home and was still sued by a large firm doing pro bono work for a rescue lit my fire for ADR. No one would talk to the other; they all just took defensive positions. We litigated and my client was able to retain her dog and the puppies. The rescue lost a repeat adopter and puppies that could

have generated revenue for them. Who really won? Who lost? The next dog that could have been adopted out of this rescue by this person. I knew there had to be a better way. My ADR practice began out of that experience.

What advice do you have for attorneys wanting to be more involved in the animal law field?

Pick this area of law if it is a passion, listen first and truly understand the issues below the surface, work to help others listen and keep the animal, not your ego, front and center. I call it getting it right over being right, top of mind.

In your practice, what would you consider the biggest challenge?

Shifting individual silos of thought regarding conflicts over animals to explore ADR. There is a need to set precedent and animals continue to suffer as we work to create precedent. I'm about keeping the people moving forward, educating and shifting the entire paradigm, not one case to precedent.

What is one of your fondest / most rewarding memories from your practice?

Being asked to be the key note speaker at and International Pet and Boarding Conference [IBPSA] and helping attendees look at conflict differently.

What change(s) would you like to see regarding the way the legal system handles disputes over animals?

I would like them to find a way to keep the animals top of mind, not winning or losing. Small incremental steps can often lead to big changes. Once the parties have gained trust in and appreciation for all sides and their independent solutions, crafting a hybrid solution that works for the animal in real time is easier. It should not be us against them-it needs to be how can we find a common path forward that saves the animals, educates people and shifts current mindset to solution building, not defensiveness and reactivity.

Is there a particular area of animal law that you feel most passionate about?

Pet ownership and the interaction of pet owners with service providers. Fostering open discussions among people holding different points of view is key in these relationships. Listening, appreciating and acknowledging another's point of view will move a movement forward and that movement will create momentum for a focus on what is best for all.

If you could share one piece of advice with all pet-owners, what would it be?

Make a plan for your pet in the event something happens to you. No one does it in writing. Leave that information in a place where it can be easily found. Your pet deserves a soft landing if you cannot care for it, short and long term. Also, no matter if

you buy a pet or adopt it, look for a mentor who will help you navigate the next few years with your new family member.

How did you get involved in NYSBA Committee On Animals And The Law?

I knew several members and waited until a position on the committee opened. I knew it did great work and hoped to help them continue to do great work while looking at things more openly, evaluating the most options they could explore.

In your opinion, what is one of the biggest benefits of being a member of NYSBA Committee On Animals And The Law?

The information shared, the brilliance of its members and the willingness of everyone to listen to each other.

What pets do you currently have?

I am a 40-year breeder of Irish Setters and Long-Haired Dachshunds.

I'm what one would call a preservationist purpose bred breeder.

I love to foster a better dog with each breeding.

I co-own all my puppies, mentor my new owners, show, do obedience and field work with my dogs. I have achieved high levels of accomplishment in each of these disciplines as have other of my dogs' owners.

I only have 3 now - all Irish Setters: Athena, 12, Champion Smoke on the Water; Roxy, 11 Champion Rumraisin Jail House Hottie; Juni, 5, Champion Rumraisin Joshua Tree MH. I have had National specialty WB/WD, BOW and BIS winners as well as a breed winner at Westminster KC 2002.

What do you enjoy doing for fun?

Being with my dogs in the yard, on a walk, ring, field, pool and in bed!!!

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Check out some of Debra's work!

Author: Nipped in the Bud Not in the Butt

Podcast: <http://whydopetsmatter.com>

YouTube: <https://www.youtube.com/user/HLawMediation>

www.hamiltonlawandmediation.com

**New York State Bar Association
Committee On Animals And The Law**

**Fluffy and Fido's Care, Once You're Gone.
By Debra Vey Voda-Hamilton**

On November 9, 2021 Jim Sarlis provided our NYSBA committees an in-depth review of how to care for Fluffy and Fido after their owners are gone. His program on pet trusts was sponsored by the Committee on Animal Law, Elder Law and Special Needs Section, Trust and Estate Law Section and Committee on Continuing Legal Education.

Sarlis began by pointing out that 100 million households in the US have pets. Of those households, 81% consider these animals as family members equal in status to children; 84% refer to themselves as their pet's mom or dad and 79% of people interviewed allow their pets to sleep in their beds.

Among pet owners, 80% admit to bragging about their pets with others and 31% take time off from work if their pets are sick or pass away. These polls are from a recent Associated Press poll. [<https://www.mercurynews.com/2009/06/23/ap-poll-americans-consider-pets-family-2/>] This poll also shows that nearly half of all pet owners carry photos of their pets in their wallets, on their cell phones and other mobile devices.

The interesting fact that Jim pointed out was, that despite these feelings for their pets, only about 12 to 27% of people include their pets in their trust and estate planning. This is where Jim's program began. He pointed out how we, as their trusted legal guides, can help assure pet owners that their pets will have a soft landing if something were to happen to their pet parent.

Pets have an incredibly therapeutic benefit for their humans. They lower blood pressure, decrease anxiety, increase mental sharpness while also increasing the longevity of residents in nursing homes according to a well-documented study. [<https://www.reuters.com/article/us-health-pets-nursing-homes/pets-in-nursing-homes-bring-both-benefits-and-risks-idUSKBN1HJ2BS>]

How can we assure our client's pets, and our own pets for that matter, continue to receive the care we want them to have? Solutions for this issue go from one extreme to the next. Very wealthy people, like Leona Helmsley and the German countess Carlotta have left millions of dollars to their pets. Realistically, most people leave a more modest amount of money for the care of their pets. They simply want them to continue to have love, food, shelter, and veterinary care.

Sarlis suggests that having all your pet plans in your Will could be problematic. Your Will needs to be probated. Funding for the care of your pets may be delayed. Funding care is a very important piece of the pet planning pie. If the pet care funds cannot be released pre-probate, money to care for the pet may be unavailable.

Sarlis said a Pet Trust may be the best way to proceed when planning care of your client's pet. An inter vivos/pet trust is a document outlining an arrangement. The settlor/pet owner sets aside money for the care of the pet, the beneficiary in the pet trust. They then appoint a trustee who manages the money that will come out of the trust. The trustee or another can be the pet's caregiver.

Sarlis explained that there are two different kinds of trusts important for animal law practitioners to understand. First, there is an inter vivos trust or a living trust, which takes effect as soon as it's signed and funded and operates during the pet owner or settler's life. Then there is the testamentary trust in the Will. It takes effect only after the death of the pet owner and only after probate. If you leave money for your pet's care in a testamentary trust, you would hope when you die that your Will is probated quickly. Remember, these funds are not immediately available for the care of the pet as the funds in an inter vivos trust/pet trust.

Sarlis' program then described a pet trust. It's a legal arrangement where a person provides care and maintenance for your beloved animal in the event of your inability, disability, or death. A pet trust is specifically designed for the care of your pet. Money is there and people are appointed to care for your pet. The best part about a pet trust is that your pet or other animal is expressly recognized as the beneficiary.

Other advantages of making a pet trust for your pets is that it is geared toward dispersing property in an ongoing manner over time, say the remaining life of your horse or parrot; not in one shot after probate as a Will or Bequest does. A pet trust gives the settlor the ongoing ability to disperse funds for the care of their pet as needed.

Another caution highlighted by Sarlis was not to leave the process of pet care undefined in your Will. He said judges are notorious, as they confirm the Will's terms, for tinkering with the Will's pet care provision. A freestanding and inter vivos pet trust is a private document that needs no judicial confirmation or intervention. A pet trust takes care of your pet from the minute it's created.

How do you make a pet trust?

You need to name one or more people who will care for the pet.

You will need to write down the details of how the pet should be maintained; the food they eat and games they like to play.

Include the name of the veterinarian.

State how the caretakers' expenses will be financed by the trustee.

Set forth how many times the trustee will check in on the caretaker to make sure they are caring for the pet.

Attendees were also advised how pet trusts are not subject to the rules against perpetuities. The effectiveness of a pet trust in estate planning would be limited if they had to meet the obstacle of the rules against perpetuities, life in being or 21 years. Before 1996, many states ruled that the life of a domestic companion animal cannot be used to sustain a legal trust agreement. These documents were, therefore seen as honorary and therefore technically unenforceable.

In 1996 EPTL 7-8.1 provided that a pet trust would end upon the pet's death or at the end of 21 years, whichever ever occurred first. This was done to comply with the rules against perpetuity with all interest in property vesting no later than 21 years after the measuring life passes. In 2010 the statute was amended to recognize the fact that some animals, like parrots, horses, and tortoises, may have longer life expectancy than 21 years. The statute now permits the trust to continue for the entire lifespan of the pet or animal.

Pet trusts have been enacted in all 50 states. In New York pet trusts are found under EPTL 7-8.1

-The statute has six [6] main parts:

-The trust is valid for the care of a domestic or pet animal. Domestic animal is defined in the New York Agriculture and Markets Law Sec. 108

-That a person can be appointed with the ability to enforce the terms of the trust.

-That the trust terminates upon the death of the animal or animals for which it was created [In Colorado it appears that extending coverage to the offspring of a domestic companion in gestation at the time of the owner's death is permitted.]

-That upon the trust termination the trustee shall transfer the remaining trust property as directed. If there's no such direction the property shall pass to the estate of the grantor.

-The court may lower the amount of money to be transferred into the trust for the pet's care if the amount is unreasonably large.

-The court may appoint a trustee if no trustee is designated or if the designated trustee[s] are unwilling or unable to serve.

Sarlis supplied sample pet trust forms which attendees could use as templates in their own practice. He also provided sample pet power of attorney documents to help us help our clients start the process of building a pet estate plan.

Sarlis concluded by pointing out that all pet parents need to carry emergency instructions for their animals with them. This is particularly true for people who live alone. The New York City Bar Association committee on legal issues pertaining to animals recommends that pet owners carry a copy of instructions with them in the event an emergency occurs so people will know what to do with their pets left at home.

The discussion ended with a list of several pet retirement homes available for animals in the event their owners pre-deceased them.

Pet trusts enable us to set aside assets knowing that they will immediately be applied for the care and maintenance of our client and our own animal friends. None of us have a crystal ball, we don't know when we will be unable to care for our pets ourselves. Pet

trusts are the best vehicle you can create to ensure the ongoing care your client's [and your own]beloved animal[s]. This program and document give everyone peace of mind.

Respectfully submitted by
Debra Vey Voda-Hamilton
NYSBA COAL Member

**Human Pandemics Can Kill Animals Too:
Depopulation Methods Used Throughout the COVID-19 Pandemic**

Áine Dillon
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Class of 2022

Human Pandemics Can Kill Animals Too: Depopulation Methods Used Throughout the COVID-19 Pandemic

Abstract

This paper will describe the use of depopulation throughout the coronavirus ("COVID-19") pandemic. In doing so, this paper will: (1) provide background on depopulation and will describe COVID-19's effects on the meat industry, including slaughterhouse closures and the subsequent mass depopulations of farmed animals, specifically focusing on the ill-prepared slaughterhouses effects on the farmed pig industry; (2) focus on industrially farmed swine and the efficacy and ethics of ventilation shutdown used throughout the pandemic; (3) illustrate the effects ventilation shutdown has on the environment, the community, and farmers; (4) detail the responses of government agencies with authority to protect human and animal life during a national emergency in relation to depopulation during COVID-19; and, (5) this paper will conclude with recommendations on how the regulatory agencies should alter their regulations and enforce stricter rules on emergency preparedness for meatpacking facilities and pig farmers.

I. Background & COVID-19 Effects on Slaughterhouses

COVID-19 is a zoonotic disease that is the result of the human exploitation of animals.¹ It is a virus that causes a dry cough, a loss of taste or smell, and trouble breathing.² Experts believe COVID-19 spreads primarily through respiratory droplets,³ which are produced by sneezing,

¹ANIMAL LEGAL DEFENSE FUND, COVID-19 AND ANIMALS: RETHINKING OUR RELATIONSHIP WITH ANIMALS TO REDUCE THE LIKELIHOOD OF THE NEXT GLOBAL PANDEMIC 9 (June 2020), <https://aldf.org/wp-content/uploads/2020/06/White-Paper-COVID-19-and-Animals.pdf>.

²CTR. FOR DISEASE CONTROL AND PREVENTION, *Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Apr. 10, 2021).

