Mid-Atlantic Journal on Law and Public Policy

VOLUME 4, NUMBER 1 SPRING-SUMMER 2018

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ANIMAL AND DISABILITY REPORTER

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SUBMISSION INFORMATION

The *Mid-Atlantic Journal on Law & Public Policy* encourages the submission of single page abstracts or completed articles on current Animal Law topics. Articles are accepted on a rolling basis.

Your abstract or article should be typed, double-spaced, and in Cambria, 11-point typeface, with 10-point footnotes. Submissions should include the author's resume/CV as well as the abstract with a word count.

The Journal accepts all submissions only to our email address: midatlanticlyceum@gmail.com. Submissions, which should provide a comparative exploration of as many states in the mid-Atlantic region as possible, will be considered for potential publication.

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FOREWORD

By: Matthew J. Stockwell, Editor in Chief

To say that the publication of this journal is a labor of love would be an understatement. Everyone involved has put in countless hours of work to create what you see today. We all come from different backgrounds but share a common cause: highlighting the problems and possible solutions to legal issues facing the disability and animal rights communities.

As such, our aim at the Mid-Atlantic Journal on Law and Public Policy is to create an inclusive, non-partisan, and scholarly venue for authors of all kinds. In today's society it is too easy to believe that civil discourse and debate no longer exist. One of our founders (and my mentor), Gary Norman, has taken it upon himself to try to revive those ideas. We hope that this journal pushes that process forward.

In this volume you'll find articles written by practicing attorneys and law students and covering a wide array of topics. Topics include the ethical implications of representing clients with traumatic brain injuries and an in-depth look at the Baltimore Arrabers, to an analysis of breed-specific legislation and the proposition of a new food label focused on animal welfare. At the same time, this journal aims to set itself apart by welcoming articles from authors outside the legal community. In this volume we feature two editorial pieces. The first focuses on the positive effects that pets can have on the health of the elderly, while the second is a reflection of Maryland's proposed Death with Dignity Act.

I want to end this foreword with a quote from Cormac McCarthy. At the end of his 1992 piece *All The Pretty Horses*, the main character John Grady Cole sits talking with a small-town judge. When Cole asks why he stayed to become a judge instead of returning to his job in the big city as a prosecutor, the judge replies, "I just saw a lot of injustice in the court system...I think I just didn't have any choice. Just didn't have any choice."

I hope in publishing this journal that we can have our own small part in bringing injustices to light and helping make the future a brighter place. Thank you and enjoy.

ARTICLES

THE PIT BULL HYSTERIA: IS THIS BREED INHERENTLY VICIOUS OR A SOCIETAL PROJECTION OF UNFOUNDED FEAR?

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I. INTRODUCTION

As the editors of Dog Fancy aptly stated, "[s]urely no breed has been demonized to the extent that the pit bull has."[1] Hence, this will explore the impact of social attitudes on specific breeds cautioning for a better approach. Notably, this article posits there is a connection among public media attitudes and the pens of lawyers or judges engaged in the legislative or executive branches; or in that great third powerful branch established by the founding fathers, the courts.

Once the Bloodhound scare - one of the first examples of labeling a specific breed as inherently vicious - dissipated, other breeds would fall under the ire of society. The Pit Bull hysteria is but the most recent iteration.

Arguably, the intersection of public media attention, when not productively engaged, results in our legislative or legal systems cycling as follows: significant negative ramifications to our legal system originate from hysteria and, in turn, a self-perpetuating, unfounded projection of fear towards the Pit Bull breed establishes various expensive legislative proposals or enactments or enforcement measures needlessly injuring the human and animal bond.

To quantify the players in this problem, the five players involved are as follows: the media, society, politicians, experts, and the court systems.

Wherefore, this article will, to the best of its abilities, explore the following points:

- How the media shapes society
- How a counter reaction exists among public media and citizens and how this, in turn, influences politicians and the legislation they enact
- How expert opinions shape reactions to specific breeds
- And as a final but as an important note, how our court system reacts to all of the foregoing.

In a republic, founded upon the will to be free, which as the founding fathers believed was fundamentally the product of

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[1] American Pit Bull Terrier Smart Dog Owner's Guide 4 (DOG FANCY eds., 2009).

information; the media maintains an important role in influencing the three branches of government. As such, the media has arguably a moral role in providing logical, non-hysteria based information. In turn, the three branches of government have their own important and independent role to shape positive frameworks influenced by, but not controlled by, mass media.

II. THE MEDIA'S ROLE

Instead of an information producing role, the media sometimes has arguably alternative motives. Notably, the media reports on such things that will expand its reputation, and enhance its business for the almighty buck. In a capitalistic society, the media focuses thusly on writing articles which seem "to be of both interest and dismay to many people."[2] That being said, the media's role in steering the public's perceptions with regard to hot topics of modern day cannot be understated.

With respect to society's current social construct as to the dangerousness of the Pit bull breed, a discernible trend can be followed as to how influential the media's style of reporting newsworthy events is on society and how this shapes public policy.

A. The Media Never Claimed To Be Unbiased

As Karen Delise accurately states in her article, *The Pit Bull Placebo*, "[i]t is not the responsibility of the media to provide a comprehensive and accurate running log of dog bites," or other statistics it decides to include in its articles.[3] There is nothing overtly wrong with this practice, other than the fact that it bombards society with fantastic, dramatic, and entertaining stories, which society then takes to be completely accurate. Despite the fact that we, the readers, seem to nod our heads and acknowledge that we understand what we're reading in various media outlets is being written by people with opinions of their own, it should be understood that these articles are not nearly as balanced as they may seem. Moreover, the public needs to "recognize[] that it is neither the responsibility nor the intent of

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[2] KAREN DELISE, THE PIT BULL PLACEBO: THE MEDIA, MYTHS AND POLITICS OF CANINE AGGRESSION, 1 (2007).
[3] *Id.* at 149.

the media to provide unbiased or detailed information . . . [t]herefore, it is vital for both the scientific community and the public to recognize that the media is under no obligation to provide balanced, comprehensive or accurate data on severe/fatal dog attacks, nor does it."[4] The fact of the matter is that the media will report what it feels is most interesting to society, and sometimes that interest takes the form of events that are viewed as unexpectedly violent, such as brutal dog attacks which leave individuals - namely children - maimed or dead.

B. The Media In The 19th Century

The media's role in helping society understand canine behavior is one of great import, and its story begins in the 19th century. Incidentally, the media was much more canine friendly back in the day. Articles humanized the dogs to far greater extents, highlighted poor living conditions, and seemed to appreciate the idea that dogs were categorized based on the type of need that was required of them by their owners. What is unique about the media during this period in history is that the "[n]ewspaper accounts of dog attacks were often brutally honest in their description of the attack and of the treatment and care the dogs received at the hands of their owner and/or victim."[5] During the 19th century, not only were dog owners more apt to take responsibility for the actions of their dogs, but society in general - many times including the victims - identified with canine behaviors, recognizing triggers that may have caused the canine aggression leading up to the attack.

Despite acknowledging canine behaviors and triggers to canine aggression, it was common for dog attacks to be accompanied by accounts that the dog in question was also "beaten or abused by either his owner or the victim prior to the attack."[6] An article was written in December of 1882, whereby a bookkeeper had been boiling water in a kettle, and "was savagely attacked by a large Bloodhound kept on the premises as a watchdog . . . The dog lacerated the man's throat . . . and bit him more than twenty times . . . the attack was not viewed as inexplicable. The article goes on to recount that the dog had

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[4] *Id*.
[5] *Id*. at 3.
[6] *Id*. at 3-4.

previously been punished by the night watchman with a kettle of scalding water . . . the unsuspecting bookkeeper triggered the Bloodhound's 'recollection of the brutal treatment by the watchman,' causing the dog to attack."[7]

i. Media's Style of Writing In The 19th Century

One might be reluctant to call any epoch as the golden age. Except, as to the media and their relationship with dog breeds, the past does seemingly fit this term. The Media, in the broadest sense of the word sympathized with the victims of a dog attack but this sympathy "did not interfere with the observation of the events that may have contributed to the attack . . .[W]e [would receive] a vivid account of circumstances and/or trigger that set some of these dogs off into a frenzied and unrelenting attack."[8]

In 1888, a newspaper published an article about a butcher, attacked by his 2-year-old Newfoundland dog whom he "trained to guard his shop at night . . . [t]he butcher entered the yard one evening to release the dog and when the man 'claimed the right to rule there and enforced his claim with a kick,' the dog responded by furiously attacking him."[9] The media did not excuse the dog's behavior, but included in the article the dog was encouraged to be aggressive, and was kicked just before the dog attacked his master.

The media also noted when dogs reacted aggressively to stressful environments. In a report, written in 1893, the media "describes how [a] baker found a cur dog on the streets . . . chained the dog in his bakery cellar where the temperature reached over 100 degrees much of the time. This newly acquired, chained, heat-stressed dog not surprisingly attacked the baker when he entered the cellar to light the ovens."[10]

In many cases, the victims were also children. In 1874, an article reported on a dog attacking a 3-year-old girl, who approached the dog while he was eating. The article noted that

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[7] *Id*. at 4.
[8] *Id*.
[9] *Id*. (quoting "*A Dog Attacks His Master*," WASH. POST, Feb. 9, 1888).
[10] *Id*. (quoting "*Bitten by a Mad Dog*," N.Y. TIMES, July 27, 1893).

the "large Newfoundland dog had been recently obtained . . . to guard [a hair-dealer's] at night." This dog's function was to guard the shop, he was still getting acclimated to his environment, and he perceived the little girl as a threat to taking away his food. The media understood canine behavior much more aptly in the 19th century, and reported it as such.[11]

This turns to other forms of media. In theater productions, for instance, it was no surprise that media outlets knew of society's desire to see more drama. One such theater production was "loosely based on the novel but with grossly exaggerated caricatures of African-Americans and full of melodrama . . . [eliciting] an intense and emotional reaction from the audience to one scene in particular, that of the escaped slave Eliza, baby in arms, fleeing barefoot across the frozen Ohio River from a pack of pursuing Bloodhounds."[12]

This article has highlighted these historic examples; arguing the public media has been better, and should be better now with its role as a provider of information.

ii. Society Affects the Media

The production of *Uncle Tom's Cabin* highlights the effects society has on the media, and how stories get relayed. While this momentous book impacted views of that vicious institution of slavery, sometimes one forgets that dogs were a part of American society during this timeframe as well, and included in the later adaptations of the book.

Bloodhounds were hardly mentioned in the book, and yet no production was complete without them. "The dramatic impact this scene had on the audience was not lost on producers, and they quickly capitalized on this imagery."[13] Additionally, reviews were written about the play adaptation, mentioning "'[h]ow the barking of these dogs behind the scenes used to make us catch our breath! That alone was worth the price of admission."[14] Given the alleged fierceness the Bloodhounds in this scene were supposed to enact, there was some supposed concern for the

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[11] *Id*. at 5 (quoting "*A Child Terribly Mangled by a Dog*," N.Y. TIMES, June 14, 1874).
[12] *Id*. at 29.
[13] *Id*.
[14] *Id*. at 30.

audience at the time, however, it was also noted by the Daily Helena Independent, in 1882, that "however risky the introduction of bloodhounds on the stage may be to the people in the play, they cannot be dispensed with, for in these days *Uncle Tom's Cabin* without them would not satisfy the public."[15] The Bloodhounds were used to sell the image of them being vicious, to dramatize the play, and the media "deliberately manipulated [the] portrayal of Bloodhounds. For a drama to be entertaining it needs villains, monsters or frightening obstacles to overcome."[16] Given what we see in various media outlets today, the goals and motivations of the media haven't changed, it has only evolved with society's wants and desires. It is hard to blame the media for society's alternating fears of various dog breeds when it seems as though it was society that pushed the media to do so.

iii. Media Affects Society

Despite the fact that it could be argued that society affects what the media reports on, to a greater extent, the media still holds a substantial amount of influence. Media's influential power has been observed in a number of settings, which this article now notes. This article illustrates how hysteria ran rampant when rabies was first discovered. This, subsequently, manipulated society's perception of dogs' aggressive behavior. The media also reported on the aggressive dogs of the Northern territories where the dangers of dog aggression and some severe attacks by them were as common as the sun rising every morning.

The media back in the 19th century was not as concerned over the types of breeds involved in attacks. Therefore, the actual term "Bloodhound" was applied quite liberally in articles, so not all dogs labeled as such were actually Bloodhounds, but that was in the article, and that's what people read. In fact, "[f]or most people today the term Bloodhound easily conjures up an image of a huge, lumbering dog with long ears, a sad countenance, and black and tan markings."[17] The media only needed to report about these Bloodhounds, and associate them with aggression in news reports to elicit emotions from their targeted audience,

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[15] *Id.*
[16] *Id.* at 31.
[17] *Id.* at 21.

society. A *New York Times* article in 1898, making light of increased numbers of Bloodhound attacks, titled their article, an "Impromptu Open-Air Uncle Tom's Cabin Performance."[18] Given that most people at this time had seen this performance, it is not difficult to see that they would have associated the Bloodhounds being cast as aggressive monsters in the play, to those being written about in articles, irrespective of canine behaviors also being recognized by the media.

What was truly remarkable was when rabies came about, and media began to report on it. Articles were written, and for whatever reason "[t]here seemed to be a disproportionate number of reported 'mad' or 'rabid' Newfoundland dogs attacking people," making it appear as though the number of rabies cases was running rampant.[19]

To summarize, this illustrates how the media intentionally or more so recklessly causes hysteria. Upon reading reports shared by the media, some people committed suicide if they suspected a dog that had bitten them, could possibly have rabies. People observed canine behavior carefully during this timeframe. Rabies symptoms may have been mistaken for basic canine aggression, further increasing the hype that rabies was everywhere. While the media was simultaneously reporting about rabies and dog attacks, fear spread amongst society, until about the time a cure was found, then the fear subsided. This "illustrate[s] the hysteria that could so easily be roused by even the suggestion of a rabid animal."[20]

The media simultaneously reported about what were arguably the "most severe and fatal attacks by the Northern breeds in Alaska, Canada, and the Northern territories . . . the dogs may have been one of the following breed/types: Husky, Siberian husky, Alaskan husky, Malamute, Alaskan malamute, Eskimo dog, Labrador dog, Newfoundland dog, Arctic sled dog, sleigh dog, sledge dog, wolf dog, wolf hybrid and any dog that might have been a mixture."[21] No one ever questioned why these dogs were so aggressive, nor insinuated any negative feelings to these breeds. Many fatal attacks by these types of dogs occurred in the late 1800s, as well as the early 1900s. During the 1900s, these

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[18] *Id*. at 32.
[19] *Id*. at 38.
[20] *Id*.
[21] *Id*. at 41.

occurrences "were not considered terribly unusual or unexpected."[22] Moreover, Delise points out that these dogs lived in extreme weather, and "were considered only once removed from their direct ancestor, the wolf. Today, we accept the fact that people will die in automobile crashes as [a] necessary evil of being able to travel and move goods from place to place. One hundred years ago, sled dogs provided the only means of communication, human transport and exchange of goods during the long winter months in Alaska, Northern Canada, and the Northern Territories. Sled dogs were often risky business and the human deaths associated with keeping these dogs . . . were considered the cost of doing business."[23]

It was well-known by most, even those not living in the Northern territories, that sled dogs were not exactly the cuddly companion dogs we see today, fetching the morning paper. They were working dogs that were "semi-wild, poorly socialized, poorly fed, maintained as a pack, and treated harshly" by their owners.[24]

Arguably, technology in the 19th century was not what it is today. The accurate number of dog attacks that occurred then as opposed to this century is not well documented as dog attacks were so common, it was considered too trite to record. For example, there was a report about a woman who was killed by a team of sled dogs. Communication was not the best, even in the early 20th century, but back in 1925, it took a year for a sled team to relay the message to a bigger city capable of reporting it in the news.[25] In 1998, there was a family that was on vacation, off the Labrador coast. Only two of the four family members survived; the rest were devoured. The word the media used, "devoured," was not meant to hype up the article for dramatization. Many of the attacks reported about in those Northern territories by these breeds, mentioned how starved these poorly socialized teams of dogs were, whose owners were letting them run loose to fend for themselves. This later story, just before the 21st century, was featured when there was adequate technology for it to be shared

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 42 (citing "*Attacked by Dog Team, Woman Dies in 2 Days*," Special to the N.Y. TIMES, Apr. 29, 1925).

with the world, and yet it wasn't. Technology clearly plays little if any role in how information is disseminated by the media.

Attacks by guard dogs upon would-be burglars were deemed acceptable. Guard dogs not being able to distinguish between that would-be burglar and a child who ran within reach of the dog to possibly retrieve a ball, was deemed understandable canine behavior, but inexcusable nonetheless. Wild sled dogs killing and eating vacationers, or random individuals caught alone at night, seemed to be considered the norm.

To summarize, these illustrations show a tendency towards rationally interpreting information about dog attacks rather than utilizing media as a vehicle for post hoc justifications for law-based outcomes.

The connective tissue here involves what society has deemed as acceptable canine behavior and how that decision may be created for good or for ill by the public media. For small font news print, the public organs of the people have a lot of power to persuade. As these illustrations demonstrate, the reaction by the public is not always well-informed by the public media. Indeed, the public media may cause negative public reaction. A clarion call to public media: uphold the best tenets of your profession and promote the public understanding.

C. The Media In The 20th Century

In the 19th century, media outlets did not tend to mention the dog's breed. The articles described the dogs by their temperament, their physical condition, or perhaps they used such descriptive words as "savage" or "vicious" dog. For example, a dog involved in a fatal attack on a young boy was described as being a "coal-mine dog."[26]

The pattern witnessed during the 19th century continued into the 20th century. The media reported the dog attacks with the same level of enthusiasm, working towards the ultimate goal of fame, money, and power. The 20th century reporters also wrote articles indicating why an event could have happened, alongside the word "vicious," so their audience could better understand the mechanisms behind canine behavior.

The Bloodhounds were the first major breed spotlighted and associated with an aggressive function; therefore, we saw

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[26] *Id*. at 47.

increased number of reports involving dogs that were construed as Bloodhounds.

As society became enamored with Mastiffs as protection/guard dogs, we saw the decline of Bloodhound attacks, and an increase in Mastiff attacks. "When their popularity as guard dogs waned in the early 20th century and they were replaced by other protection breeds, severe and fatal attacks associated with [the Mastiffs] virtually disappeared."[27]

As mentioned in the previous section, societal interests affect what the media writes about, and in what manner it does so. The Mastiffs and the dog attacks they were associated with no longer were of particular interest to society. Why? Because "other breeds of dogs began emerging in reports of attacks as these new breeds caught the fancy of the American public and became popular."[28] The media outlets of the 20th century continued to reveal the gruesome details of the attack, but also what may have contributed to the canine's aggression. For example, a 1915 article reported that a Collie was "responsible for attacking two children . . . [and] [t]he article concludes with the explanation for the dog's aggressiveness: '[i]t is believed the dog got lost and became frantic.'"[29] Another article stated that a Collie attacked a 10-year-old boy, stating that "'flesh and muscles of the boy's chest and both arms were torn by the teeth of the dog.' [and that] . . . [h]ere the victim claims he was only shouting to his friend and the dog rushed out of the yard and attacked him. However, the constable investigating the incident wrote in his report that witnesses claimed this was not a true account of what transpired and that the dog was on the porch 'and the boys were playing around the house and began to annoy the dog with sticks, and that the dog then attacked. . . his tormenters.'"[30] Yet another article reported that in 1916, a Collie attacked a 3-year-old boy, "when he attempted to pet an old Collie . . . believed to be harmless [and] evidently mistook the boy's intentions in his semi-blindness.'"[31] These are just a few examples, but as you can see, the media never shied away from reporting that flesh and

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[27] *Id*. at 48.
[28] *Id*.
[29] *Id*. at 49 (citing "*Boy and Girl Bitten When Collie Runs Amuck*," INDIANAPOLIS STAR, May 2, 1915).
[30] *Id*. (citing "*Bitten by Dog*," FITCHBURG DAILY SENTINEL, Mar. 29, 1910).
[31] *Id*. at 49-50 (citing "*Child Bitten by a Dog*," NEW OXFORD ITEM, Nov. 16, 1916).

muscles were showing after the attack of a child, nor did they fail to try and understand the circumstances that had transpired from the dog's perspective.