³ WORLD HEALTH ORG., *Transmission of ARS-CoV-2: implications for infection prevention precautions*, (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

coughing, talking, or breathing.⁴ An estimated 20% of people who have COVID-19 are asymptomatic but still contagious.⁵

Meatpacking facilities characterized themselves as victims of COVID-19.⁶ In reality, they were willfully ignorant and wholly unprepared.⁷ In 2006, the National Infrastructure Advisory Council estimated that a worldwide pandemic could halt 40% of employees from working.⁸ The Bush Administration worked to determine the potential effects of a pandemic and recommended that all commercial and public sectors be prepared.⁹ Meat processing facilities were wholly unprepared for the emergency, often citing that the pandemic was unprecedented.¹⁰ However, they were clearly warned over fifteen years prior about potential disasters a pandemic could have.¹¹ These warnings cautioned that a pandemic could pose a danger to employees and cause worker absenteeism due to illness, quarantine, or fear of getting sick.¹² Without deterrence, slaughterhouses will continue to remain ill-prepared for disasters and endanger their employees.

Early in the COVID-19 pandemic, the meat industry was disrupted by slaughterhouse workers becoming sick.¹³ Meat processing facilities were subsequently unable to process the

⁴ Atkinson J. & Chartier Y., *Natural Ventilation for Infection Control in Health-Care Settings*, GENEVA: WORLD HEALTH ORG., (2009), <https://www.ncbi.nlm.nih.gov/books/NBK143281/>.

⁵ George Citroner, *20% of Coronavirus Infections Are Asymptomatic but Still Contagious*, HEALTHLINE (Sept. 22, 2020), <https://www.healthline.com/health-news/20-percent-of-people-with-covid-19-are-asymptomatic-but-can-spread-the-disease>.

⁶ See Kate Shepard, *'The food supply chain is breaking': Tyson Foods raises coronavirus alarm in full-page ads, defends safety efforts*, WASH. POST (Apr. 27, 2020), <https://www.washingtonpost.com/nation/2020/04/27/tyson-food-supply-coronavirus/> (detailing the ad Tyson Foods put in the N.Y. Times which claimed the food chain was breaking due to slaughterhouse closures).

⁷ See *id.* (detailing the ill-preparedness of meat processing facilities).

⁸ Michael Grabell & Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (Aug. 20, 2020, 5:00 AM), <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19>; see also NATIONAL INFRASTRUCTURE ADVISORY COUNCIL, THE PRIORITIZATION OF CRITICAL INFRASTRUCTURE FOR A PANDEMIC OUTBREAK IN THE UNITED STATES WORKING GROUP 37, 110 (Jan. 16, 2007) https://www.dhs.gov/xlibrary/assets/niac/niac-pandemic-wg_v8-011707.pdf (recommending that public and private sectors create a plan in the case of a pandemic); see also FOOD & AGRICULTURE ORGANIZATION OF THE U.N., FOOD OUTLOOK BIENNIAL REPORT ON GLOBAL FOOD MARKETS 7 (June 2020), <http://www.fao.org/3/ca9509en/CA9509EN.pdf> (finding that meat consumption decreased throughout the pandemic and attributed the decline to “economic hardships, logistical bottlenecks and steep decline in demand from the food services due to lockdown”).

⁹ NATIONAL INFRASTRUCTURE ADVISORY COUNCIL, THE PRIORITIZATION OF CRITICAL INFRASTRUCTURE FOR A PANDEMIC OUTBREAK IN THE UNITED STATES WORKING GROUP 8 (2006).

¹⁰ *Id.* at 37.

¹¹ *Id.*

¹² *Id.* at 37, 110.

¹³ CTR. FOR DISEASE CONTROL AND PREVENTION, *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities – United States, April– May 2020* (July 10, 2020),

incoming meat.¹⁴ The backup resulted in pigs remaining at their farms.¹⁵ Factors contributing to the outbreaks were cramped workspaces, long shifts, shared transportation, and asymptomatic workers coming to work.¹⁶ According to the Center for Disease Control and Prevention ("CDC"), on July 10, 2020, 16,233 cases of COVID-19 were reported from 239 facilities in twenty-three states.¹⁷ By May, 2020, 137 United States Department of Agriculture ("USDA") inspectors tested positive for the virus.¹⁸ 704 others stopped working due to lack of personal protective equipment ("PPE") and/or fear of the high-risk environments they had to inspect.¹⁹ This was not a purely American experience either; there were reported COVID-19 outbreaks in meat processing facilities worldwide.²⁰

Abattoirs closed or reduced production due to the outbreaks at their facilities.²¹ Three pork processing plants in particular- Smithfield Foods in South Dakota, JBS Pork Processing in Minnesota, and Tyson Fresh Foods in Iowa all had to close in April of 2020.²² These three plants alone comprised 15% of all pork processing in the United States.²³ These plants had to close due to being ill-equipped to accommodate social distancing and employees becoming sick or remaining at home.²⁴ Smaller plants across the nation also closed to allow for cleaning

<https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> [hereinafter *COVID-19 Among Workers in Meat and Poultry Processing Facilities*].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Dan Charles, *How Widespread Coronavirus Testing Helped Meatpacking Plants Slow Outbreaks*, NAT'L PUB. RADIO (June 22, 2020, 4:04 PM), <https://www.npr.org/sections/health-shots/2020/06/22/879774584/how-widespread-coronavirus-testing-helped-meatpacking-plants-halt-outbreaks>; see also Anthony Reuben, *Coronavirus: Why have there been so many outbreaks in meat processing plants?*, BRIT. BROAD. CO. (June 23, 2020), <https://www.bbc.com/news/53137613> (explaining that conditions inside slaughterhouses are typically old and damp, which fosters the spread of disease).

¹⁷ *COVID-19 Among Workers in Meat and Poultry Processing Facilities*, *supra* at Note 13.

¹⁸ *Id.*

¹⁹ Bob Fernandez, *Meat inspectors are terrified their job is a coronavirus 'death sentence' and they don't even have face masks*, PHILA. INQUIRER (Apr. 24, 2020), <https://www.inquirer.com/news/meat-plants-closed-coronavirus-tyson-jbs-cargill-inspectors-shortage-safety-20200424.html>.

²⁰ Reuben, *supra* note 16 (stating there were outbreaks in meat processing facilities in Germany, France, Spain, and the United Kingdom).

²¹ Dianne Gallagher & Pamela Kirkland, *Meat processing plants across the US are closing due to the pandemic. Will consumers feel the impact?*, CABLE NEWS NETWORK BUS. (Apr. 27, 2020, 8:43 AM), <https://www.cnn.com/2020/04/26/business/meat-processing-plants-coronavirus/index.html> [hereinafter Gallagher & Kirkland].

²² *Id.*

²³ *Id.*

²⁴ *Id.*; see also Konstantin Toropin & Theresa Waldrop, *CDC issues recommendations for closed South Dakota Smithfield plant following coronavirus outbreak*, CABLE NEWS NETWORK (Apr. 23, 2020, 7:58 PM), <https://www.cnn.com/2020/04/23/us/cdc-report-smithfield-plant-south-dakota/index.html> (stating that employees speak forty different languages thus creating difficulties communicating from management to employees); see

and employee testing.²⁵ This created a nationwide bottleneck.²⁶ The bottleneck was compounded with the decreased demand for meat products.²⁷ Due to closures of restaurants, schools, and hotels, meat was not being consumed on a large scale anymore and therefore decreased demand for commercially packaged meats.²⁸

II. Effects of Slaughterhouse Closures

Due to the closures or decreased capacity of slaughterhouses, many concentrated animal feeding operations (hereinafter “CAFOs”) had to kill their animals.²⁹ Not only pork processing plants were affected.³⁰ Milk had to be dumped, eggs smashed, and crops buried.³¹ The pork industry was disproportionately affected because of the long-life cycle of the pigs, the use of the just-in-time production cycle, and other animals could remain in the farms to be slaughtered while pigs could not.³²

The swine production was disproportionately affected by slaughterhouse closures because the industry uses a “just-in-time” production cycle.³³ The industry uses segmented life stages, including nursing with the sow, weaned/ nursery stage, and the finishing stage before sending

also Ann Colwell et al., *Workers, officials sat too little too late after Tyson closes Waterloo pork plant: ‘All they talked about was production,’* CABLE NEWS NETWORK (Apr. 23, 2020, 9:55 PM), <https://www.cnn.com/2020/04/22/us/tyson-waterloo-iowa-plant-employees-coronavirus/index.html> (claiming that

“worker absenteeism lead to plant slowing productions and lead to indefinite closure”).

²⁵ *Id.*

²⁶ Gallagher & Kirkland, *supra* note 21.

²⁷ Andréia G. Arruda et al., *A Systematic Literature Review on Depopulation Methods for Swine*, MULTIDISCIPLINARY DIGIT. PUBL’G INST., (Nov. 20, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7699593/>; Jeremy N. Merchant-Forde & Laura A Boyle, *Covid-19 Effects on Livestock Production: A One Welfare Issue*, FRONT. VET. SCI. (Sept. 30, 2020), <https://www.frontiersin.org/articles/10.3389/fvets.2020.585787/full> [hereinafter *Effects on Livestock Production*].

²⁸ *Id.*

²⁹ Sophia Kevany, *Millions of US farm animals to be culled by suffocation, downing, and shooting*, GUARDIAN (May 19, 2020, 5:47 AM), <https://www.theguardian.com/environment/2020/may/19/millions-of-us-farm-animals-to-be-culled-by-suffocation-drowning-and-shooting-coronavirus>.

³⁰ Michael Corkery & David Yaffle- Bellany, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html> (explaining the amounts of crops and livestock that had to be killed or thrown away).

³¹ *Id.*

³² See Olivia Solon, *Coronavirus crisis puts hog farmers in uncharted territory: Killing their healthy livestock*, NAT’L BROAD. CO., (May 28, 2020, 3:53 PM), <https://www.nbcnews.com/news/us-news/coronavirus-crisis-puts-hog-farmers-uncharted-territory-kill-their-healthy-n1216571> (explaining cows could be left out in the pasture for months whereas pigs, if left at the finishing facilities, will gain too much weight to go to slaughter).

³³ NAT’L PORK PRODUCERS COUNCIL, *THE TRAGIC IMPACT OF COVID-19 ON U.S. HOG FARMERS: THE NEED TO EUTHANIZE 2* (2020), <https://nppc.org/wp-content/uploads/2020/05/euthanasia-fact-sheet-FINAL-5-8-20.pdf> [hereinafter *THE TRAGIC IMPACT OF COVID-19 ON U.S. HOG FARMERS*].

the pigs to slaughter.³⁴ Each life stage typically has separate facilities that specialize in the pigs' maturity.³⁵ Once the pigs have spent enough time at the finishing facility, they are 'just-in-time' for gaining the maximum amount of weight to be slaughtered.³⁶ If the pigs stay at the finishing facility too long, they gain too much weight and cannot fit safely within the slaughterhouse equipment.³⁷ Because the pork processing facilities were either closed or at diminished capacity, many pigs simply got too big to be slaughtered.³⁸ The farmers also had more incoming pigs from earlier life stage facilities.³⁹ Some farmers used local butchers or distant facilities that were still operating, but neither option could handle all the pigs.⁴⁰

During the week of May 2, 2020, USDA-inspected pork slaughterhouses slaughtered 1.55 million pigs.⁴¹ In the same week in 2019, over 2.36 million hogs were slaughtered.⁴² An estimated 10,068,000 pigs would be depopulated between April and September 2020 due to either closure or limited capacity of meat processing facilities.⁴³

a. Depopulation Explained

Mass depopulation is the practice of killing a herd of animals due to emergent circumstances, such as disease or environmental disaster.⁴⁴ In the case of diseased animals, the entire herd is killed, ill or healthy, in the facility and occasionally surrounding areas.⁴⁵ Disease is the most common reason for depopulation.⁴⁶ It is typically used to decrease the risk of disease spread outside the population already infected and protect from zoonotic diseases.⁴⁷ The

³⁴ *Id.*

³⁵ *See id.* (explaining that many finishing stage facilities are located near soybean and corn farms for the feed for the pigs).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ THE TRAGIC IMPACT OF COVID-19 ON U.S. HOG FARMERS, *supra* note 33.

⁴⁰ Solon, *supra* note 32.

⁴¹ THE TRAGIC IMPACT OF COVID-19 ON U.S. HOG FARMERS, *supra* note 33.

⁴² *Id.*

⁴³ *Id.*; Rossi A Hassad, *Why COVID-19 Might Get Worse in Winter, Just Like Flu*, (Nov. 5, 2020), MEDPAGE <https://www.medpagetoday.com/infectiousdisease/covid19/89495> see also <https://www.npr.org/sections/health-shots/2020/10/27/928062773/u-s-cases-surpass-summer-peak-and-are-climbing-higher-fast>.