Reports of Collies attacking children have occurred. This notes that, as by the media and society alike, Collie's were never deemed to be dangerous dogs. Society has been enamored with the Collie, because of its "positive image and popularity . . . [in] the 1919 publication of *Lad: A Dog* . . . including Eric Knight's novel *Lassie Come Home*."[32]

As in the 19th century, society in the 20th century tended to hold some sway as to what media chose to report about. Despite numerous accounts of Collies getting aggressive and severely injuring children, they did not sit in the hot seat the way Bloodhounds and Mastiffs had in the past. Incidentally, neither did the St. Bernard. There have been reports of St. Bernard attacks too, but this breed "has never been associated with negative functions."[33] The media additionally reported about attacks by smaller breeds, such as the Fox Terriers, Boston Terriers, and Airedales. But as Delise points out in her article, "[t]he image of a feisty little Fox Terrier attacking the pant leg of a man passing on the street seems more comical than dangerous."[34] Society never really saw the smaller breeds as dangerous, but some reports of dog attacks occurring by these smaller breeds were reported, as they were severe enough to be deemed newsworthy.

For example, in 1901, a Fox Terrier was reported to have attacked "[a] 2-year-old boy [who] was playing on the floor with the [Fox Terrier] . . . when the dog began attacking the boy. . . As this attack occurred in New York City during the middle of the summer, the excessive heat was noted in the article as a possible reason for the vicious attack by the dog against his 'former playmate.'"[35]

Fox Terriers have been reported to have killed infants. By all reports, a Boston Terrier grabbed a 2-year-old by the neck and shook him, breaking the child's spine.[36] In 1934, two Boston

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[32] *Id*. at 50.
[33] *Id*. at 52.
[34] *Id*. at 53.
[35] *Id*. (citing "*Child Attacked by a Dog*," N.Y. TIMES, June 29, 1901).
[36] *Id*. at 54 (citing "*Baby Killed by Dog*," WASH. POST, Feb. 4, 1921).

Terriers were able to kill a larger child.[37] Airedales, too, have been known to attack and kill, or severely injure children. Yet society has been reluctant to characterize these breeds as vicious.

The media's styles of reporting in the 19th and 20th centuries were very similar, providing information not only about the dog attacks, but information to help define the behaviors of the dogs for society. Additionally, "[a] fascinating aspect of 19th and early 20th century newspaper articles about dog attacks is the perception and portrayal of dogs as emotional beings. Dogs were described as jealous, treacherous, lonely, depressed, enraged, frustrated, angry, brave, heroic and noble."[38] There are plenty of dog lovers who have understood this concept for centuries, but for those that do not, the media has helped others in society understand why a canine committed what appears to have been an unforgivable act of aggression. Despite my previous statements that the media outlets are only in it for the money, sometimes even they used their influential power for the good of the canines. As the *Fort Wayne Daily News* reported in an article on July 21, 1905, "[t]here are two sides to the vicious dog stories."[39]

D. The Media In The 21st Century

The media of today, is nothing like the media of the 19th and 20th centuries. Today, the media seemingly has a pecuniary interest in "[t]heories about the breed, its history and temperament . . . while details concerning the circumstances of the individual dog involved are not reported. Cause and effect, or reasons for the attack, are no longer found in reports, since the breed is now recognized as sufficient information to explain aggression."[40] Canine experts have been quoted in recent articles as to the dangers of specific breeds, "[but] [t]hese 'experts' . . . discussing the history, anatomy, nature and temperament of [specifically] the Pit bull . . . have other full-time jobs - as politicians." [41] These 21st century reporters along with

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[37] *Id.*
[38] *Id.* at 58.
[39] *Id.* at 62.
[40] *Id.* at 172.
[41] *Id.* at 104.

politicians, have arguably joined forces to "grossly distort[] [society's] perceptions as to the dangerousness of dogs and the frequency of attacks."[42] What's interesting about this latest breed of reporters and media outlets, is the degree of influence to which society and media are each controlling how the other reacts. The media always want to report what society wants to see from them, and as it always been, the media want a good reputation and to make money. The media's motivations have not really changed, so what did?

i. Media's Style of Writing In The 21st Century

Before the late 20th century, "the breed of dog was *not* the story; the attack was the story, with the breed as an added detail."[43] The media of today, as Delise puts it, is as unscrupulous as ever, and "print[s] outrageous rumors, myths and theories about anatomy and temperament that earlier generations of reporters had the good sense and professionalism to leave in the children's playgrounds."[44] The 21st century media reporters changed their style of writing significantly, in that they added pseudoscience to their articles, began reporting inaccurate stories to increase the fear factor of the Pit bull, and increased the number of articles that were percolating through society, which was inevitably going to alter the public perception, thus allowing for negative social constructs and breeds such as the Pit bull to be unnecessarily demonized by society.

For example, today's media articles "vilify the Pit bull as a creature that revels in a 'frenzy of blood-letting,' and described as 'lethal weapons' with 'steel trap jaws' and as 'killer dogs,' . . . [additionally using] [a]n unproven, unreferenced claim of Pit bulls biting with 1800 psi."[45]

During past centuries, owners and victims of the dogs at issue - for the most part - took responsibility for either failing to properly contain their dog, or the victims understood canine behavior to a greater extent than society today, and understood why the dog became aggressive with them. Today's society,

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[42] *Id*. at 172.
[43] *Id*. at 86.
[44] *Id*. at 87.
[45] *Id*. at 98.

however, seems to relish in hearing only about the dog, the type of dog, and the pseudo statistics that will allow them to sound smart when explaining why a particular breed ought to be eliminated or controlled, because just last week, they allegedly heard about a number of stories of said breed killing or maiming someone. It is entirely irrelevant, it seems, that a victim may have been torturing the dog, or any variety of reasonable circumstances. No one wants to hear about why the dog may have become aggressive, only that they did, and look at the pictures of the poor victim. Ironically, the media first started writing articles regarding Pit bulls, due to the increasing amount of dog fights, police raids, and animal cruelty stories coming to light. It was a "legitimate and well-intentioned coverage" at first, but then these Pit bull attack stories "elicited an emotional reaction from their audience, [and] the media went into overdrive . . . churning out emotionally charged articles about Pit bull anatomy and behaviors that were based on rumors, myths and unproven claims by both experts and laymen."[46]

ii. Society Affects the Media

Although the media was well-intentioned in the beginning, that Pit bulls obtained their origin through fighting and the reporting on this form of animal abuse enabled the media outlets to change direction from being well-intentioned to finding new meat on the bone to chew and giving society something more to talk about. Society clearly influenced the media to report more about Pit bulls, reacting to the stories in similar ways as the audiences at the play productions of *Uncle Tom's Cabin*. Society likes drama, and the media will be there every time, to give it to them. There was a rising awareness, and dog fights were becoming more apparent and growing as a problem that people wanted to address.

This notes a circular response. Society "elicited an emotional reaction from their audience, [and] the media went into overdrive . . . churning out emotionally charged articles." And more charged reports on a specific breed ramped-up the fear.

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[46] *Id*. at 96.

In 1986, "over 350 newspaper, magazine, and journal articles… [appeared] about the Pit bull in the United States."[47] The media has overwhelmed society with a variety of Pit bull stories, creating an unfounded fear amongst the public at large, which then feeds into the media's need to continue to produce fear-inducing stories that will keep society hooked.

iii. Media Affects Society

Despite the fact that society caused a responsive media to give them their desires of tales of bad dogs, the 21st century reporters created a "media image of the Pit bull so intense and magnified that it sometimes took precedence even over a person's actual experience with the breed."[48] Some of the media articles written and disseminated were so ridiculously false, and yet members of society believed the stories, irrespective of the fact that many dog lovers and dog organizations would try and educate the public. One such report occurred where a man claimed to be attacked by a Pit bull, and he somehow "easily warded off the dog with his foot and no injuries occurred."[49] For anyone who's actually been bitten by a dog, be it playfully or not, you would not get away from a dog intending to bite you with no injuries. Based on anecdotal evidence of the times I played with my childhood dogs, they never intended to hurt me, and yet I sometimes walked away bleeding. You are not walking away from an aggressive, vicious dog, without a scratch.

Another report the following year occurred, where a man called the police claiming a Pit bull had killed his 19-month-old daughter, when she stopped breathing. Even the police who responded were skeptical, stating that this Pit bull referred to was a puppy, who "'was so young, it barely had teeth,'" to which the father was then suspected of actually killing his daughter, but tried to blame it on this breed.[50] Another report the same year this incident occurred, was reported when a woman brought her small dog into the Veterinary Hospital, "claim[ing] her small dog had been 'mauled by a Pit bull,'" despite any apparent bite

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[47] *Id*. at 97.
[48] *Id*.
[49] *Id*. at 97.
[50] *Id*. (citing "*Father Held in Tot's Death after Telling Pit Bull Story*," SAN JOSE MERCURY NEWS, June 19, 1987).

wounds. The small dog was later found to have actually been shot by a bullet, and the veterinarian "commented that 'unless Pit bulls are now carrying guns, the dog was probably shot by one of the woman's neighbors.'"[51]

Society was not only being bombarded by ridiculous stories intent on blaming Pit bulls for everything, starting in the late 20th century, but magazines and newspapers drastically added to the hysteria. *Rolling Stone* magazine actually wrote an article entitled "'A Boy and his Dog in Hell,'" while talking about inner city gangs, violence and the horrific abuse of Pit bulls, talking about how sometimes if the Pit bull lost a street fight, it would "bec[o]me a source of embarrassment or fail[ure] to uphold the machismo image of their owners" whereupon they would be killed because they weren't tough enough.[52] *Sports Illustrated* magazine weighed in, with an "entire front cover of [an] issue [with] a photograph of a Pit bull, mouth open, teeth bared, over which in bold print was the headline, 'Beware of this Dog.'"[53] It started out as a mere reporting of dog fighting, and morphed into telling the public these dogs were vicious and unpredictable, a characteristic many ignorant people believe as truth. *Time* magazine not long after "ran the headline 'Time Bomb on Legs,'" not to be outdone by any other media outlets.[54] *People Weekly* also wrote an article about Pit bulls, entitled "An Instinct for the Kill."[55] With so many news reports bombarding society with dog attacks, claiming Pit bulls were involved when they weren't, using numbers to claim Pit bulls have this supernatural strength and claiming characteristics that simply aren't true, are enough to terrify people.

When the media has reported about the vicious characteristics of a specific breed, the media seemingly encourages "the most extremely abusive of owners [to get that breed] while feeding into a public hysteria and frightening potential suitable owners for this breed of dog"[56]

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[51] *Id*. (citing "*Pit Bulls: Months of Hysteria Lead to a Distorted Response*," DET. FREE PRESS, Aug. 10, 1987).
[52] *Id*. at 97 (citing Sager M, "*A Boy and His Dog in Hell*," ROLLING STONE, July 2, 1987).
[53] *Id*. at 98 (citing "Swift, E.M., "*Beware of This Dog*," SPORTS ILLUSTRATED, July 27, 1987).
[54] *Id*.
[55] *Id*. (citing "*An Instinct for the Kill*," PEOPLE WEEKLY, July 7, 1987).
[56] *Id*.

Unfortunately, the media, including, on-line news media, has taken the lead in influencing society to a greater extent, because as Delise mentions, it is discernible that "[w]ithin the last decade or two, a new phenomenon has not only drastically influenced the public's perception of certain breeds of dogs, but contributed greatly to a generalized ignorance of canine behavior.

Moreover, there are "[e]ditorial columns about the vicious nature of certain breeds, dog-bite attorneys' websites filled with photos and statistics about dog attacks, quotes from politicians and outraged citizens about the nature and behaviors of certain dogs, and sensationalized headlines of dog attacks all seemingly offer instant and ample 'proof' of the vicious nature of certain dogs."[57]

To recap, media outlets are doing a fine job maintaining this self-perpetuating projection of unfounded fear.

III. SOCIETY'S ROLE

Society's role in the demonizing of certain breeds over the past few centuries cannot be understated. The media, as we have seen time and time again, reacts to what society wants to see, hear, or read about. It is easy to say the media is more influential, and it is their fault that society fears entire breeds of dogs, but the media's motivations in their style of reporting have never really changed, despite the significant differences we see in reporting between the 19th and 20th centuries, and then the 21st century. The media is not what has changed, society has.

A. Bloodhounds

Many of the early reports of Bloodhound attacks, or various other dog attacks, highlighted that society was accepting of certain types of aggression. For example, and as can be observed in many state statutes today, if a dog severely injures or kills an individual entering their land with the intention to commit a crime, society then - as it still presently does - was willing to say, that was acceptable canine behavior. Unfortunately, despite the fact that dogs are fairly intelligent, if you train them to attack any trespassers, "any" will also include innocent adults and children. Many children were the victims of

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[57] *Id.*

dog attacks, particularly when it came to guard dogs, because the dogs could not distinguish between a criminal and an innocent bystander who happens to trespass.

Bloodhounds were used in the early 1900s by law enforcement, as scent hounds, "to track down fleeing criminals, escaped convicts or runaway slaves. Often these dogs were encouraged to display an increased level of aggression towards humans in the performance of these tasks."[58] The term "Bloodhounds," was used very loosely by both society and media, to describe a dog used for tracking, so when there was an increased reporting of dog attacks by Bloodhounds, it wasn't necessarily an accurate depiction that Bloodhounds were as aggressive and vicious as they were made out to be, largely due to the function they served.

In the 19th century the Bloodhounds were being used for acceptable purposes, as chasing criminals, convicts, or slaves. Certain types of Bloodhounds - namely the Cuban Bloodhound - "[were] considered a particularly fierce and aggressive animal and the function of these dogs usually involved cruelty and subjugation."[59] The reputations of these dogs resulted from their use by the Spanish conquistadors "to subjugate and decimate the native populations in the New World."[60] Bartolome de Las Casas, a Spanish missionary and historian, "described some of the atrocities practiced by the Spaniards against the natives . . . [and] recognized that the dogs were 'taught' to behave so ferociously. The savagery shown by these dogs towards the natives was an extension of the savagery of their masters."[61] These Cuban Bloodhounds were also used in the Civil War, to track down enemy soldiers, and hunt down fugitive slaves before that, so their reputation was well known as terrifying. This image of the Bloodhound was sufficiently established in the minds of society, and would be very difficult to shake.

Ironically, there was a subset of dog enthusiasts who fell victim to their own argument, becoming "guilty of the same stereotyping of which they complained so loudly . . . that the behaviors of the Cuban Bloodhounds and other Bloodhound imposters had tarnished the reputation and prejudiced the public

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[58] *Id*. at 9.
[59] *Id*. at 22.
[60] *Id*. at 23.
[61] *Id*.

against their breed."[62] Moreover, there was something about the Bloodhounds, that made them popular with society so much so, that despite the fact that their function as guard dogs and use by law enforcement was deemed reasonable by society at the given points in history, dog attacks by this breed were considered far more noteworthy than the significantly more fatalities by dog attacks in the Northern territories. Incidentally, the Northern breeds and the aggressive behavior they displayed, was not considered unusual or unexpected, working with "[s]led dogs [was] often risky business and the human deaths associated with keeping these dogs . . . were considered the cost of doing business."[63]

While society's perception of the Bloodhounds was that they were aggressive and vicious dogs, substandard owners increasingly sought out this breed, for bad purposes, that would exacerbate how society perceived them for a time. When criminals are using Bloodhounds, these dogs are typically the ones who make the front page when they're trained to be aggressive. If crimes are announced and reported, and all people see are Bloodhounds being used in a function that has required them to be exceedingly aggressive, that is all people see. Subsequently, this breed is demonized by society, and the media responds by reporting all the dog attacks which a Bloodhound was associated with. In the 19th century, describing a dog as a Bloodhound also didn't necessarily mean the dog was an actual Bloodhound.

Fortunately, this didn't last, and "when these breeds left the hands of those looking for a vicious tracking, attack, or guard dog, severe and fatal attacks by these breeds virtually disappeared from newspaper reports."[64]

B. Northern Breeds

In discussing Northern breeds, I'm referring to the "Husky, Siberian husky, Alaskan husky, Malamute, Alaskan Malamute, Eskimo dog, Labrador dog, Newfoundland dog, Arctic sled dog, sleigh dog, sledge dog, wolf dog, wolf hybrid and and any

[62] *Id*. at 34.
[63] *Id*. at 41.
[64] *Id*. at 35.

dog that might have been a mixture."[65] Incidentally, society has always been accepting of the aggression these dogs have shown. They were bred as working dogs, and have typically been respected as aggressive as compared to other breeds, as they were created to fulfill a very distinctive purpose.

While it could be said that these breeds have killed and maimed more people than most, they were not usually vilified as their function and aggressive behavior were side effects of their ability to do their jobs effectively. These types of dogs are observed in Northern Territories where they are part of sled dog teams.

The news reporters in the 19th century indicated that extreme behaviors such as the aggression these types of breeds showed, was a result of their extreme environment. The media has not only reported such dog attacks, but they also understood canine behavior, because one needs to only look around to see there are quite a few huskies and other Northern breeds that have infiltrated the hearts of many and become loving, loyal companions to a great many people, including children.

C. Collies, St. Bernards, & Other Smaller Breeds

Society has been influential in how certain breeds are perceived, many times depending on the function they were viewed to carry out. Members of the public accepted Bloodhounds as being reasonably aggressive for guard dogs, then they were not. This notes that the Northern breeds were aggressive from the start, and yet they were never seen as dangerous to society. Collies, St. Bernard's and other smaller breeds as the Boston Terrier, and Airedale Terriers have also not been seen as threatening despite reports of them having killed children.

Numerous reports, as mentioned previously in this article, involved Collies attacking children. The media also indicated there may have been reasons, such as being partly blind, being scared, dogs seemingly behaving aggressively when they are actually in pain, among other reasons. Nevertheless, the public recognized Collies as a hard-working loyal farm dog . . . [and for] the first few decades of the 20th century there were numerous accounts of severe attacks by Collies reported in the newspapers

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[65] *Id*. at 41.

of the day."[66] Yet, the public never deemed Collies particularly aggressive or vicious. Therefore, newspapers have failed to report on their negatives, rather focusing on their favorable status as our furry friend.

It was also believed that because of the 1919 publication of *Lad: A Dog*, and Eric Knight's novel *Lassie Come Home*, the Collie received exuberant amounts of good press, and could essentially do no wrong.

The St. Bernard's story is short, because they were never seen as dangerous. Stories popped up from time to time that a member of this breed had seriously or fatally injured someone, but it was not of interest to society, therefore the media did not hone in on this breed.

The smaller breeds are interesting in that people tend to believe these smaller dogs are incapable of hurting anyone. Smaller dogs have typically been reported to do more grievous injuries to smaller children, but many of these smaller breeds also have been known to hurt or kill larger children. However, smaller breeds have not been thought of as dangerous to society. Therefore, they do not receive the coverage.

D. Bulldogs

Bulldogs illustrate one of the best examples how society and media influence each other.

During the 19th century, Bulldogs were used for such purposes as dog fighting, and acting as guard and/or attack dogs. Alternatively, they were also viewed as police dogs, and helped out around the farm, saving many an owner from farm animals about to kill them. The media ended up "present[ing] [a] balanced reporting of both the devastation Bulldogs inflicted in attacks and of the contributions they made by saving lives and defending the public as police dogs and personal guardians. Additionally, the media often printed accounts of Bulldogs interacting with their owners and others in the more mundane or everyday activities."[67] Much like the Collie, the Bulldog received enough good press to outweigh any bad press the breed would receive.

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[66] *Id*. at 49.
[67] *Id*. at 69.

Society and the media both played their part in maintaining a positive image that society latched onto with regard to their perceptions of the Bulldog, incidentally one of the ancestors to the Pit bull breed.

E. German Shepherd

The German Shepherd presents an interesting case, because much like the Bulldog, society had the opportunity to identify the breed with both good or bad associations. Many of the reports of dog attacks by this breed occurred between 1965 and 1976. Incidentally, the German Shepherd "never received the widespread public condemnation that the Bloodhound had in the 1800s or that the Pit bull receives today . . . [t]he German Shepherd has consistently been used in positive functions by persons in authority . . . [t]hese very public displays of the German Shepherd in positive functions were a tremendous asset to the breed image . . . [and] media never portrayed the German Shepherd negatively."[68]

Like the Collie was presented in *Lassie Come Home*, so too did the German Shepherd Rin Tin Tin bring about much good press from being cast in the movie, *The Man from Hell's River*. Rin Tin Tin starred in approximately 25 more films.[69] Rin Tin Tin also starred on TV from 1954 -1959, and shortly thereafter, "new issues with aggression would emerge in the late 1960s and early 1970s."[70]

Why did society first vilify the German Shepherd, then accept the breed for a time, then later re-vilify the breed? The media did not seem to contribute to this particular breed's downfall, but neither is it clear why society perceived the German Shepherd as a bad breed during different points in history, particularly when society never seemed to have a problem with the number of deaths that occurred in the Northern territories with regard to the Northern breeds.

F. Doberman

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[68] *Id*. at 89.
[69] *Id*. at 76.
[70] *Id*. at 78.