⁴⁴ Arruda et al, *supra* note 27.

⁴⁵ *Id.*

⁴⁶ *Id.* See AM. VETERINARY MED. ASS'N, AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION 4 (2020), AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf [hereinafter AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS].

⁴⁷ Robert E Myer et al., *Carbon dioxide for emergency on-farm euthanasia of swine*, J. SWINE HEALTH PROD. (Aug. 2005), <https://www.aasv.org/shap/issues/v13n4/v13n4p210.pdf>.

challenge of depopulation is weighing the emergency circumstances with the welfare of the animals.⁴⁸ Depopulation is not considered euthanasia by the American Veterinary Medical Association (“AVMA”).⁴⁹ Unlike euthanasia, animals may experience suffering while dying.⁵⁰ The depopulation method chosen depends on the species, number of animals involved, the technical skill of the responders, potential for chemical residue, and personnel safety.⁵¹ Methods used for mass depopulation of pigs include injected anesthetic agents (including barbiturates and barbituric acid derivatives) and inhaled gases (including carbon monoxide and carbon dioxide).⁵²

The AVMA is a not-for-profit corporation that has created Guidelines for the Euthanasia of Animals,⁵³ Guidelines for the Humane Slaughter of Animals,⁵⁴ and Guidelines for Depopulation.⁵⁵ The AVMA defines penetrative captive bolt, electrocution, and anesthetic overdose as “preferred methods” (“PM”) for depopulating farmed pigs.⁵⁶ The AVMA lists ventilation shutdown (“VS”) and sodium nitrate as methods “permitted in constrained circumstances” (“PCC”).⁵⁷ These circumstances could include response time to zoonotic diseases, concern for human safety, and disease transmission risk.⁵⁸ In essence, constrained circumstances can allow for a less favorable depopulation method to be used.⁵⁹ Finally, the AVMA details “not recommended” (“NR”) methods that should be used only when PM and PCC methods are impossible.⁶⁰ The AVMA has no listed NR methods for depopulating pigs.⁶¹

⁴⁸ See AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION 4 (2020), AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf [hereinafter AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS].

⁴⁹ *Id.*

⁵⁰ *Id.* at 5

⁵¹ *Id.*

⁵² JUST IN TIME TRAINING, EUTHANASIA AND MASS DEPOPULATION DURING ANIMAL HEALTH EMERGENCIES 1 (July 2014), <https://www.cfsph.iastate.edu/Emergency-Response/Just-in-Time/15-Euthanasia-HANDOUT.pdf>.

⁵³ AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS: 2020 EDITION (2020).

⁵⁴ AVMA GUIDELINES FOR THE HUMANE SLAUGHTER OF ANIMALS: 2016 EDITION (2016).

⁵⁵ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 5.

⁵⁶ *Id.* at 8, 44–45.

⁵⁷ See *id.* at 44–45 (nothing that these methods depend highly on the attributes of the pig, for example, electrocution is only suitable for pigs over ten pounds).

⁵⁸ *Id.* at 8.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See, *Id.* at 45 (stating “[n]ot applicable” for NR methods).

Emergency circumstances include structural collapse, complete inability to safely access the animals for a prolonged period, or any circumstance that poses a "severe threat to human life."⁶²

b. Depopulation Methods used During the Pandemic

One of the depopulation methods used on pigs during the pandemic was VS.⁶³ VS involves shutting off all ventilation to the swine's housing facility by closing all doors and windows, turning off fans, and shutting inlets.⁶⁴ The process increases the temperature in the facility from the pigs' body heat and results in death by hyperthermia.⁶⁵ The pigs may die from many variables attributed to VS, including rising CO² levels or toxic gases from slurry and/or manure.⁶⁶ Experts generally agree that using rising temperatures to kill pigs produces suffering,⁶⁷ as it involves suffocation, very high temperatures, and often takes hours.⁶⁸

AVMA lists VS as PCC.⁶⁹ AVMA states, "[f]ailure to achieve 100% mortality in depopulation is unacceptable."⁷⁰ VS, however, has multiple variables that can impact the time required for 100% of the pigs to die.⁷¹ These variables include the size of the barn, efficiency of insulation, ability to close doors or windows, and the size and number of pigs.⁷² Occasionally, facilities use a modified VS method that includes additional heat sources or added CO² to ensure 100% mortality.⁷³ Due to these confounding variables, the AVMA recommends that VS is only used in facilities that can produce a temperature that results in more than 95% death rate *in less than one hour*.⁷⁴ A United Kingdom study found that a facility that could result in more

⁶² *Id.*

⁶³ Kevany, *supra* note 29.

⁶⁴ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 45.

⁶⁵ *Id.*; see also HARV. HEALTH PUBL'G, HARV. MED. SCHOOL, *Heat Stroke (Hyperthermia)*, (Jan. 2019), https://www.health.harvard.edu/a_to_z/heat-stroke-hyperthermia-a-to-z (explaining what hyperthermia is, and how death can occur from being exposed to high temperatures over time).

⁶⁶ See *id.*; see also AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 45.

⁶⁷ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 8–9 (capturing the pig's screams as they die); The Intercept, *Hidden Video Reveals Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, YOUTUBE (May 29, 2020), <https://www.youtube.com/watch?v=UhavFP9f6b4&t=1s> [hereinafter *Hidden Video Reveals Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*].

⁶⁸ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 45.

⁶⁹ *Id.* at 45

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS, *supra* note 48, at 9.

⁷⁴ See *id.* (emphasizing that VS should only be used when other methods are impossible can result in less suffering than if other methods were used) (emphasis added).

than 95% death rate in less than one hour did not result in a 100% death rate *over sixteen hours*.⁷⁵ Finally, the AVMA does not recommend VS in any situation that would not result in 100% mortality.⁷⁶ Therefore, the current recommendations may allow for temperatures creating a 95% death rate in one hour; however, they also may allow 5% to die after many hours of being cooked alive.⁷⁷ This is in direct conflict with AVMA's belief that failure for 100% mortality in depopulation is unacceptable.⁷⁸

The AVMA also recommends that a plan should be in place for depopulation before the need for depopulation presents itself.⁷⁹ However, even if planning was not accomplished, the main objective should be alleviating animal suffering while maintaining human safety.⁸⁰ The current guidelines also aim to mitigate the psychological effects of depopulation.⁸¹

A facility that used VS was Iowa's largest pork producer; Iowa Select's rural Grundy Country facility.⁸² A whistleblower took a video inside the facility while the VS occurred and sent it to the online publication; The Intercept.⁸³ The video included audio that captured the screams of the pigs while they died being cooked alive.⁸⁴ The video also revealed that some pigs survived the ordeal before being killed by a bolt gun the following morning.⁸⁵ The whistleblower also stated that the facility had experimented in VS in late April by shutting off the ventilation to the barn.⁸⁶ The experiment failed to raise the heat to a fatal level, so the

⁷⁵ SMITH P CRABTREE ET AL., *PERFECTING THE PIG ENVIRONMENT* (Nottingham, England: Nottingham University Press, 2009) (emphasis added).

⁷⁶ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 45.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 41.

⁸⁰ *Id.*

⁸¹ U.S. DEP'T OF AGRIC. – ANIMAL AND PLANT HEALTH INSPECTION SERV., FOREIGN ANIMAL DISEASE PREPAREDNESS AND RESPONSE PLAN (FAD PREP): NATIONAL ANIMAL HEALTH EMERGENCY MANAGEMENT SYSTEM (NAHEMS) GUIDELINES: MASS DEPOPULATION & EUTHANASIA (2015),

https://www.aphis.usda.gov/animal_health/emergency_management/downloads/nahems_guidelines/mass_depop_euthan.pdf; *see also* AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 7 (explaining that cultural, economic, psychological and ecological ramifications of depopulation should be considered before choosing which method to implement).

⁸² Glenn Greenwald, *Hidden Video and Whistleblower Revel Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, INTERCEPT (May 29, 2020, 12:08 PM), <https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/> [hereinafter Greenwald].

⁸³ *Hidden Video Reveals Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, *supra* note 67.

⁸⁴ *Id.*; ANIMAL LEGAL DEFENSE FUND ET AL., BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE: PETITION FOR EMERGENCY RULEMAKING 19–26 (2020).

⁸⁵ Greenwald, *supra* note 82.

⁸⁶ *Hidden Video Reveals Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, *supra* note 67.

workers began injecting steam into the barns.⁸⁷ The whistleblower stated, "[t]he first day they shut off all the fans and turned the heat up and the hottest they could get the building was 120 degrees. After four to five hours, none of the animals were dead."⁸⁸ Even after the employees had inspected the pigs to ensure all were dead, some were still alive when a bulldozer piled the carcasses.⁸⁹ According to the AVMA guidelines, this would be a total and unacceptable failure.⁹⁰

III. Effects of Mass Depopulation

a. *Environmental Costs*

There are extraordinary environmental costs of depopulation in addition to the enormous detriment CAFOs already bequeath on the environment.⁹¹ Both depopulation and carcass disposal can negatively impact the environment and surrounding communities.⁹² VS, in particular, can result in elevated levels of ammonia, a poison that is dangerous to both humans and animals.⁹³ Methods of carcass disposal used in the U.S. include unlined burial and composting.⁹⁴ Both are prohibited in the European Union.⁹⁵ As animal carcasses degrade, their bodily fluids, chemicals, and hazardous gases (including ammonia, hydrogen sulfide, and methane) are released into the environment.⁹⁶ Vectors also feed on the carcasses and can spread leachate components, which can contaminate groundwater.⁹⁷ The environmental costs of

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS, *supra* note 48, at 45.

⁹¹ *Effects on Livestock Production*, *supra* note 27; NAT'L ASS'N OF LOCAL BOARDS OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 2, (2020) https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

⁹² *Id.* at 2-10.

⁹³ USDA APHIS, HIGH PATHOGENY AVIAN INFLUENCE CONTROL IN COMMERCIAL POULTRY OPERATIONS- A NATIONAL APPROACH: FINAL ENVIRONMENT ASSESSMENT 32 (Dec. 2015); Banday Baba et al., *Traditional methods of carcass disposal: a review*, J. DAIRY VET. ANIMAL RES. (2017).

⁹⁴ *Effects on Livestock Production*, *supra* note 27.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ ENV'T PROT. AGENCY (EPA), CARCASS MANAGEMENT OF NON-DISEASED ANIMALS IN RESPONSE TO THE CORONAVIRUS OUTBREAK (COVID-19) (2020), <https://www.epa.gov/agriculture/carcass-management-non-diseased-animals-response-coronavirus-outbreak-covid-19>; NAT'L ASS'N OF LOCAL BOARDS OF HEALTH, *supra* note 91, at 3-4.

carcass disposal compound on the environmental harms that stem from depopulation.⁹⁸ All these factors culminate to affect the communities surrounding CAFOs negatively.⁹⁹

b. Costs to Farmers

Finally, there are profound psychological effects on the farmers that have to kill their animals.¹⁰⁰ Farmers are already more likely to suffer from mental illness and have higher rates of suicide than the normal population.¹⁰¹ The whistleblower informed The Intercept of the mental distress they and their coworkers encountered due to the act of depopulating their pigs.¹⁰² The whistleblower explained that farmers never regularly witnessed the slaughter of their animals, and knowing the suffering their animals were subjected to was very distressing.¹⁰³ Depopulation also comes at a financial cost for the farmers.¹⁰⁴ Many farmers cited financial problems as a stressor, and many lost money due to depopulation.¹⁰⁵ On average, it costs \$130 to raise a pig for slaughter, and the cost to euthanize and dispose of a hog ranges from \$20-\$80 per animal.¹⁰⁶ Also, many farmers simply work for giant corporations and make little money while the corporation makes billions.¹⁰⁷

IV. Government Response

The USDA was established to “acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture,

⁹⁸ *Id.*

⁹⁹ Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, ENV'T HEALTH PERSPECTIVES (Feb. 1, 2007), <https://ehp.niehs.nih.gov/doi/full/10.1289/ehp.8835>.

¹⁰⁰ See e.g., Greenwald, *supra* note 82 (quoting the whistleblower's experiences with depopulation and how they and their coworkers were affected by depopulation).