For the Doberman, the image that has remained in the minds of society was "images of SS guards standing rigid and tall, their obedient Dobermans at their side and the depraved accounts of concentration camp guards using Dobermans to torture and kill prisoners."[71]

The Doberman, sadly, did not have enough of the good press the German Shepherd, Collie, or Bulldog obtained, to overcome the bad press it received during World War II.

Prior to World War II, however, Dobermans were quite popular in dog shows, and there was a famous traveling show, Willy Necker's Canine Carnival, that maintained "five exceptionally trained Dobermans."[72]

Due to the images of the Dobermans being associated with the Nazis, it was simple enough for the media to use this to their advantage. "A new, entertainment-hungry society was unmoved by the shop-worn vicious dog attack stories. Dogs have always attacked people and, as one journalist famously commented, '[w]hen a dog bites a man, that is not news, because it happens so often . . ."[73]

To recap, media changed its tactics too, and used the shock and awe of the atrocities from the war, to rekindle the interest society had in hearing about dog attacks.

What seems to be the case though, is this post hoc fear of a particular breed allowed for a vehicle that people could use to distance themselves from the abominations found in their own nature.[74] This would certainly explain the shift in societal perceptions, and explain why people presently seem to blame the dogs, when just last century most people were still taking responsibility for their dogs hurting people rather than just blaming the dog as being vicious for no reason.

G. Pit Bulls

Society's first impression of Pit bulls occurred when people learned initially about the existence of dog fighting. This occurred during the mid-1970s. Pit bulls were specifically bred for this, comprised of characteristics to be short, stocky, strong,

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[71] *Id*. at 81.
[72] *Id*. at 80.
[73] *Id*. at 79.
[74] *Id*. at 85.

and faster than the Bulldog. These dogs, right from the start, were projected in a negative light. As with each breed that was characterized negatively, the substandard owners would obtain these dogs, as a means for "increas[ing] their status as a person of power or intimidation."[75] Because of this, much of society simply saw these dogs on the news, when policemen were breaking up a drug ring, or arresting some other criminal elements. So on and on it goes.

The media reacted to society's fascination and fear of this breed, more than "a few newspapers reported that the dog 'locked its jaws on [a] child's neck.'"[76] This resulted in a rumor and continued publications of this supernatural ability of the Pit Bull to lock its jaw in place when it attacks, causing immeasurable amounts of damage to its victim. This is simply untrue, but as was previously mentioned, the media's job was not to get the facts straight, but to entertain. Many other myths and rumors regarding the Pit bull's anatomy were reported, skewing society's perceptions of this breed.

This is the pattern we must address, of history continuously repeating itself in that when a breed is portrayed and perceived "as exceedingly ferocious or dangerous [it] will only serve to increase the breed's popularity with dangerous owners."[77] What is interesting is if you were to ask someone who genuinely knows about Pit bulls, they would tell you that this breed typically "makes a poor watch dog because the breed is friendly, even towards strangers. Aggression is uncharacteristic in this breed and has always been considered highly undesirable" by dog lovers.[78] For as long as society continues to fear a breed based on faulty facts the media feeds it, the dangerous owners will continue to misuse the dog for their own nefarious purposes, further feeding into the perception that this dog is dangerous, and for as long as society fears Pit bulls, the media will continue to plaster the most horrifying pictures of this breed it can find, and title their articles such things as "Time Bomb on Legs." Who wouldn't this terrify? And for anyone who gasps at the idea that

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[75] *Id*. at 96.
[76] *Id*. at 95.
[77] *Id*. at 104.
[78] American Pit Bull Terrier Smart Dog Owner's Guide 5 (DOG FANCY eds., 2009).

Pit bulls might be good with kids, they used to be referred to as Nanny dogs.

Moreover, there was a famous Pit bull named Petey who was cast in *The Little Rascals,* but this small amount of good press could hardly compete with the bad press.

IV. POLITICIAN'S ROLE

Society's role in demonizing breeds of dog - such as the Pit bull - is fairly predictable, and the media's role in helping to exacerbate society's negative perceptions of dog breeds, that is also fairly predictable. What should not be predictable is a politician allowing legislation to take unfounded facts and rumored characteristics, and allow such things to permeate government decisions, thereby allowing for a sort of legitimization of this fearful perception that specific dog breeds must be bad. Politicians are reacting to society, in the same way society is reacting to the media's reports, and this is unacceptable, as well as inefficient because breed-specific legislation (BSL) does not actually address the problem of increasing dog-bite statistics.

In 1989, Denver decided to ban all Pit bulls within the city limits. The reason? One such councilwoman involved in the meeting when the legislation to ban Pit bulls was being discussed, determined that she refused to believe that a Schnauzer could be just as dangerous as a Pit bull given the right conditions.[79] The media has reported on such occasions when these smaller types of breeds are perfectly capable of acting aggressively, given the right conditions. Clearly, this woman knows nothing about canine behavior. Denver later approved this legislation to ban Pit bulls.

Additionally, Denver's Director of Environmental Health stated that the apparent difference between "Pit bulls and other breeds . . . [is that] [t]hey have lower levels of fighting inhibition; they have a tendency to attack without provocation because they're bred to do that. They will continue to fight until they're either dead or exhausted, no matter how bad you've hurt them, because they have been trained to do that. They don't signal when they're going to attack . . ."[80] This is how other politicians justified passing BSLs, and this is how false rumors about this breed were allowed to make its way into our court systems.

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[79] Delise, *supra* note 2, at 102.
[80] *Id*. at 102-103.

Chicago Alderman Ginger Rugai contributed to society's perceived fear by adding her two cents, when she was quoted in the "*Chicago SunTimes* as saying, '[h]ave you heard of any other particular breed that has, in fact, killed or maimed someone?'"[81] Irrespective of this inane statement, the fact of the matter is a person of authority and respect is making these statements, and people are nodding their heads in agreement like the bobbleheads you can put on your car dashboards. Moreover, she also was quoted, stating that "Pit bulls don't feel pain."[82]

Other damaging comments made by politicians have included Michael Bryant, Attorney General for Ontario, while defending the legislation banning Pit bulls, he stated "Pit bulls are ticking time bombs."[83] That was similar to the name of one of *Time's* magazine's. Are we to expect our politician's standards in legislating for the good the people, to be based on the same standards media upholds in finding new ways to entertain us? The same thing with Kory Nelson, Assistant City Attorney to Denver, CO. She stated, "the breed should be terminated as simply being a time bomb waiting to go off."[84]

So now that finger has leveled itself on the dog breed, which currently happens to be the Pit bull, but was initially the Bloodhound, and the Bulldog, and the German Shepherd, and the Dobermans. The fact of the matter is none of these breeds should be branded as dangerous: what makes them dangerous is the owners who either intend their dogs to do harm, or who allow their dogs to do harm as a result of their own negligence.

In passing BSLs, the politicians appear as standing on their parapet, doing something, but BSLs are not actually the most effective means of addressing the increasing statistics of dog-bites.

The first official breed to be banned was the German Shepherd, in 1929 by the Australian government. However, they found it unhelpful, and lifted the ban in 1974.[85] Moreover, studies were specifically conducted in Spain and England, determining

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[81] *Id*. at 148.
[82] *Id*. at 117 (citing "*Alderman Wants to Ban City's Pit Bulls*," CHI. SUN-TIMES, Dec. 1, 2005).
[83] *Id*. at 120.
[84] *Id*. at 120.
[85] *Id*. at 75.

that BSLs were fairly ineffective in addressing an increase in dog-bite statistics.

When politicians pass legislation for the good of the people, this may be viewed as a positive. When they utter claims that dogs are holding, shaking, and tearing their victims, and this is a characteristic exclusive to the Pit bull, as Denver has tried to proclaim, then such comments can potentially "wind up in 'official' court records," further legitimizing false statements, and adding to society's fear of these dogs.[86] In fact, the media has been using the words "holding," "shaking," and "tearing" since approximately 1875, when describing various breeds of dogs during dog attacks. And this then reinforces public officials to do something, not always for the best reasons.

Also pernicious is that this does not only do harm to the breeds, but sometimes this need of politicians to solve problems that win them future voting blocs harms the rights of humans. Such as has been the case in some instances of people with disabilities.

The regulatory update of 2010 to Titles II and III of the Americans with Disabilities Act of 1990, as amended, provides in its Preamble that any breed of dog may be trained to work and to have a partnership with a person with a disability. The regulatory update specifically references the Pit Bull. The training, not the breed, is key. Yet counties, such as Prince George's County, Maryland, have local laws, grounded in fear rather than data, prohibiting citizens from having a particular breed of dog; interfering with their human and animal relationship. As with one case brought by the Maryland Animal Law Center, this has possibly impacted the rights of service animal handlers.

Rather, more efficient methods have been enacted, and seem to be doing well, that do not involve singling out and punishing breeds of dogs. So what is required is this; a new generation of public officials who base decisions on data and logic, not hype.

V. EXPERTS

There have been a variety of experts weighing in on whether BSLs are effective, as well as what is being said as to the rumored characteristics of Pit bulls. These opinions vary

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[86] *Id*. at 122.

depending on who you ask, because different experts will have experienced different scenarios. For instance, many police officers will be inclined to state that Pit bulls are more often than not aggressive and vicious, because when they observe Pit bulls, it's the bad subset of Pit Bulls who have had to deal with the bad owners which is the reason why the police officers encountered them to begin with. Alternatively, many veterinarians would react differently because they recognize canine behavior, and acknowledge that dogs in general will lash out when they are scared or hurt, and contrary to statements made by people of authority, basic anatomical knowledge would dictate that Pit bulls have nerve endings like any other living, breathing animal, therefore they do feel pain. Ultimately, the majority of experts seem to agree that not only are BSLs ineffective, but the statistics and characteristics of Pit bulls being mentioned in the media, and regurgitated by politicians, are typically wrong.

The Center for Disease Control (CDC) report *Dog Bite-Related Fatalities From 1979-1988*, released in September 1989, did nothing to help the Pit bulls, as these statistics were most likely used by the media or politicians, and unfortunately the "numbers were derived largely from newspaper stories and from the media's identification of dogs involved in attacks" which as previously mentioned, was wrong a significant number of times.[87] The American Veterinary Medical Association (AVMA) convened a Task Force on Canine Aggression and Human-Canine Interactions in 2001, to "address the continuing dog bite problem and to assist in avoiding 'ineffective responses' following a severe dog attack in a community"[88] Their study found that the dog bite statistics being used were an inaccurate depiction of the dogs actually biting, and "[u]unfortunately the findings and information presented by these learned experts has been largely ignored by many communities when addressing dangerous dogs."[89]

The American Society for the Prevention of Cruelty to Animals (ASPCA) stated that "behavior develops through a

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[87] *Id*. at 99 (citing Sacks Jeffrey J., Sattin Richard W., Bono Sandra E., "*Dog Bite-Related Fatalities From 1979 through 1988*," 262 JAMA 1989).
[88] *Id*. at 100 (citing "AVMA Task Force on Canine Aggression and Human-Canine Interactions, *A community approach to dog bite prevention*," 218 JAVMA 2001).
[89] *Id*.

complex interaction between environment and genetics . . . [m]any diverse and sometimes subtle factors influence the development of behavior, including, . . . early nutrition, stress levels experienced by the mother during pregnancy, and even temperature in the womb. And when it comes to influencing the behavior of an individual dog, factors such as housing conditions and the history of social interactions play pivotal roles in behavioral development."[90] Laws banning the Pit bull or any other breeds, therefore, are not the best way to enhance public safety if that is truly the aim.[91]

Dog Fancy's editors contend that the Endangered Breed Association, American Dog Owners Association, American Veterinary Medical Association, American Kennel Club and various breed clubs all have taken the same positions against discriminating on the basis of breed. They contend that many "other, non-restricted breeds are also responsible for serious attacks in which officers and media often misidentify dogs as belonging to restricted breeds."[92] The National Animal Control Association (NACA) does not support "discriminatory measures that target Pit bulls or any other breeds. NACA's policy states that [d]angerous and/or vicious animals should be labeled as such because of their actions or behavior and not because of their breed."[93] Additionally, NACA stated that police officers and media tend to misidentify the breeds involved in dog attacks roughly 87.5% of the time.[94]

Best Friends Animal Society also concluded, based on a study put together for them by economist John Dunham on May 13, 2009, that the study "estimated that there were 72,114,000 dogs in the United States, with an estimated 5,010, 934 Pit bull-type dogs. The model was based on data provided by the federal government, national dog-bite victim groups, national media reports, animal activist groups, court transcripts, animal welfare

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[90] ASPCA Policy and Position Statements, Position Statement on Pit bulls, http://www.aspca.org/about-us/aspca-policy-and-position-statements/position-statement-pit-bulls (last visited Apr. 27, 2016).
[91] *Id*.
[92] American Pit Bull Terrier Smart Dog Owner's Guide 12-13 (DOG FANCY eds., 2009).
[93] Ledy Vankavage, Katie Barnett, and Lauren A. Gallagher, The Fiscal Impact of Breed Discriminatory Laws at the Dawn of Doggy DNA, Pub. Law. 2010, at 8.
[94] *Id*.

publications and canine registries."[95] Therefore, it was found that it would generally cost "approximately $459,138,163 to "enforce annually . . . economic impact of BSL in Chicago is estimated to be $3,950,530 annually."[96] This study further shows that studies from Spain and the United Kingdom indicate, based on dog bite data and breed discriminatory provisions enacted, that "breed-specific provisions failed to reduce dog bites."[97]

In 2006, the National Canine Research Council found that approximately 97 percent of the time, dog attacks typically involve unsterilized dogs. Illinois reacted by "enact[ing] a statute that prevents convicted felons from owning unsterilized dogs or dogs that have been deemed 'vicious' by a court because of temperament."[98] Additionally, "St. Paul pet owners cited more than once for abusing or neglecting an animal can't legally own another pet under the ordinance. Dog bites are down in St. Paul. Similarly, Tacoma, Washington, created an ordinance regulating 'problem pet owners.'"[99] As of 2010, many BSLs are being repealed.[100]

Experts find that the increase in dog bites was more of a "result of the acquisition of guard dogs by inexperienced owners, the indiscriminate breeding of dogs and the inability of owners to properly care for or control their dogs."[101] Moreover, when asked to comment about the dog attacks occurring in 1960s and 1970s, experts responded "almost unanimously [and] agreed the problem rests with owners failing to control their dogs, children attempting to interact with dogs unfamiliar to them, and the use and procurement of large dogs for guard/attack dog functions."[102] It was also pointed out that no one suggested the "eradication of the German Shepherd (or any other breed) as a solution to the dog bite epidemic" during the 1970s.[103]

People should not have to be concerned for their safety every time they leave their house out of fear of running into a Pit bull or other perceived dangerous dog, but neither should breeds

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Delise, *supra* note 2, at 91.
[102] *Id.* at 141.
[103] *Id.* at 91.

be demonized for no good reason, and experts tend to agree that BSLs do not work, if the goal is to decrease the number of dog bites.

Once again, Pit Bulls are "a descendant of the original English bull-baiting dog - a dog that was bred to bite and hold bulls, bears and other large animals around the face and head. When baiting large animals was outlawed in the 1800s, people turned instead to fighting their dogs against each other. These larger, slower bull-baiting dogs were crossed with smaller, quicker terriers to produce more agile and athletic dog for fighting other dogs."[104] This in no way is to be construed as Pit Bulls being supernatural, unpredictable, having a lock jaw, feeling no pain, or having supercanine jaw strength that rivals a crocodile.

Contrary to what some have said, and what media tends to present to society, "the pit bull can be stoic in terms of enduring pain."[105] It is not that they don't feel pain.

Another misconception comes in the form of what society has been allowed to believe as Pit bulls having a locking jaw, so strong that you need a crow bar to open their jaws. "Dr. Howard Evans (Professor Emeritus, College of Veterinary Medicine at Cornell University, Ithaca New York and author of the world's definitive work on canine anatomy . . , in conjunction with Dr. Sandy deLahunta, one of the foremost dog neurologists in the country, along with Dr. Katherine Houpt, a leading dog behaviorist wrote the following statement about the 'locking jaw' in Pit bulls: 'We all agree that the power of the bite is proportional to the size of the jaws and the jaw muscles. There is no anatomical structure that could be a locking mechanism in any dog.'"[106] Additionally, Dr. I. Lehr Brisbin of the University of Georgia, conducting research on the functional morphology of the jaws of various dog breeds, notes . . . "'there were no mechanical or morphological differences between the jaws of American Pit Bull Terriers and those of any of the other comparable breeds of dogs which we studied. In addition . . . [they] did not have any

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[104] ASPCA, *supra* note 91 (last visited Apr. 27, 2016).
[105] American Pit Bull Terrier Smart Dog Owner's Guide 6 (DOG FANCY eds., 2009).
[106] Delise, *supra* note 2, at 109.

unique mechanism that would allow these dogs to lock their jaws.'"[107]

Alongside this locking jaw myth is the fact that there is a "disturbing number of newspaper reporters, attorneys, politicians, physicians, and testosterone-driven websites discussing Pit bulls . . . [having] biting power in terms of psi," that's been claimed to be around 1200 psi.[108] Of course none of these individuals could point to a decent source, but "[e]xtensive research on the subject of Pit bull biting force reveals only one medical journal reference on the psi of Pit bulls. The information (or rather misinformation) is startling and unsettling in that it is printed in a scientific journal without supporting data."[109] Dr. Brady Barr of National Geographic, conducted a study on animal bites. It was found that "[d]omestic dogs averaged at about 320 pounds of pressure."[110] An interesting case occurred in 2003, when a man came into a hospital with bite wounds, claiming it was the work of a pit bull. Based on the appearance of the wound the doctor refused to believe it, and soon after police found his 400-pound pet Bengal-Siberian tiger.[111] This was just one doctor, however, who had enough common sense to not allow someone to convince him that a Pit Bull was superhuman and must have been the animal to bite the man. However, there are those who would have believed him, because this pseudoscience sounds very legitimate.

There are many who believe Pit bulls attack without being provoked, but the only reason they say that is because they do not understand canine behavior. Dogs do not communicate as humans do, and just because humans choose not to read the signs as many before them actually did, does not mean the signs or reasons for the aggression are not there. The United Kennel Club (UKC) noted "that the characteristics of the American Pit bull terrier make them excellent family companions and observes that they 'have always been noted for their love of children.'"[112] If anything, its "off-duty quietness and trustworthy stability . . . [make the Pit bull] a foremost all-purpose dog.'"[113]

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[107] *Id*. at 109-110.
[108] *Id*. at 111.
[109] *Id*.
[110] *Id*. at 112.
[111] *Id*. at 112-113.
[112] Ledy Vankavage et al., *supra* note 94, at 8.
[113] *Id*.

Experts warn bad research may find its way into official court records. It's a major problem when "misinformation or unsubstantiated claims about Pit bull anatomy and abilities published in medical journals" ends up being entered into official court documents as evidence that the Pit bull poses a unique danger to society.[114]

VI. THE COURT'S ROLE

The courts attempt an unbiased approach in dealing with Pit bulls. Their legitimacy, as stated in the Federalist Papers, flows from the pen. Yet, in revealing the veil; the courts are comprised of fallible humans. They are influenced by three important factors: the politicians, society, and experts.

A. Politicians

When the politicians pass legislation, the courts are obliged to follow the enacted laws. It is not the job of the courts to determine whether bad law was passed, only that it should be applied in the cases that end up in front of them. This is why it is so concerning when politicians make unsubstantiated and incorrect comments, that ultimately condemn a breed, while apparently legitimizing the fear society perceives towards the Pit bull.

In the words of the great Chief Justice John Marshall, it is emphatically the role of the courts to say what the law is. But that is based ab initio from the hand of a politician.

As *Burnett ex rel. Burnett v. Clarke* showed, a safety rule was included in the defendant's policy in this case, and the court merely looked at the fact that the defendant included the exclusion of Pit bulls, which the court here, noted that such a "rule *presumes* that Pit bulls are vicious. Why else ban them?"[115]

As case law develops, later cases are given the opportunity to cite to the past – stare decisis. The trend continues of using faulty statistics and language to characterize Pit bulls, and this establishes precedent. This refers to *Weigel v. Maryland*, in citing *Tracey v. Solesky* April 26, 2012, Court of Appeals of

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[114] Delise, *supra* note 2, at 111.

[115] Burnett ex rel. Burnett v. Clarke, No. [309373] 2013 WL 1010062, at *8 (Mich. Ct. App. Mar. 14, 2013).