¹⁰¹ Sahar Daghagh et al., *Key Risk Factors Affecting Farmers' Mental Health: A Systematic Review*, INT. J. ENVIRON RES. PUB. HEALTH (Dec. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6926562/> (citing “pesticide exposure, financial difficulties, climate variabilities/drought, and poor physical health/past injuries” as reasons for farmers to be more susceptible to mental illness or suicide); C. E. Frasier, *Farming and mental health problems and mental illness*, INT. J. SOC. PSYCHIATRY (Dec. 2005), <https://pubmed.ncbi.nlm.nih.gov/16400909/>.

¹⁰² Greenwald, *supra* note 82.

¹⁰³ *Id.*

¹⁰⁴ Solon, *supra* note 32.

¹⁰⁵ Daghagh, et al, *supra*, note 101.

¹⁰⁶ *Id.*

¹⁰⁷ David Jackson & Gary Marx, *Illinois contract pig farmer: Work is low-paying, physically pushing*, CHI. TRIBUNE (Aug. 8, 2016), <https://www.chicagotribune.com/investigations/ct-pig-farms-operators-met-20160802-story.html> (analogizing many pig farmers' contracts to indentured servants to the corporations they work for).

and human nutrition.”¹⁰⁸ A department of the USDA, the Animal and Plant Health Inspection Service (“APHIS”), is specifically tasked with maintaining the health and welfare of plants and animals.¹⁰⁹ The Animal Health Protection Act also authorized APHIS to take remedial actions regarding animals that have been affected by a livestock disease or pest.¹¹⁰ APHIS has interpreted this power to include animals affected by national emergencies.¹¹¹ Thus APHIS must regulate how animals are depopulated due to COVID-19.¹¹²

Although the Animal Welfare Act does not protect farm animals,¹¹³ livestock are protected from inhumane slaughter by the Humane Methods of Slaughter Act (“HSA”).¹¹⁴ The HSA requires that the slaughter of livestock avoids needless suffering.¹¹⁵ The USDA’s Food Safety and Inspection Service (“FSIS”) enforces the HSA.¹¹⁶ FSIS also inspects meat processing facilities.¹¹⁷ Thus, the USDA has the authority and duty to oversee how animals are slaughtered and how meat processing facilities are run via FSIS, and how animals are treated in response to national emergencies via the APHIS.¹¹⁸

a. Meat Packing Facilities

On April 26, 2020, the United States Labor Department's Occupational Safety and Health Administration ("OSHA") and the CDC released guidelines containing recommendations for workers in meat, poultry, and pork processing and packaging facilities.¹¹⁹ OSHA fined

¹⁰⁸ 7 U.S.C.A. § 2201 (West).

¹⁰⁹ 7 C.F.R. § 371.10 (2018).

¹¹⁰ 7 U.S.C.A. § 8306(a)(1) (2018).

¹¹¹ USDA, CARCASS MANAGEMENT DURING A MASS ANIMAL HEALTH EMERGENCY FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT DECEMBER 2015 97 (Dec. 2015), https://www.aphis.usda.gov/stakeholders/downloads/2015/eis_carcass_management.pdf

¹¹² *Id.*

¹¹³ See 9 C.F.R. § 2132 (g) (defining “The term ‘animal’ means . . . but said term excludes . . . other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber”).

¹¹⁴ U.S.C. § 1958 (1) (2018); Constantinos Hotis, *The Anthropological Machine at the Abattoir: The Humane Methods of Slaughter Act*, 1 U. CHI. LEGAL F. 1–3 (2006); ANIMAL LEGAL DEFENSE FUND, ET AL., *supra* note 84, at 25.

¹¹⁵ U.S.C. § 1958 (1) (2018).

¹¹⁶ 21 U.S.C.A. §§ 1901–1907 (2018).

¹¹⁷ 21 U.S.C.A. § 601 (West); USDA, SUMMARY OF FEDERAL INSPECTION REQUIREMENTS FOR MEAT PRODUCTS 2 (Sept. 2015), https://www.fsis.usda.gov/sites/default/files/media_file/2021-02/Fed-Food-Inspect-Requirements.pdf.

¹¹⁸ See 21 U.S.C.A. § 601; U.S.C.A. §§ 1901–1907.

¹¹⁹ OSHA, 9 STEPS TO REDUCING WORKER EXPOSURE TO COVID-19 IN MEAT, POULTRY, AND PORK PROCESSING AND PACKAGING FACILITIES 1 (Apr. 26, 2020), <https://www.osha.gov/sites/default/files/publications/OSHA4050.pdf>.

facilities that were in noncompliance with their COVID-19 guidelines.¹²⁰ In September, Smithfield Foods was fined \$13,494 (totaling less than \$10.50 for every worker that contracted the virus).¹²¹ OSHA fined the facility for “failing to provide a workplace free from recognized hazards that can cause death or serious harm.”¹²² The vast majority of slaughterhouses faced no penalty.¹²³

On April 28, 2020, President Trump ordered meat processing plants to stay open through an executive order.¹²⁴ The President expressed concern over “unnecessary closures” of meat processing facilities and the effect the closures could have on the food chain.¹²⁵ These actions would include allocating materials and services necessary to maintain the food supply and overrode state mandates that required the closure of facilities where COVID-19 was present.¹²⁶ Many plants remained closed, citing employee absenteeism.¹²⁷ If employees were sick or fearful, they simply refused to come into work, and the plants could not reopen fully.¹²⁸ According to the National Pork Producers Council, as of May 6, 2020, the slaughtering capacity for pork decreased by 40%.¹²⁹

¹²⁰ Nick Roberts & Rosa Amanda Tuirán, “it’s a national tragedy”: *What a devastating Covid-19 outbreak at a California slaughterhouse reveals about the federal government’s failed pandemic response*, COUNTER (Nov. 24, 2020, 10:30 AM), <https://thecounter.org/covid-19-outbreak-meatpacking-safety-osha-california/> (advising workers to stay home if they were sick, maintain at least six feet between coworkers, and installing partitions along the production line to achieve physical distance) [hereinafter Roberts & Tuirán].

¹²¹ *Id.*; see also OSHA Press Release, U.S. Department of Labor Cites Smithfield Packaged Meats Corp. For Failing to Protect Employees from Coronavirus (Sept. 10, 2020), <https://www.osha.gov/news/newsreleases/region8/09102020> (stating 1,294 Smithfield workers contracted the virus, and four died).

¹²² *Id.*

¹²³ See Roberts & Tuirán, *supra* note 120 (explaining that OSHA has only imposed \$70,000 in total fines to meatpacking companies).

¹²⁴ Exec. Order No. 13917, 85 Fed. Reg. § 26,313 (Apr. 28, 2020).

¹²⁵ See *id.* (stating that “Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA).

¹²⁶ See Sarah Westwood, *Despite Trump executive order, meat processing plants struggle to stay open*, CABLE NEWS NETWORK (May 1, 2020, 7:17 PM), <https://www.cnn.com/2020/05/01/politics/executive-order-meat-processing-plants-open/index.html> (citing Stephen Meyer, an economist at Kerns & Associates working with the pork industry.)

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ THE TRAGIC IMPACT OF COVID-19 ON U.S. HOG FARMERS, *supra* note 33.

b. USDA Response

On April 24, 2020, the USDA established the National Incident Coordination Center ("NICC") to aid farmers affected by COVID-19.¹³⁰ NICC assisted farmers on depopulation, carcass disposal and supplied equipment and personnel.¹³¹ APHIS and the USDA's Natural Resources Conservation Service ("NRCS") created a PowerPoint on depopulating pigs and disposing of the carcasses.¹³² This PowerPoint details the PM, PCC, and NR depopulation options for swine farmers according to the AVMA.¹³³ Further, the APHIS provided bolt guns to aid depopulation.¹³⁴ However, at this point, many facilities were already experimenting with depopulation methods and feeling the effects of the bottleneck.¹³⁵

V. Conclusion & Recommendations

The USDA is tasked with protecting the health of humans and animals.¹³⁶ Throughout COVID-19, the USDA failed to protect the pigs that were being cooked alive, the farmers who had to witness and execute the depopulation, and the health of the communities surrounding CAFOs. The just-in-time model exacerbated the unpreparedness of the facilities and resulted in intense suffering for the pigs. It is hardly surprising that an industry that relies on animal suffering to maximize profits had no problem allowing their animals to die in excruciating pain.¹³⁷ This lack of preparedness was both willful and allowed by the current regulatory

¹³⁰ USDA, *Coronavirus and USDA Assistance for Farmers*, (last visited Apr. 24, 2021), <https://www.farmers.gov/coronavirus>.

¹³¹ *Id.*

¹³² PORK CHECKOFF, PLANNING FOR EMERGENCY DEPOPULATION AND DISPOSAL (Apr. 26, 2020), <https://library.pork.org/media/?mediaId=F7549893-1D5E-42BD-879981850085984B>.

¹³³ *Id.*

¹³⁴ U.S. ANIMAL HEALTH ASS'N, NATIONAL VETERINARY STOCKPILE RESOURCES FOR MASS DEPOPULATION OF ANIMALS 1 (Oct. 2020).

¹³⁵ Greenwald, *supra* note 82 (explaining a whistleblower that claimed their facility began experimenting with depopulation in late April).

¹³⁶ 7 U.S.C.A. § 2201 (West).

¹³⁷ Greenwald, *supra* note 12.

structure and needs to be remedied for the future, especially when pandemics may become more prevalent.¹³⁸

To combat these shortcomings in the future, there should be steeper fines for failure to comply with OSHA guidelines. A slap on the wrist fine does not create deterrence. These minimal fines invalidated the illness and deaths of slaughterhouse workers. Further, the President should not allocate exemptions from state guidelines to meat processing facilities due to their ill-preparedness for national emergencies that have been predicted for over fifteen years. Meat processing facilities need be prepared to handle disasters in the future. Without preparation for pandemics, slaughterhouses put their workers, families, and communities at risk. The USDA is tasked with protecting human life within agriculture. They should also be protecting those who supply the American grocery stores. The meek fines and Presidential exceptions perpetuated the narrative that slaughterhouses were also victims of COVID-19, rather than the reality that they were warned and chose not to prepare.

Secondly, the AVMA should move VS onto the NR list, as many veterinarians have urged.¹³⁹ Due to the many variables associated with VS, even listing VS as PCC permits both immense suffering and for some animals to survive the unacceptable ordeal. Moving VS to NR will spare the needless suffering of many pigs and require more planning by finishing facilities. Further, it will force facilities to investigate other options, and only use VS when all other depopulation methods are impossible.

Thirdly, as seen with the USDA's efforts to aid farmers throughout the pandemic,¹⁴⁰ they should be responsible for ensuring that depopulation methods comply with preferred methods

¹³⁸ Walter Doods, *Disease Now and Potential Future Pandemics*, WORLD WORST PROBLEMS (Dec. 3, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7120200/>.

¹³⁹ Press Release, The Humane Soc. of the U.S., More than 2,900 veterinary professionals and advocates call on AVMA to prevent brutal ventilation shutdown on farms (Dec. 16, 2020); CHANGE.ORG, *AVMA, remove inhuman Ventilation Shutdown as an acceptable depopulation method*, (last visited Apr. 15, 2021), <https://www.change.org/p/american-veterinary-medical-association-avma-remove-inhumane-ventilation-shutdown-as-an-acceptable-depopulation-method>; ANIMAL LEGAL DEFENSE FUND, ET AL., *supra* note 84 at 25–32.

¹⁴⁰ *Coronavirus and USDA Assistance for Farmers*, *supra* note 130; PORK CHECKOFF, PLANNING FOR EMERGENCY DEPOPULATION, *supra* note 132.

described by the AVMA. They have the ability to aid farmers, and while doing so they should ensure that farm animals are depopulated with PM. Further, the USDA should avoid and advocate against PCC and NR methods. Providing farmers with resources can help them use PM methods. If the USDA can prove that no other alternative is available and that their application of VS will result in the death of 100% of the animals after an hour, only then should the farmers use methods like VS.¹⁴¹

Finally, due to their reliance on the just-in-time business model, pig raising facilities should be punished if they are ill-prepared for emergencies. The business model they rely on is so focused on profit that any disturbance results in more suffering for pigs. These pigs whose entire existence is being in small pens, with little sanitation and no fresh air or sunlight.¹⁴² In short, the USDA should ensure that farmers have plans if an emergency happens, and they must depopulate their pigs; the primary consideration should not be the bottom line of the few corporations; it should be the pigs, their farmers, and their communities.

¹⁴¹ *Id.* at 45.

¹⁴² Kelley J. Donham, *The Concentration of Swine Production: Effects on Swine Health, Productivity, Human health and the Environment*, VETERINARY CLINIC OF N. A.: FOOD ANIMAL PRACTICE (Nov. 2000), <https://www.sciencedirect.com/science/article/abs/pii/S0749072015300876?via%3Dihub> (describing how the condition of the pigs affects their social and emotional wellbeing).

**JUSTICE FOR ALL THROUGH JUSTICE FOR ANIMALS:
WELFARE ACT CAN SERVE AS A MODEL FOR ANIMAL PROTECTION
LAW AND CRIMINAL JUSTICE REFORM IN THE UNITED STATES**

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JUSTICE FOR ALL THROUGH JUSTICE FOR ANIMALS: HOW THE UNITED KINGDOM’S ANIMAL WELFARE ACT CAN SERVE AS A MODEL FOR ANIMAL PROTECTION LAW AND CRIMINAL JUSTICE REFORM IN THE UNITED STATES

I. INTRODUCTION

The need for criminal justice reform in the United States is evident, if not urgent. Young, black males are incarcerated in grossly disproportionate numbers.¹ A recent report found that in California, black citizens were about ten times more likely to receive a citation for a local infraction,² and in a typical California city, black citizens were stopped and cited four times more often than white citizens.³ Overcriminalization has created a power disparity between prosecutors and citizens, political delegitimization, a waste of resources, and moral erosion.⁴ Although some recent progress has been realized in federal sentencing laws,⁵ and there have been mixed, incremental changes to U.S. states’ criminal law,⁶ individual states have more work to do to improve the fairness and effectiveness of their criminal justice systems.⁷ The summer 2020 police killings of George Floyd, Breonna Taylor, and others brought renewed focus and urgency to this issue.⁸

While successes in the criminal justice reform movement are mixed, another progressive legal reform movement—animal law—has seen steady progress over the past twenty-five years.⁹ Federal restrictions on some animal testing are increasing,¹⁰ and there are growing statutory

¹ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004).

² LAWYER’S COMM. ON CIVIL RIGHTS OF THE S. F. BAY AREA, CITED FOR BEING IN PLAIN SIGHT 12 (2020), https://lccrsf.org/wp-content/uploads/LCCR_CA_Infraction_report-FINAL-9.29.20-1-1.pdf.

³ *Id.* at 14.

⁴ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 725–29 (2005) (discussing the consequences of overcriminalization).

⁵ See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

⁶ See Jessica Kelley & Arthur Rizer, *Keep Calm and Carry on With State Criminal Justice Reform*, 32 FED. SENT’G REP. 86 (2019) (describing the successes and failures of reform implementation across several states).

⁷ *Id.* at 89.

⁸ *Introduction*, 68 UCLA L. REV. Discourse 2 (2020).

⁹ Pamela Frasch & Joyce Tischler, *Animal Law: The Next Generation*, 25 ANIMAL L. 303 (2019).

¹⁰ *Id.* at 318.

protections for captive wild animals and companion animals.¹¹ The most robust legal protections for animals have developed in the form of criminal animal cruelty laws.¹² This includes “felony provisions, mandates for the forfeiture of animal victims of crime, and provisions forcing the abuser to pay for the cost to rehabilitate and care for the animal victims,”¹³ among other legal innovations. Although real gaps remain in state criminal animal cruelty laws,¹⁴ “[n]o other legislative success comes close to measuring up to the widespread acceptance of cruelty laws.”¹⁵

Unfortunately, as animal cruelty law progress works within the U.S. criminal justice framework to close the gaps, success in animal protection law sometimes means retrogression for criminal justice reform.¹⁶ And, vice-versa, individual criminal justice reforms sometime conflict with the goals of animal protection advocates.¹⁷ This, paradoxically, presents a tension between two social justice and reform movements: one concerned with human rights, and another concerned with animal protection. Is there a fundamental cause of this tension in the law? Are there ways to eliminate it that are productive for both movements? Criminal law scholar Justin Marceau argues, “The [animal protection] movement needs to find ways to conceive of their struggle as part of and intertwined with the struggles of low-income people and people of color.”¹⁸ This essay looks to a foreign jurisdiction for a legal solution that does both: enhances animal protections *and* improves criminal justice outcomes.

¹¹ *Id.* at 316.

¹² Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL’Y 27 (2012).

¹³ Frasci & Tischler, *supra* note 9, at 312–13.

¹⁴ See Amie J. Dryden, Comment, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177 (2001) (identifying, in particular, the difficulties of obtaining evidence and proving intent in animal cruelty cases).

¹⁵ JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 55 (2019).

¹⁶ *Id.* at 2 (“[I]t is not uncommon for animal advocates to label the dismissal of charges or short prison sentences . . . as among the most urgent problems . . .”).

¹⁷ See Steve Maugeri, *Animal Rights Advocates Pushing Back Against Criminal Justice Reforms in N.Y.*, CBS 6 WGRB ALBANY (Oct. 22, 2019), <https://cbs6albany.com/news/local/animal-rights-advocates-pushing-back-against-criminal-justice-reforms-in-ny> (reporting on animal advocates who oppose cash bail reforms because bail reforms may not allow judges to incapacitate dangerous animal abusers).

¹⁸ MARCEAU, *supra* note 15, at 276.

The United Kingdom's Animal Welfare Act 2006 went into effect in April 2007.¹⁹ It replaced the Protection of Animals Act 1911 and incorporated nearly 100 years of related legislation and case law.²⁰ One of the new Act's innovations is found in Section 9, which codified five animal welfare needs for any animal under the control of a human.²¹ The five animal needs require that people responsible for an animal meet the following needs of that animal:

1. Its need for a suitable environment;
2. Its need for a suitable diet;
3. Its need to be able to exhibit normal behavior patterns;
4. Any need it has to be housed with, or apart from, other animals; and
5. Its need to be protected from pain, suffering, injury or disease.²²

While the Act creates a criminal offense for the deprivation of any of an animal's five needs, the Act itself does not provide specific guidance on how owners should meet these requirements. Instead, England and Wales each publish "codes of practice" pursuant to Section 12 of the Act that detail how the five needs shall be met regarding specific animals.²³ A violation of a code of practice is not a criminal offense in and of itself, but it can be used as evidence tending to prove a violation of Section 9's requirements.²⁴

In contrast with the United Kingdom's comprehensive approach, the national U.S. Animal Welfare Act does not generally protect companion animals from criminal animal

¹⁹ Alice Collinson, *Legal Protection of Animals in the U.K.*, Animal Legal & Historical Center (2018), <https://www.animallaw.info/article/legal-protection-animals-uk#id-4>.

²⁰ *Id.*

²¹ *Id.*

²² Animal Welfare Act 2006, c. 45, § 9 (UK), <https://www.legislation.gov.uk/ukpga/2006/45/section/9>.

²³ *Id.*

²⁴ *Id.* at para. F.

cruelty.²⁵ Instead, most domestic animals are protected under the laws of each individual state.²⁶ Unfortunately, this results in animals protected under an unpredictable patchwork of poorly understood state cruelty laws, county ordinances, and municipal codes.²⁷ For example, Georgia’s anti-cruelty statute contains a misdemeanor provision for animal suffering caused by an act or omission.²⁸ No proof of mens rea is required for a misdemeanor charge.²⁹ However, some courts still hesitate to issue arrest warrants for misdemeanor animal neglect without an indication of some purpose or knowledge on behalf of the accused.³⁰ Meanwhile, local code and ordinance violations can vary wildly from county to county. For example, Clarke County, Georgia bans tethering an unattended dog.³¹ However, the five neighboring counties, from which most of Clarke County’s work force commutes every day,³² allow tethering within a broad and confusing range of different restrictions,³³ or they have no tethering restrictions whatsoever.³⁴

Although local code or ordinance violations are not technically criminal charges, they can be just as serious,³⁵ and armed police usually enforce local codes and ordinances by stopping and searching people.³⁶ For vulnerable populations, any contact with law enforcement can result in

²⁵ Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 477 (1999).

²⁶ *Id.*

²⁷ Cf. Lisa Milot, *Backyard Breeding: Regulatory Nuisance, Crime Precursor*, 85 TENN. L. REV. 707, 713-22 (2018) (exposing a similar and related patchwork between federal, state, and local dog breeding laws).

²⁸ GA. CODE ANN. § 16-12-4 (2019).

²⁹ *Id.*

³⁰ See Audiotape: Transcript of Warrant Application Hearing at 1:56:08, Athens-Clarke Cty. Animal Control v. Fields, MC-01-CR-MS-18-140 (Athens-Clarke Cty. Magistrate Ct. 2019) (on file with author) (magistrate refuses to issue a warrant for a misdemeanor animal cruelty offense because “I feel like I have to find some criminal intent to what he did.”).

³¹ CLARKE COUNTY, GA., CODE § 4-1-2(b) (2019).

³² Lee Shearer, *Athens Population Swells with Daily Commuters*, ATHENS BANNER-HERALD (Mar. 5, 2013, 10:05 PM), <https://www.onlineathens.com/article/20130305/NEWS/303059935>.

³³ Compare CLARKE COUNTY, GA., CODE § 4-1-2(b) (2019) (banning all unattended tethering), with BARROW COUNTY, GA., CODE § 14-41 (2020) (allowing tethering subject to seven restrictions), and JACKSON COUNTY, GA., CODE § 8-72(g) (2019) (enumerating twelve requirements for lawful tethering), and OCONEE COUNTY, GA., CODE § 10-143 (2020) (enumerating seven requirements for lawful tethering).

³⁴ MADISON COUNTY, GA., CODE ch. 10 (2019); OGLETHORPE COUNTY, GA., CODE ch. 6, art. II (2011).

³⁵ Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1424–36 (2001).

³⁶ See LAWYER’S COMM. ON CIVIL RIGHTS, *supra* note 2, at 8.

exposure to an inequitable criminal justice system³⁷ or spiral into a dangerous encounter.³⁸ Thus, in Georgia, a pet owner who is understandably confused about the tethering rules in a given county could invite police contact and risk exposure to the criminal justice system despite not understanding the distinctions between local county ordinances. Also, pets who are intended to benefit from legal protections, such as tethering restrictions, will likely be denied some of those protections if the pet owner lacks notice and understanding of local law.

A more uniform, predictable scheme for the legal duties of animal owners could result in better outcomes for both animals and their owners. While U.S. criminal animal law practice has embraced increased felony provisions, animal forfeitures, criminal procedure enhancements, prosecutorial support, and has even leveraged immigration enforcement,³⁹ improving the notice and deterrence functions of animal protection law has not been given as much attention. If we can assume that better notice and deterrence will increase compliance with protection laws, then better notice and deterrence will benefit the welfare of companion animals *and* decrease unfair and ineffective criminal justice consequences for offenders and accused offenders. The adoption of the United Kingdom’s five animal welfare needs into U.S. animal cruelty law, at the state level, can enhance notice and deterrence, increase compliance, and benefit both animal protection law and criminal justice reform movements together.

II. BACKGROUND

A. *The Development of Animal Cruelty Laws*

³⁷ See *id.* at 35 (“[I]t is difficult to navigate the court process, particularly for people who are unhoused, disabled, medically vulnerable, or employed full-time during court hours.”).

³⁸ See *id.* at 36 (describing the health consequences of frequent police contact).

³⁹ See Frasch & Tischler, *supra* note 9, at 312–14; see also MARCEAU, *supra* note 15, at 53–96.

Animal cruelty law originated strictly as a form of economic and property protection for animal owners.⁴⁰ An animal's owner could not even be liable for cruelty against his own animal.⁴¹ As criminal animal cruelty law developed to apply even against some animal owners in the eighteenth century, the rationale for those laws also developed to protect human values and morals, not to protect any interests of animals themselves.⁴² In modern times, human concerns about rabies exposure and aesthetics have resulted in the delegation of most animal law enforcement to localities, especially in the United States where public health and safety is often regulated at the local level.⁴³ Animal cruelty law development tends to prioritize human interests today. For example, a modern justification for stiff animal cruelty penalties is a purported connection between animal abuse and violent crimes toward humans.⁴⁴

In the United Kingdom, early animal protections could only be found by an animal's owner in tort and trespass against a non-owner. The sponsor of anti-bull-baiting legislation in 1800 decried bull-baiting's association with "idle persons," "mischievous proceedings," and the "labouring poor."⁴⁵ In 1822, "Martin's Law" banned cruel treatment toward farm animals, even by their owners, but enforcement was limited by restrictions on complaints in order to protect animal owners from harassment.⁴⁶ Court decisions reinforced the importance of human interests in animal law advocacy.⁴⁷ In a case which upheld the charity status of an anti-vivisection group, Justice Joseph Chitty emphasized that "[c]ruelty is degrading to man," and the group's object

⁴⁰ BRUCE A. WAGMAN & MATTHEW LIEBMAN, A WORLDVIEW OF ANIMAL LAW 149 (2011).