Maryland Decision, as an example of so-called bad facts making for bad law.[116] The court in *Weigel v. Maryland* looked to the *Tracey v. Solesky* decision, where it determined "Pit bulls' 'aggressive and vicious nature' and capability to inflict serious and sometimes fatal injuries . . . [where it had] relied upon . . . *Matthews v. Amberwood Associates Ltd Partnership, Inc.*; a 2000 report on dog attacks in the Journal of the American Veterinary Medical Association; a 2011 article in the Annals of Surgery; *Mortality and Morbidity* weekly reports by the Centers for Disease Control and caselaw from other jurisdictions."[117] Despite this finding, a strongly worded dissent by Judge Greene was also included, stating that "Tracey's new rule was 'grounded ultimately upon perceptions of a majority of this Court about a *particular breed,* rather than upon adjudicated facts" of the case.[118]

In *Toledo v. Tellings* (2007), Ohio enacted legislation, for the purposes of "protecting citizens from the dangers associated with pit bulls." [119] This case was about challenging the constitutionality of these types of legislations, the problem is, the courts are looking at this, and stating Ohio has a "legimate interest in protecting citizens" which is true enough, but then we get the added language, "the dangers associated with Pit bulls.[120]

States should enact legislation to protect their citizens, and perhaps have this power by way of their police powers. The question is for what reason or based on what data does this occur. With BSL, this has seemingly not occurred for data-driven reasons, but rather based on this cycle. When the courts follow suit, it adds a second layer of legitimacy to the misconceptions about Pit bulls, which further adds to the fear society already possesses. Now, not only are the media and politicians adding to society's fear, but the courts are as well.

Also found in *Toledo*, is an important concurrence in judgement. Judge O'Connor stated that she does not agree that legislation ought to "identif[y] Pit bulls as vicious animals per se . . . [that] dangerous animal behavior is the function of inherently dangerous dog owners, not inherently dangerous dogs . . .

[116] Weigel v. Maryland, 950 F.Supp.2d 811, 820 (2013).
[117] *Id*. at 821-822.
[118] *Id*. at 822.
[119] Toledo v. Tellings, 114 Ohio St.3d 278, 278 (2007).
[120] *Id*.

[Additionally], [t]he statistics offered at trial in this case may support a correlation between Pit bulls and the frequency and severity of injuries they cause to people in urban settings, but they do not establish the conclusion that pit bulls must necessarily pose a danger."[121] - Earlier this year, the Superior Court of Pennsylvania, in Franciscus v. Sevdik, "note[d] that Pennsylvania law does not recognize a presumption that Pit bulls as a breed are dangerous or have dangerous propensities . . . [their] statute punishes dogs and owners only when a dog exhibits dangerous behavior."[122]

Other courts, however, approach this in a different manner. In *Giaculli v. Bright*, the City of North Miami's ordinance stated that "pit bulls have a greater propensity to bite humans than all other breeds, that they are extremely aggressive towards other animals and have a natural tendency to refuse to terminate an attack once it has begun."[123] This court merely quoted and added to the enacted ordinance.

B. Society

What society perceives, plays a role in influencing the language of the courts, and how they might think society would react to these cases. In a 2006 case, *Ward v. Hartley*, you can see courts using such language that would make you think of a locked jaw. In a dog bite case, they describe the dog attack, where the "dog's jaws were still clamped onto his foot."[124] In *Giaculli v. Bright*, the District Court of Appeals in Florida noted in their opinion that "[p]it bulls as a breed are known to be extremely aggressive and have been bred as attack animals."[125] Ohio court systems believe that owning a Pit bull is considered prima facie evidence that a person owns a vicious dog.[126] In the unpublished case, of *Ortiz v. Johnson*, the Court of Appeals of New Mexico stated in a landlord tenant dispute, that they "'do not intend to condemn the . . . breed as a whole' and recognizing that 'there are

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[121] *Id*. at 285.
[122] Franciscus v. Sevdik, A.3d, 4 (2016 PA Super 52).
[123] Giaculli v. Bright, 584 So.2d 187, 189 (1991).
[124] Ward v. Hartley, 168 Md.App 209, 213 (2006).
[125] *Supra* note 124 at 189.
[126] State v. Anderson, 57 Ohio St. 3d. 168 (1991).

good Pit bulls and bad Pit bulls.'"[127] The Supreme Court of Appeals of West Virginia, in *State v. Blatt*, determined that the "circuit court's decision ordering Tinkerbell [the pit bull] be destroyed relied on a presumption that Pit bull dog breeds are inherently vicious. Because extensive debate exists over whether scientific evidence and social concerns justify breed-specific presumptions, we conclude that courts may not, upon judicial notice, rely solely upon a breed-specific presumption" in determining whether a dog is dangerous enough to be destroyed.[128] It was also pointed out that an Alabama Court in 1994 refused to extend the "presumption that a specific breed is 'dangerous,'" where the court "refused to take judicial notice that the German Shepherd Dog breed [was] inherently dangerous."[129] *State v. Blatt* also took notice that in New York, the court "conclud[ed] that the court below had erred by taking judicial notice of 'the vicious nature of Pit bulls," in *Rivers v. New York City Hous. Auth.*[130]

Alternatively, the courts should be careful about not helping to continue the self perpetuating machine of unfounded fear amongst society, by making commentary that these dogs are obviously dangerous, and then not back these statements up with any meaningful data. In *State v. Blatt*, the court cited *Matthews v. Amberwood Associates Ltd Partnership, Inc*, stating that "with regard to pit bulls, 'the extreme dangerousness of this breed, as it has evolved today, is well recognized."[131] *State v. Blatt* looks to *Garcia v. Village of Tijeras*, where the court in that case stated Pit Bulls "have exceptionally strong bites, possibly twice the strength of bites of other dogs."[132] This is the concern some experts had, where faulty data gets included into court decisions, and cited over and over again.

Some courts are attempting a reasonable dog standard, based on what types of behaviors they think society would perceive as vicious. In an unreported case, *Burnett ex res. Burnett v. Clarke*, a police officer reported a dog exhibiting vicious

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[127] Ortiz v. Johnson, No. [31,645, 31,709] 2013 WL 6145908 (N.M. Ct. App. Oct. 30, 2013).
[128] State v. Blatt, 235 W.Va. 489, 491 (2015).
[129] *Id*. at 499 (citing Lundy v. California Realty, 170 Cal.App.ed 813 (1985).
[130] *Id*. at 501.
[131] *Id*. at 499.
[132] *Id*. at 511.

behavior for growling and barking. The Court of Appeals of Michigan, however, decided that in "determining whether a dog exhibits vicious behavior . . . noted that 'the mere fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way is common canine behavior." [133] However, Michigan still included the statement "[w]hile it may be true that pit bulls are inherently dangerous creatures."[134]

C. Experts

Experts tend to hold great influence in how cases are ruled upon. In the *Toledo* concurrence, Judge O'Connor noted that "experts in the canine field who rate the temperament of different breeds of dogs conclude that pit bulls have a better temperament than many other common breeds of dogs used as pets, including the miniature poodle and Shih-Tzu."[135]

When there's a lack of expert testimony, and what appears to be a lack of evidence, courts have typically rejected the presumption that Pit bulls are inherently vicious. In *Carter v. Metro North Associates* the court noted, "[s]cientific evidence more definitive than articles discussing the dogs' breeding history is necessary before it is established the pit bulls, merely by virtue of their genetic inheritance, are inherently vicious." [136] In *McDonald v. Burgess*, we have a supposed dog attack, despite the victim stating "the dog did not bite him[137], involving two German Shepherd dogs, where the plaintiffs "filed an affidavit from an officer of the Prince George's County police department with long time experience in the 'K9 Corps' that this 'breed of dog can and often does behave in a very vicious manner"[138] The testimony of a police officer can be quite damning, and what needs to be considered with regard to police officer testimony and what they claim to construe as aggressive dogs, is just that. These police officers are running into the worst of the breeds, because they were bred and trained to be extra aggressive and vicious. Their testimony is influential due to their experience, but sometimes it

[133] *Supra* note 116 at *2.
[134] *Id*. at *5.
[135] *Supra* note 120 at 285.
[136] Richard E. Schimel, Tracey v. Solesky: The Court of Appeals of Maryland Mounts the Pit-Bully Pulpit, 46 -APR Md. B.J. 58, 60 (2013).
[137] McDonald v. Burgess, 254 Md. 452, 455 (1969).
[138] *Id*. at 458.

can be unfoundedly projected onto the rest of a breed. In this case the court was not swayed by this testimony, and the Court of Appeals of Maryland agreed with the trial court in that it "[did] not accept the theory that because a German [S]heperd dog 'can and often does behave in a very vicious manner' an owner of a particular German Shepherd dog knows or should know that his dog possesses these tendencies."[139] Other courts have allowed police to come into court, however, and provide testimony that "[b]ased on [their] experience of doing a lot of search warrants over the years being on the drug team, Pit bulls are very aggressive . . . Pit bulls, on a scale of one to ten are a ten for aggressiveness, and yes, there's no doubt in [their] mind if [they] had gone into that house if that dog had gotten loose it would have come after somebody, if not [them]."[140]

Some courts have been swayed by what some of the experts have mentioned, and despite being an unreported case regarding animal torture, the Illinois court in *People v. Peterson* acknowledged evidence that suggested the reason why the Pit bulls here were aggressive, was because of the deplorable environment which they were living in. They were starving to death, among other concerns, and one of the dogs was noted to have become extremely aggressive, particularly that this aggressive streak developed over the period of months in which they weren't being treated well.[141] In *Knapton ex rel. E.K. v. Monk*, the Supreme Court of Montana determined that they "[could not] conclude that [the] record demonstrate[d] that purebred pit bulls are inherently vicious."[142]

Courts are allowing canine DNA admissibility into evidence. "The Mars Wisdom Panel Professional™ DNA test has already been used as evidence in some municipal court breed identifications." [143] Moreover, in 2009, "an officer visually identified the dog Lucey as a 'Pit bull' in Salina, Kansas, which has BSL . . . [but] DNA testing revealed that Lucey was 25 percent Burmese mountain dog, 12.5 percent Staffordshire bull terrier,

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[139] *Id*. at 460.
[140] *Supra* note 116 at *7.
[141] People v. Peterson, Not Reported in N.E.3d (2016).
[142] Knapton ex rel. E.K. v. Monk, 379 Mont. 1, 9 (2015)
[143] Ledy Vankavage et al., *supra* note 94, at 8.

12.5 percent bull terrier, 12 percent boxer and 12.5 percent unknown."[144] In this case, the charges were dropped.

VIII. CONCLUSION

This article means not to be a soap box wherein one preaches. Rather, this cautions against what appears to be a perpetual scenario. It is only a matter of time before another breed gets spotlighted for the next witch hunt, and the most damaging consequences to these scenarios is that bad science and bad opinions are permeating our courts, and undermining the very foundation of our justice system. It is this unfortunate chain of events that we must stop; providing a voice for a breed that cannot defend itself is just an added benefit.