⁴¹ *Id.* at 148.

⁴² Dryden, *supra* note 14, at 179.

⁴³ See Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 550–54 (2009).

⁴⁴ Cynthia Hodges, *The Link: Cruelty to Animals and Violence Toward People*, Mich. St. U. Animal Legal & Hist. Ctr., <https://www.animallaw.info/article/link-cruelty-animals-and-violence-towards-people>.

⁴⁵ MIKE RADFORD, ANIMAL WELFARE LAW IN BRITAIN 34 (2001).

⁴⁶ WAGMAN & LIEBMAN, *supra* note 40, at 150–51.

⁴⁷ *Id.* at 94.

was “not merely the protection of the animals themselves, but the advancement of morals and education among men.”⁴⁸

In the United States, nineteenth century caselaw suggests a similar human-centered rationale in the development of animal legal protections. In *Commonwealth v. Turner*, the Massachusetts Supreme Court explained that the state animal cruelty statute “does not define an offense . . . against the rights of the animals that are in a sense protected by it. The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt.”⁴⁹ In 1893, the North Carolina Supreme Court cited *Turner* and declared that its own animal cruelty statute “was enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt.”⁵⁰ A different rationale was offered in an 1888 Mississippi Supreme Court case, which held that its animal cruelty statute was “for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.”⁵¹ But that court concluded its opinion by declaring that humans should be kind to animals, if for no other reason than to learn how to be kind and just to each other.⁵² These cases show an emerging concern for animal interests in American cruelty laws, but a steadfast reliance on human interests to justify their enforcement.

The progress of first-generation animal cruelty laws reflects more of a concern for Victorian-era moral regulation and less of a concern for animals themselves.⁵³ Queen Victoria herself was an active and powerful member of the United Kingdom’s Royal Society for the

⁴⁸ Re Foveaux [1895] 2 Ch 501, 507.

⁴⁹ 14 N.E. 130, 131–32 (Mass. 1887).

⁵⁰ State v. Porter, 16 S.E. 915, 916 (N.C. 1893).

⁵¹ Stephens v. State, 3 So. 458, 458 (Miss. 1888).

⁵² *Id.* at 459.

⁵³ See MARCEAU, *supra* note 15, at 54.

Prevention of Cruelty to Animals (RSPCA),⁵⁴ which was founded shortly before the beginning of her sixty-three-year reign.⁵⁵ Regardless of the policy aims or rationale, animal cruelty laws in the United Kingdom achieved great progress throughout the nineteenth century.⁵⁶ Eventually, most of this legal progress was consolidated into the Protection of Animals Act of 1911,⁵⁷ which stood as the primary national animal cruelty law for nearly 100 years.⁵⁸ While this Act included some additional animal cruelty law innovations, its passage would mark the end of significant animal law progress in the U.K. for another fifty years.⁵⁹

The United States pursued a similar course to the United Kingdom in the enactment of criminal animal cruelty laws in the late nineteenth and early twentieth century. The American counterpart to the RSPCA, the American Society for the Prevention of Cruelty to Animals (ASPCA), influenced dramatic legal changes beginning with the reform of New York’s criminal animal cruelty law in 1868.⁶⁰ The New York law led a wave of reform that continued until 1913, when every U.S. State had an animal cruelty law on the books.⁶¹ The United States seems to track with the United Kingdom in that attention to the law picks up again in the late twentieth century.⁶² Animal cruelty was a felony in only four states before 1980; by 2014 all fifty states had felony animal cruelty provisions.⁶³ Animal protection groups advocated for stiffer penalties in existing felony laws, like North Carolina’s 2010 “Susie’s Law,” which increased the

⁵⁴ RADFORD, *supra* note 45, at 80.

⁵⁵ *Id.* at 41.

⁵⁶ *Id.* at 62–63, 71, 86.

⁵⁷ *Id.* at 87.

⁵⁸ Collinson, *supra* note 19.

⁵⁹ RADFORD, *supra* note 45, at 88–89.

⁶⁰ MARCEAU, *supra* note 15, at 54.

⁶¹ *Id.*

⁶² *See id.* (“Thirteen more states [reformed their animal cruelty laws] during the 1980s and nine more in the 1990s.”); *see also* Tischler *supra* note 12, at 58.

⁶³ MARCEAU, *supra* note 15, at 58–59.

maximum animal abuse sentence to eleven months,⁶⁴ and Massachusetts’s 2014 “Puppy Doe bill” which increased the maximum penalty for abuse from five to seven years for a first offense, and up to ten years for a second offense.⁶⁵ There have been various reform trends across state cruelty laws, from mandated animal forfeitures,⁶⁶ to the criminalization of animal fighting paraphernalia,⁶⁷ but felony provisions and stiffer sentences have been heralded as the most widespread success across all fifty states.⁶⁸

While the latest developments in U.S. cruelty law increasingly relied on felony enhancements and penalties, progress in the United Kingdom somewhat diverged. The work of various authors and philosophers in the 1960s and 70s brought animal concerns back to the political forefront.⁶⁹ Ruth Harrison’s *ANIMAL MACHINES* in particular raised so much concern about the treatment of livestock and poultry animals that the government convened a committee⁷⁰ to investigate the conditions of the animals and make recommendations for improvement.⁷¹ The committee, chaired by zoology Professor Roger Brambell, produced what is now referred to as the “Brambell Report.” The report made many specific recommendations about farming practices, but the overall basis for these recommendations became known as the “five freedoms,”⁷² summarized in a contemporary press statement as follows:

1. Freedom from thirst, hunger, or malnutrition,

⁶⁴ Dan Bowens, *Susie’s Law Toughens Penalties for Animal Cruelty*, WRAL (June 23, 2010), <https://www.wral.com/news/local/story/7835724/>.

⁶⁵ MARCEAU, *supra* note 15, at 60.

⁶⁶ Frasch & Tischler, *supra* note 9, at 312.

⁶⁷ *Id.*

⁶⁸ See *Animal Cruelty Facts and Stats*, THE HUMANE SOC’Y OF THE U.S., <https://www.humanesociety.org/resources/animal-cruelty-facts-and-stats>.

⁶⁹ RADFORD, *supra* note 45, at 169.

⁷⁰ Melissa Elischer, *The Five Freedoms: A History Lesson in Animal Care and Welfare*, MICHIGAN STATE UNIVERSITY EXTENSION (September 2016), https://www.canr.msu.edu/news/an_animal_welfare_history_lesson_on_the_five_freedoms.

⁷¹ REPORT OF THE TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS (December, 1965), <https://edepot.wur.nl/134379>.

⁷² RADFORD, *supra* note 45, at 265 n. 16.

2. Appropriate comfort and shelter,
3. Prevention, or rapid diagnosis and treatment, of injury and disease,
4. Freedom to display most normal patterns of behavior,
5. Freedom from fear.⁷³

The reporting committee later became the United Kingdom's Farm Animal Welfare Council,⁷⁴ and its five freedoms became a benchmark for animal welfare policy in the United Kingdom, though not legally binding.⁷⁵ However, the five freedoms became more influential throughout the late twentieth century. They were adapted and adopted by the RSPCA, the World Veterinary Association,⁷⁶ the American Veterinary Medical Association, the World Organization for Animal Health,⁷⁷ and the Association of Shelter Veterinarians.⁷⁸ In 1992, the five freedoms were incorporated into the European Convention for the Protection of Animals Kept for Farming Purposes,⁷⁹ before the five freedoms came back home to the United Kingdom as the five animal welfare needs in Section 9 of the Animal Welfare Act 2006, applying to all animals under the Act.

Although the Act's five animal needs have been slightly adjusted from the five freedoms as first published by the Farm Animal Welfare Council in 1979,⁸⁰ the Act still recognizes intrinsic needs of animals as a rationale and a legal requirement, unlike the old animal cruelty scheme which sought to protect human property, morals, and values first and foremost. In fact,

⁷³ *Farm Animal Welfare Council Press Statement* (December 5, 1979), <https://webarchive.nationalarchives.gov.uk/20121010012427/http://www.fawc.org.uk/freedoms.htm>.

⁷⁴ Elischer, *supra* note 70.

⁷⁵ RADFORD, *supra* note 45, at 265.

⁷⁶ *Id.* at 266.

⁷⁷ Elischer, *supra* note 70.

⁷⁸ *The Five Freedoms for Animals*, ANIMAL HUMANE SOCIETY, <https://www.animalhumanesociety.org/health/five-freedoms-animals> (last visited Oct. 13, 2020).

⁷⁹ Council Directive 98/58, art. 4, 1998 O.J. (L 221) 24 (EC); RADFORD, *supra* note 45, at 264.

⁸⁰ *See supra* p. 3.

Section 9 created a new kind of offense that depends on the five freedoms as objective standards of care, rather than the traditional cruelty offense that depends on the subjective intent of the person charged.⁸¹

The five animal welfare needs serve as an objective standard of care, but they are not explicit in their requirements. For example, the Act does not define what a “suitable environment” is for any particular animal in any particular context. Instead, the Act provides authority for England and Wales to issue “codes of practice” that provide specifics related to the treatment and standards of care for animals.⁸² Any violation of a code of practice is not an offense in and of itself, but instead may be used as evidence that someone has violated the five freedoms provisions of Section 9.⁸³ For example, England’s Code of Practice for the Welfare of Dogs requires that, in order to provide a suitable environment, owners must provide their dogs with “somewhere they can go to avoid things that frighten them.”⁸⁴ However, if an owner allows his dog to be exposed to something frightening, the owner would not necessarily be guilty of an offense under Section 9. Instead, evidence of the exposure may be used as evidence tending to prove that the dog was not provided a suitable environment.⁸⁵

The Animal Welfare Act 2006 is not the only recent animal cruelty legislative activity in the United Kingdom. Echoing the U.S. developments in stiffer sentencing, the Animal Welfare

⁸¹ R on the Application of Gray v. Aylesbury [2013] EWHC (Admin) 500 [31] (Eng).

⁸² Animal Welfare Act 2006, c. 45, § 14, para. 1 (UK), <https://www.legislation.gov.uk/ukpga/2006/45/section/14>.

⁸³ *Id.* para (3) and (4).

⁸⁴ *Code of Practice for the Welfare of Dogs*, DEPARTMENT FOR ENVIRONMENT, FOOD, AND RURAL AFFAIRS (Dec. 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697953/pb13333-cop-dogs-091204.pdf.

⁸⁵ See *Chancepoxies Animal Welfare v. North Kesteven District Council* [2017] EWHC (Admin) 1927 [31] (Eng) (“The Code provides practical guidance to owners on how to comply with section 9 of the 2006 Act. Section 14 makes it clear that a failure to comply with the Code is not a criminal offense in itself but may be relied upon as tending to establish breach of regulations.....”).

(Sentencing) Bill was passed in 2021.⁸⁶ The highly popular⁸⁷ new law will increase the maximum allowable sentence for animal cruelty under the AWA from six months to five years.⁸⁸ Brexit may also result in a need for new animal protection legislation.⁸⁹

B. Criminal Justice Reform in the United States

During the early twentieth century, the United States largely adopted a progressive model of criminal penalties that embraced transformation and rehabilitation over punishment or retribution.⁹⁰ The criminal law was largely controlled and enforced at a state and local level, despite the emerging use of federal criminal law to control a “perceived threat to the nation’s moral order.”⁹¹ The presence of professional, uniformed, armed police was not a given throughout the country until the mid-twentieth century.⁹² Social developments during the 1960s and 1970s brought a marked change to criminal justice through changes in sentencing and policing. The rehabilitation model began to be viewed with skepticism for contrasting policy reasons. On one hand, the indeterminate sentencing of the rehabilitative model raised fairness concerns, while on the other, judicial discretion and expert influence was perceived as too soft on violent offenders and unresponsive to community safety concerns.⁹³ These pressures resulted in

⁸⁶ RSPCA, *Tougher Sentencing*, <https://www.rspca.org.uk/getinvolved/campaign/sentencing>.

⁸⁷ Dep’t of Env’t, Food, & Rural Affairs, *Press Release: Government announces support for Animal Welfare (Sentencing) Bill in Parliament*, GOV.UK (Feb. 5, 2020), <https://www.gov.uk/government/news/government-announces-support-for-animal-welfare-sentencing-bill-in-parliament>.

⁸⁸ Dep’t of Env’t, Food, & Rural Affairs, *Animal Cruelty Maximum Sentences Will Be Increased Government Confirms*, GOV.UK (Aug. 7, 2018), <https://www.gov.uk/government/news/animal-cruelty-maximum-sentences-will-be-increased-government-confirms>.

⁸⁹ *Brexit and Animal Welfare*, RSPCA, <https://www.rspca.org.uk/whatwedo/endcruelty/changingthelaw/brexit> (last visited Oct. 13, 2020).

⁹⁰ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 1 (2004), <https://www.ussc.gov/research/research-and-publications/research-projects-and-surveys/fifteen-years-guidelines-sentencing>.

⁹¹ Trevor George Gardner, *Immigrant Sanctuary As the “Old Normal”: A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 34 (2019).

⁹² See Gary Potter, *The History of Policing in the United States*, Eastern Ky. U. Police Stud. Online (2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> (“Three compelling issues faced early American police departments: (1) should police be uniformed; (2) should they carry firearms; and (3) how much force should the use to carry out their duties?”).

⁹³ See U.S. SENTENCING COMM’N, *supra* note 90, at 2.

more determinate sentencing laws and mandatory minimum sentences that reduced judicial discretion. The professionalization of police departments led to a process of centralization and bureaucracy that resulted in more distance between the police and the communities they were meant to protect.⁹⁴

The results of sentencing and policing changes during the second half of the twentieth century show up today in alarming rates of incarceration and racial disparity in criminal justice outcomes. The national rate of incarceration was steady for about fifty years between 1925 and 1975, and then quadrupled between 1975 and 2000.⁹⁵ During the same time period, drug arrests rose among white citizens by 85 percent, while drug arrests among black citizens rose by about 400 percent,⁹⁶ despite the fact that the rate of actual drug use is the same or higher among white citizens.⁹⁷ Between 2015 and 2020, the number of deadly police shootings has remained steady, but so has the disproportionate number of citizens of color killed by police.⁹⁸

While there has been a conspicuous response these vast, objective inequities within the U.S. criminal justice system,⁹⁹ less attention has been paid to problems caused by substantive

⁹⁴ See Potter, *supra* note 92 (“All of this served to further isolate the police from the citizenry [and] to further reduce the effectiveness of police practices.”).

⁹⁵ U.S. SENTENCING COMM’N, *supra* note 90, at 39–40.

⁹⁶ Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 CRIMINAL JUSTICE 2000: POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427 (Julie Horney, ed., 2000), https://www.ncjrs.gov/criminal_justice2000/vol_3/03front.pdf.

⁹⁷ *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, The Hamilton Project (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

⁹⁸ *Fatal Force*, WASH. POST: POLICE SHOOTINGS DATABASE, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> (last updated Oct. 15, 2020) (“[Black Americans] account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of White Americans. Hispanic Americans are also killed by police at a disproportionate rate.”).

⁹⁹ Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1378–79 (2019).

criminal law.¹⁰⁰ Luis Chiesa points out how the Model Penal Code's emphasis on possession and inchoate offenses has provided subjective standards that have been applied in a racially discriminatory fashion.¹⁰¹ Others have argued that overcriminalization is a large part of the problem, with an ever-expanding number of laws that expect the criminal justice system to solve broad social problems.¹⁰²

There are particular areas in which criminal justice reform and animal protection progress might come into tension. Lighter sentences and bail reform might result in animal abusers having more opportunities for cruelty. Fewer resources for police or prosecutors could mean far less attention to animal crimes and weaker animal crime cases. Given the tension, the movement for criminal justice reform and animal protection advocates could become adversarial. However, it is important to identify ways in which both can progress together. One such reform is in improving the notice and deterrence functions of animal cruelty law in the United States by way of the five animal welfare needs, which are codified into U.K. law. Improved notice and deterrence can mutually benefit criminal justice and animal protection in the United States. Similar substantive changes could benefit the broader body of U.S. criminal law.

III. ANALYSIS

This analysis will describe the Animal Welfare Act 2006, Section 9 and Georgia's animal cruelty statute and then compare them two, with special attention paid to the affirmative duties imposed by each statute. I use the Georgia statute as an exemplar for U.S. animal cruelty statutes in general to show how U.K. and U.S. animal cruelty statutes diverge in their application. Next, I

¹⁰⁰ See Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (2019) (describing how substantive reforms are overlooked or even viewed with suspicion by those whose generally advocate for criminal justice reforms).

¹⁰¹ Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 GEO. MASON L. REV. 605, 650-52 (2018).

¹⁰² See Luna, *supra* note 4.

will introduce notice and deterrence theory and analyze each statute for its effectiveness in notice and deterrence.

A. Comparing U.K. and U.S. Animal Cruelty Law

The Senior Courts of England and Wales have had one occasion to comment on the substantive animal welfare offense created by Section 9 of the Animal Welfare Act 2006 when, in 2013, the High Court of Justice made a judicial review of *R on the Application of Gray v. Aylesbury*.¹⁰³ In January 2008, the police and the RSPCA in Amersham, England discovered horses and donkeys being kept in extremely poor conditions. Dead and decomposing animal carcasses were found among the sick and starving living animals. The RSPCA seized 115 animals, the most animals ever involved in such a seizure.¹⁰⁴ Along with unnecessary suffering charges for the dead, sick, and starving animals under the Animal Welfare Act Section 4,¹⁰⁵ the animal owners were also charged with animal welfare offenses under Section 9. The Section 9 offenses were for 97 animals, most of whom were found in “acceptable condition” but “had not been properly looked after and that the conditions at the farm were such that they were likely to suffer if their circumstances remained unchanged.”¹⁰⁶

The court rejected the defendant’s argument that he had no knowledge of the animals’ condition, and held that the Animal Welfare Act Section 9 set forth a “purely objective standard of care,”¹⁰⁷ and required no subjective knowledge on the part of the defendant. The court noted that Section 9 created a new type of offense that did not require proof of unnecessary suffering, but only proof that the standard of care (the five animal needs) was not met. Furthermore, the

¹⁰³ [2013] EWHC (Admin) 500 (Eng).

¹⁰⁴ *Id.* at para. 13.

¹⁰⁵ *Id.* at para. 1.

¹⁰⁶ *Id.* at para. 21.

¹⁰⁷ *Id.* at para. 31.

court explained that the legislative history of the Animal Welfare Act 2006 indicates that the difference between a Section 4 “cruelty offense” and a Section 9 “welfare offense” is proof of unnecessary suffering, and that “the mental state of the person concerned” is irrelevant to both Sections.¹⁰⁸

Georgia’s animal cruelty statute, O.C.G.A 16-12-4, was enacted in 1968.¹⁰⁹ It has since undergone several revisions,¹¹⁰ and the state courts of appeal and supreme court have since developed it through case law. The statute provides for two offenses: cruelty to animals (a misdemeanor) and aggravated cruelty to animals (a felony).¹¹¹ While felony aggravated cruelty to animals requires a “malicious” act, misdemeanor cruelty can be found where a person:

- (1) Causes physical pain, suffering, or death to an animal by any unjustifiable act or omission, or
- (2) Having intentionally exercised custody, control, possession, or ownership of an animal, fails to provide to such animal adequate food, water, sanitary conditions, or ventilation that is consistent with what a reasonable person of ordinary knowledge would believe is the normal requirement and feeding habit for such animal’s size, species, breed, age, and physical condition.¹¹²

Two cases illustrate how intent and notice operate within the statute. In *Miller v. State*,¹¹³ the Georgia Court of Appeals upheld a misdemeanor animal cruelty conviction where the defendant allowed his dogs to roam free and consequently kill the dog of a third person. The defendant argued that there was no evidence of his intent, malice, knowledge, or criminal

¹⁰⁸ *Id.*

¹⁰⁹ GA. CODE ANN. § 16-12-4 (2019).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 345 S.E.2nd 909 (Ga. Ct. App. 1986).

negligence. The court responded that only an omission or neglect was required for the misdemeanor conviction, not malice or intent.¹¹⁴ The Georgia Supreme Court took up the notice requirement for the animal cruelty statute in *In re C.B.*¹¹⁵ In that case, the defendant argued that the misdemeanor animal cruelty provision was unconstitutionally vague because another provision of the statute authorized animal killings that are “humane as possible under the circumstances.”¹¹⁶ The defendant also argued that the word “humane” as used in the statute was vague and did not provide fair notice.¹¹⁷ The court held that the entire statute, taken together, does not create any ambiguity because the misdemeanor provision simply explains when a person is liable for cruelty by killing or wounding animal; the later provision simply explains when such a killing is justified.¹¹⁸ The court also held that the word “humanely” does not create vagueness because the context and definition of the word make it sufficiently definite.¹¹⁹

There are some surprising similarities and some important differences between Georgia’s animal cruelty law and the United Kingdom’s animal welfare offense. The AWA Section 9’s five animal needs are similar to some requirements found in O.C.G.A. § 16-12-4(b). The AWA Section 9 requires that an animal be provided a suitable environment, a suitable diet, housing with or apart from other animals as needed, and protection from pain, suffering, injury, and disease. O.C.G.A. § 16-12-4(b)(2) requires that animals be provided with “adequate food, water, sanitary conditions, [and] ventilation,”¹²⁰ and O.C.G.A. § 16-12-4(b)(1) criminalizes pain or suffering caused by an unjustifiable act or omission.

¹¹⁴ *Id.* at 911.

¹¹⁵ 686 S.E.2d 124 (Ga. 2009).

¹¹⁶ *Id.* at 125-26.

¹¹⁷ *Id.* at 126.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ GA. CODE ANN. § 16-12-4 (2019).

The requirements of the U.K. statute and the Georgia statute cover much of the same ground: animals must be properly fed, sheltered, cared for, and not mistreated. Also, as confirmed in *Gray v. Aylesbury* and *Miller v. State*, neither law requires any malice or criminal intent on the part of an offender, only an objective failure of an offender to meet the requirements. Furthermore, a violation of either law does not require proof of unnecessary suffering on part of the animal. *Gray v. Aylesbury* explains that unnecessary suffering is required for AWA Section 4 offenses, but not Section 9 violations.¹²¹ The plain language of O.C.G.A. § 16-12-4(b)(2) does not require proof of suffering or harm, but only a failure to provide adequate food, water, sanitary conditions, or ventilation.

While both U.K. and Georgia laws have some similar requirements, the two laws diverge in their standards. In Georgia, the definition of adequate food, water, and shelter is determined by a reasonable person standard. But in the United Kingdom, the specifics of animal the needs are determined by “good practice.”¹²² This distinction leaves Georgia courts to determine the specifics of sufficient nutrition, sanitation, and ventilation in Georgia, while the U.K. courts can turn to the administrative “codes of practice” to determine whether animal needs have been met. The codes of practice are secondary legislation that are published by the governments of England, Wales, and Scotland.¹²³ In each constituent country, there are codes specific to different species of animals.¹²⁴ The codes of practice are detailed guides written in plain language to a pet-owner audience. So, in Georgia, to find a misdemeanor violation *without proof of actual suffering*, courts must look to unpublished, community-based reasonable person standards to

¹²¹ [2013] EWHC (Admin) 500 [31] (Eng).

¹²² See Animal Welfare Act 2006, c. 45, § 9 (UK), <https://www.legislation.gov.uk/ukpga/2006/45/section/9>.

¹²³ *Id.*, § 14, para. 1.

¹²⁴ See *Animal Welfare Legislation: Protecting Pets*, GOV.UK, <https://www.gov.uk/guidance/animal-welfare-legislation-protecting-pets> (last visited Nov. 17, 2020), and *Animal Welfare: Pets*, WELSH GOVERNMENT, <https://gov.wales/animal-welfare-pets> (last visited Nov. 17, 2020), and *Animal Health and Welfare*, SCOTTISH GOVERNMENT, <https://www.gov.scot/policies/animal-health-welfare/animal-welfare/> (last visited Nov. 17, 2020).

determine whether an animal has been provided adequate food, water, sanitary conditions, or ventilation. However, in the United Kingdom, the courts can turn to a published, detailed, legislative document that outlines specific standards for whether an animal need has been met or not.

B. Notice and Deterrence Theory

Notice is an important part of deterrence.¹²⁵ The criminal law seeks to deter citizens from committing crimes (general deterrence), or at least deter criminals from committing further crimes (specific or particular deterrence).¹²⁶ Criminal statutes provide notice for two reasons: the utility of deterrence,¹²⁷ and fairness.¹²⁸ The traditional model of notice and deterrence seems obvious.¹²⁹ Punishment through incarceration or through fines discourages people from committing crimes in the first place.¹³⁰ However, if people do not know what activity is illegal, then they cannot know what behavior to avoid. Fairness requires that offenders know the criminal restrictions before they are punished for violations. This idea of fairness is captured in the American due process requirement that crimes be specifically defined by the legislature in a statute.¹³¹

Despite the fairness requirements for statutory notice and definitive construction, only constructive notice, not actual notice, is required to hold a person accountable for criminal acts. Constructive notice captures the idea that a criminal “should have known” that the proscribed

¹²⁵ Although contemporary scholars agree that there are several plausible theories of criminal law and punishment, this analysis examines the statutes described above for their deterrent value, which is a fundamental part of utilitarianism theory.

¹²⁶ WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 26–27 (3d ed. 2017).

¹²⁷ Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 *CARDOZO L. REV.* 1535, 1551–53 (2005).

¹²⁸ *McBoyle v. United States*, 283 U.S. 25 (1931).

¹²⁹ John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 *VA. L. REV.* 189, 205–06 (1985).

¹³⁰ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, (9th Ed. 2014).

¹³¹ Jeffries, *supra* note 129, at 206.

acts were illegal. The constructive notice requirement bars defenses of ignorance of the law, which would make prosecutions difficult and encourage ignorance to avoid culpability.¹³² Both actual and constructive notice concepts assume that criminal statutes clearly warn people of average intelligence of what conduct is punishable.¹³³

Alternative theories of notice and deterrence account for flaws in the traditional model. For example, in “Toward a New Theory of Notice and Deterrence,” Dru Stevenson shows that although notice is essential to fairness, the law does a poor job of providing actual notice to citizens, if it provides any notice at all.¹³⁴ He contends that the text of criminal statutes rarely provides laypeople with dependable descriptions of crimes and corresponding penalties.¹³⁵ However, he proposes that citizens’ uncertainty about the law can act as a feature rather than a bug, because uncertainty discourages legally risky behavior and socially undesirable conduct.¹³⁶ Meanwhile, because statutes and judicial decisions are addressed to the state and legal practitioners, people with authority *are* given notice, and it is that official notice which protects citizens from unfair use and abuse.¹³⁷ Also, Stevenson notes that because the criminal law must be amended by the legislature and published, it assures the public that activities which were legal yesterday are likely legal today, even if actual notice is inaccessible.¹³⁸

C. The Animal Welfare Act 2006 Provides Superior Notice and Deterrence

The traditional model of notice and deterrence assumes that people can understand what acts or omissions constitute a crime, and what conditions or defenses will excuse otherwise

¹³² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 33 (Am. Bar Ass’n 2009) (1881) (“It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance.....”).

¹³³ Jeffries, *supra* note 129, at 196.

¹³⁴ Stevenson, *supra* note 127, at 1536–38.

¹³⁵ *Id.* at 1586.

¹³⁶ *Id.* at 1584.

¹³⁷ *Id.* at 1585.

¹³⁸ *Id.*

criminal behavior.¹³⁹ Assuming that a citizen reads Georgia’s animal cruelty statute, its plain language seems clear and straightforward.¹⁴⁰ Georgia’s supreme court has even reviewed the statute and ruled that it is not vague, at least in part.¹⁴¹ However, for the layman, potential for confusion remains about the meaning of “unjustifiable” in paragraph (b)(1) and “reasonable person of ordinary knowledge” in paragraph (b)(2). The statute bans “unjustifiable acts and omissions” that cause harm to animals. It also requires animal owners and caretakers to provide for the animal’s needs “consistent with what a reasonable person with ordinary knowledge would believe is the normal requirement.”¹⁴²

Litigation in other U.S. states has demonstrated how legally “justifiable” harm to animals creates confusion. In 2000, a trial court in Watertown, New York ruled that the word “unjustifiable” in the New York animal cruelty statute is unconstitutionally vague because it does not “give adequate notice to a reasonable person that the conduct of docking a dog’s tail under the facts of this case is proscribed by the statute.”¹⁴³ However, in a different case applying the same statute in 2003, a New York court of appeals reasoned that whether dog tail docking is unjustifiable can be a question of fact, determined at trial.¹⁴⁴

Confusion about “normally required” animal needs or what is legally justifiable or reasonable within the standards of the community is understandable. The law itself creates some confusion: local requirements vary, even between neighboring counties.¹⁴⁵ The persistent rationale for animal cruelty law suggests that protections of human health, human values, and

¹³⁹ Paul H. Robinson & John M. Darley, *Does the Criminal Law Deter? A Behavioural Science Investigation*, 24 (2) OXFORD J. LEGAL STUD. 173, 175 (2004).

¹⁴⁰ See *supra* p. 16 for the text of the Georgia statute.

¹⁴¹ *In re C.B.*, 686 S.E.2d 124 (Ga. 2009).

¹⁴² GA. CODE ANN. § 16-12-4 (2019).

¹⁴³ *People v. Rogers*, 703 N.Y.S.2d 891, 893 (City Ct. 2000).

¹⁴⁴ *Hammer v. Am. Kennel Club*, 758 N.Y.S.2d 276, 279 (App. Div. 1st Dept. 2003).

¹⁴⁵ See *supra* p. 4 and accompanying notes.

property is the ultimate goal, not meeting the intrinsic needs of animals.¹⁴⁶ The differing legal expectations in different jurisdictions also invites mistake when determining whether an act or omission towards an animal is justifiable or reasonable. For example, a failure to provide veterinary care may be tolerated in one jurisdiction, but aggressively enforced in another.¹⁴⁷ Such ambiguity may provide some benefit under Stevenson’s alternate model of notice and deterrence by encouraging animal owners to adopt a high standard of care to avoid criminal liability. However, due to various communities’ reasonableness and justifiable standards, some owners likely do not even know what a legally safe, high standard of care actually requires.

The Animal Welfare Act 2006 Section 9 performs better when analyzed for notice and deterrence. Any ambiguity within the animal welfare needs provision is filled by the separately published codes of practice. Neither courts nor citizens may know with certainty, for example, a particular animal’s need to be housed with other animals under Section 9 (2)(d). However, taken with the descriptive codes of practice, the statute is fair and definite. The relationship between the codes of practice and the statute also creates the “desirable equilibrium of limited uncertainty” described in Stevenson’s alternate notice and deterrence model.¹⁴⁸ It is difficult to predict with certainty whether a particular requirement mandated by the codes of practice will result in a legal violation and prosecution: this discourages animal owners from taking chances by testing technicalities and loopholes. Codes of practice aside, by placing a legal requirement on a person to meet the needs of an animal, Section 9 suggests that its rationale is animal welfare

¹⁴⁶ Dryden, *supra* note 14, at 179.

¹⁴⁷ See Audiotape: Transcript of Warrant Application Hearing, *supra* note 30, at 1:43:47. Defendant, charged with misdemeanor cruelty for failure to provide adequate food and medical care to a postpartum dog, explained, “I just moved over here and all this just started happening . . . I was naïve to everything you had to do about dogs. I didn’t know about all the things you had to have. I’m from Augusta originally.” Both Augusta and the venue Athens-Clarke jurisdictions maintain County Codes that establish relatively extensive duties of care, compared to other counties. However, differences in enforcement and between the codes of neighboring rural counties could account for legitimate confusion about the extent of an owner’s legal duties.

¹⁴⁸ Stevenson, *supra* note 127, at 1539.

and animal *needs*, not the protection of people, human values, or property. Clarity about the law's rationale gives animal owners cause to consider how acts and omissions are *experienced by the animal*, not how acts and omissions are viewed by the community or by the law.

Because of their superior notice and deterrence functions, the codification of the five animal welfare needs can provide a model for state animal cruelty laws in the United States. State animal cruelty statutes could codify the five animal needs as duties for animal owners and caretakers. Local ordinances or codes of practice can account for local community concerns while the underlying animal need-based duties provide a better baseline of understanding for citizens. One might argue that the primary and secondary legislation scheme of the AWA statute and the codes of practice is a European regulatory model that does not align with federalism and localism principles in the United States. However, the patchwork of local animal control ordinances in U.S. counties work as a de facto regulatory scheme where officials enforce ordinances against people who may not understand them and are otherwise vulnerable to criminal justice inequity. Of course, the creation of explicit, detailed legal duties of care which are enforceable under criminal law creates more opportunities for abuse and over-enforcement by U.S. police and prosecutors.¹⁴⁹ This is a valid concern. It must be addressed by collateral efforts to improve law enforcement and punishment schemes. But if animal protection advocates and criminal justice advocates can move forward together with substantive law improvements, that can create more space for reformers to address procedural and enforcement issues.

IV. CONCLUSION

¹⁴⁹ See Luna, *supra* note 4, at 716 (arguing that the proliferation of criminal statutes “incorporate abusive policing, such as state agents deploying the full weight of their authority to search and arrest based on trifling offenses or even civil infractions.....”).

Each U.S. state should adopt the United Kingdom’s five animal welfare needs into its respective animal cruelty statutes. The criminal justice system is fairer when common principles are enforced uniformly throughout each state’s jurisdiction.¹⁵⁰ Animals will be better protected when people better understand that the law’s purpose and intent—protection of animals through the fulfillment of their needs—will be enforced over the technical details of anti-cruelty statutes and animal control ordinances. Similar attention to notice, deterrence, and rationale could serve to reform criminal law outside of animal cruelty statutes. Inchoate crimes, such as conspiracy and attempt, along with felony murder rules are areas where such attention and improvement could result in meaningful criminal justice reform.¹⁵¹

A significant rationale for inchoate conspiracy crimes is to deter the “special danger incident to group activity.”¹⁵² However, conspiracy convictions can be troubling, especially when no underlying crime was actually committed or when no agreement was actually made.¹⁵³ Imposing criminal liability for otherwise lawful behavior goes beyond the common-law deterrence rationale for the crime of conspiracy, and opens up potential unfair abuse by undercover agents and prosecutors.¹⁵⁴ Attention to notice and deterrence principles in these laws can ensure that potential conspirators correctly balance the costs and benefits of their actions.

¹⁵⁰ See Logan, *supra* note 35, at 1409, 1461 (“The proliferation of local criminal laws, however, imposes a correspondingly lessened likelihood that the substantive reach and content of such laws can be known, and therefore observed. This is especially of concern to itinerant citizens passing through a given locality, a common occurrence in today’s highly mobile society.”).

¹⁵¹ See Robinson & Darley, *supra* note 139, at 176 n.3 (discussing primary research on the inchoate crime of attempt in New Jersey, where participants mistakenly believed that the punishment for attempt was much less severe than for the completed crime: “This is a particularly bad error to make, from a deterrence perspective, because it means that people seriously underestimate the penalty that would be assigned for crime, and thus are less likely to be deterred from committing it.”).

¹⁵² LAFAVE, *supra* note 126, at 528.

¹⁵³ Chiesa, *supra* note 101, at 627.

¹⁵⁴ *Id.*

Felony murder rules in the United States are intended deter dangerous crime by enforcing harsh murder liability when an otherwise unintentional homicide occurs during the commission of a felony.¹⁵⁵ But the laws vary substantially from state to state,¹⁵⁶ the Model Penal Code rejects felony murder,¹⁵⁷ and the rules tend to have complicated limitations at one extreme and potentially unsettling consequences at the other.¹⁵⁸ Enumerated requirements, duties, or prohibitions, like those found in the AWA Section 9, might work to improve the deterrence and fairness of felony murder rules. In fact, this may already be the case in some jurisdictions. One could argue that the most just and effective felony murder rules are those that strictly limit their application to homicides which occur during the commission of limited enumerated dangerous felonies.

Animal cruelty law in the United States would be more effective in deterring crime against animals and fairer toward offenders and accused offenders if it adopted the five animal welfare needs found in the United Kingdom’s Animal Welfare Act 2006. Criminal justice reform in the United States is an immediate issue. Substantive changes to criminal animal cruelty laws—with attention to notice and deterrence—are a prime target for improvement, especially if support for such change can be found across multiple advocacy groups. Codifying the United Kingdom’s five animal welfare needs is just such a substantive change that can collect wide support and enhance protection for animals in the United States. With a need for similar substantive improvement across the criminal law, improved notice and deterrence is a way in which animal protection law can lead the way in criminal justice reform.

¹⁵⁵ LAFAVE, *supra* note 126, at 651, 660.

¹⁵⁶ *Id.* at 661.

¹⁵⁷ *Id.*

¹⁵⁸ See HOLMES, *supra* note 142, at 39 (“[I]f the object of the rule is to prevent [killing], it should make accidental killing with firearms murder, not accidental killing in the effort to steal; if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.”).



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