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[144] *Id.*

EDITORIALS

PETS IMPROVE HEALTH AND WELL-BEING OF THE ENDERLY

By: Carol Sorgen

Linda Schoene's beloved dog, Prince, died recently at the age of 14, and the 73-year-old resident of Weinberg House in Baltimore, MD, misses him every day.

"He was loving, giving and forgiving," said Schoene. Prince not only gave Schoene "unconditional love," but helped her socialize more with the other residents and become more active as she walked him three to four times a day.

Now that Prince is gone, Schoene still gets to enjoy her love of dogs through the Pets on Wheels program that her senior apartment residence holds. "My stress and anxiety just disappear when I'm playing with one of the dogs," she said. "People tell me my eyes brighten and I smile more when I'm with the dogs. I can't explain how much they do for me."

The beneficial relationship between older adults and animals is so well known that more and more senior residences--from independent apartments to continuing care retirement communities (CCRCs) to nursing homes--have some kind of pet program in place.

Every Sunrise Senior Living community nationwide, for example, has a resident cat and dog. At Sunrise of Pikesville, Maryland, Activities and Volunteer Coordinator Kate Skelton says that Janie, the residential pooch, lives in the assisted living neighborhood, while kitty Max lives in the memory care neighborhood. "Both are wonderful companions and bring smiles to all the residents' faces," said Skelton.

The community also has a pet therapy program come to the community twice a month. "I eagerly await his [the dog] monthly arrival and it helps brighten my day," said one of the residents. "I always have treats in my pocket waiting for him."

According to the American Animal Hospital Association, meeting, walking, playing and cleaning up after a pet gives us a sense of purpose and keeps us active. Talking to or cuddling a pet has also been shown to ease chronic pain from arthritis and migraines, as well as increase brain activity, which helps prevent or ease the effects of depression. The Centers for Disease Control and Prevention report that pet companionship can also help lower cholesterol and triglyceride levels and encourage healthier

heart rates. Pets also protect against isolation and provide older adults with more opportunities for socialization.

Further, in a 12-month study conducted by Northwestern Memorial Hospital in Chicago and Hill's Pet Nutrition, both people and their pets were found to be more successful at following a weight loss program when they exercised together. The Pet Study consisted of three groups: dog only, people only, and dog/owner. The dog/owner group lost significantly more weight and stayed on their diet and exercise program longer than either the dog-only or people-only groups.

In a report produced by the National Park Service, "The Health Benefits of Companion Animals" (nps.gov/goga/learn/management/upload/Comment-4704-attachment_.pdf; citations 46, 47, 49), more than 53 works were cited attesting to the health benefits of animals on their human friends in general, and the elderly specifically. Patients with Alzheimer's Disease, for example, showed less agitation and improved social interactions when they were visited by Golden Retrievers who came to their residential facility. Nutritional intake and weight of the residents increased when fish aquariums were placed in their dining areas and just one brief session of animal-assisted therapy dramatically reduced patients' fear before receiving serious medical treatment.

Pets are valuable allies in promoting good health not only at home but in the healthcare setting at well. At Sinai Hospital, physical therapists use dogs as part of their physical rehabilitation programs, while at Levindale's Eden Alternative, residents take care of the live-in dogs, cats, and birds, gaining not only companionship, but a sense of purpose as well.

Further research supports Lifebridge's pet-friendly approach. At the Research Center for Human-Animal Interaction (ReCHAI), a collaboration between the University of Missouri-Columbia Sinclair School of Nursing and College of Veterinary Medicine, researchers are exploring how the human-animal bond positively affects the health of both people and animals. Among its research projects, the Center is documenting evidence that animal-assisted activity is a beneficial form of complementary therapy in healthcare institutions.

At pet-friendly Oak Crest Continuing Care Retirement Community, dogs of any size are permitted, as long as common sense rules of ownership are followed: i.e., cleaning up after them, not walking them through the clubhouse areas, etc. The

retirement community provides ample space for residents to walk their dogs along the community's loop road and nature trail.

Oak Crest also celebrates its pets. Pastoral Ministries hosts a blessing of the pets each October and later this year the community will have its 5th Canine Cup, with categories such as Best in Show, Best Costume and Best Trick, with prizes and celebrity judges.

"Pets provide unconditional love and affection which can help ease the losses the senior is going through, whether it is loss of a loved one, loss of functioning or loss of roles," said Oak Crest's Director of Resident Life, Catherine Cohen. "Even visiting pets can have added benefits to those who live here – it is not just those who own pets who have the added benefits."

At Levindale Hebrew Geriatric Center and Hospital, pets are all about "motivation, companionship, and compassion," said John Ottena, Manager of Therapeutic Recreation. At the moment, there are no resident live-in dogs, though visitors are encouraged to bring their own dogs to visit as long as the animal has a form signed by a veterinarian and has passed a temperament test. There are resident cats, birds, and fish.

The animals are part of the "Eden Alternative" philosophy of a growing number of senior residences and long-term care facilities. The Eden Alternative (edenalt.org) is designed to fight some of the consequences of getting older such as loneliness, helplessness, and boredom. The animals brighten the residents' days because many people have grown up with animals and miss them when they aren't around.

Pets occupy such a special place in the lives of older people that "no pets allowed" is rarely seen anymore. In a 1992 study of 2,300 older adults in Evanston, Illinois, that was reported in the *San Francisco Chronicle* ("Pets Determine Where Elderly Choose to Live"), 86 percent of those who were pet owners said that being allowed to have a pet was a decision in where they lived (nolo.com/legal-ecyclopedia/free-books/dog-book/chapter4-3.html).

That's true even for tenants in federally-assisted housing for the elderly or handicapped, who are legally allowed to have pets, thanks to the Housing and Urban-Rural Recovery Act of 1983, U.S.C. section 1701r-1. The residence doesn't have to be owned by the government, as long as a government agency subsidizes it. Individual states, such as California, Arizona, Connecticut, the District of Columbia, Massachusetts, Minnesota, and New Hampshire, have enacted similar legislation.

In residential communities such as Levindale, which is based on the Eden Alternative, residents, patients, and staff members on each hall decide which pet they would like to live with them. Together, the group considers factors such as who will feed, clean up after, and walk the animals.

"The residents just light up when they see the animals," said Ottena, observing that the animals are especially soothing to patients with dementia.

Ottena, who used to bring his own dog to work, enjoyed seeing how excited the residents were. It went both ways too. "He never wanted to be in my office," Ottena said. "He just wanted to go visit everyone...that might have had something to do with all the treats he got! All in all, it was a win-win for everyone."

REFLECTIONS ON THE 2016 MARYLAND 'DEATH WITH DIGNITY' INITIATIVE

By: Seth Morgan

I am in favor of the movement to pass a Death with Dignity Act in Maryland. I have testified three times to date in Annapolis, Maryland's Capitol, in support of such legislation and have sat through hours of testimony on both sides of the issue. I am also a person living with a disability.

The death with dignity movement is an emotionally packed issue for all involved and passions are very close to the surface for all who feel strongly enough to make the effort to testify. This is true of me as well, of course. And, as is to be expected, I find it easiest to find the flaws in the arguments of those opposed to the push for this legislation. So, my disclaimer is that I do have a strong personal bias in support of this passage of this law in Maryland.

I am also trained in the sciences and value the absolutes of the scientific method of objective analysis. Bring the facts to bear to the analysis of emotionally volatile issues and just maybe logic may temper some of the emotion. For many this is not effective as biases and beliefs are so central to their being. Religious tenets and teachings cannot, for the most part, be argued against. Faith is not a matter subject to proof or disproof. Faith trumps logic as logic depends on facts that are provable and faith, by its very nature, is an unassailable belief.

So, for those whose faith precludes acceptance of the concept of death with dignity on a religious, moral level, nothing I can write will make any difference to your position. Religion is the trump card that you can always play and logic becomes irrelevant. Truly, the statement, "Don't confuse me with facts, my mind is made up" applies in this scenario. But, for whoever is left after that, I will try to present the reasons why I supported and continue to support Maryland's failed Death with Dignity bill. In so doing I will analyze the statements and positions taken by opponents of the bill and explain why I disagree with their logic.

I think it best to start with the way supporters and opponents refer to the legislation. Supporters such as me refer to it as a 'death with dignity' initiative. Opponents call it 'assisted suicide.' The very terms used expose the biases on both sides of the debate. Of course, this is because of the emotional baggage associated with the term 'suicide.' The word itself evokes the

emotions and implied pejoratives that the mores of our Judeo-Christian tradition oppose and are integrally entwined with. There is a dirty, surreptitious quality to the term 'suicide' earned by years of societal and religious disapproval. It plays upon the belief that death is an enemy to be avoided at all costs.

The concept that there could be a fate worse than death is only a very recent proposition; it is an offshoot from medical advances that refuse to accept the 'failure' of death and not acknowledging the impact of a 'care at all costs' dogma. The term 'suicide' is too steeped in our historic biases to be discussed in a dispassionate objective manner. 'Death with dignity' is a term proposed to avoid the negative implications of 'suicide.' The different terms used crystalize the fundamental disagreement between proponents and opponents to the movement.

For all of the reasons just outlined, it is clear to see why the different terms are used. Proponents of the bill want to divorce themselves from the historic negatives of 'suicide' while opponents want those negative emotional implications to carry the day. Playing on emotions suffused the majority of the testimony given at the hearing in Annapolis. In fact, little of the time devoted to testimony from either side of this debate involved a discussion of the actual bill. Arguments often came down to emotional, personal appeals that often raised concerns that a cursory reading of the proposed legislation would have proven moot and already addressed by the bill.

With that preamble, the following are arguments against the Maryland Death with Dignity bill (as I recall them and in no particular order) along with my responses:

1) Compassion and Choices, the major group in favor of the bill, is actually an organization that used to be called 'The Hemlock Society' whose purpose was to help people commit suicide for whatever reason they chose. Isn't Compassion and Choices just continuing to advance the efforts initiated by the Hemlock Society?

This question is designed to invalidate the value of anything presented in favor of the bill. Putting aside that this has nothing to do with the merits of the proposed legislation, this simplistic statement fails to recognize that where a group begins does not always reflect their evolution. The reason the group is called 'Compassion and Choices' is precisely because the values of

the Hemlock Society are not espoused by the current organization.

A similar incorrect accusation could be leveled at one of the vocal opponents of the bill. The ARC testified against the bill. The ARC is an organization that has effectively advocated for people with cognitive disabilities for decades. It has been a valuable and pivotal group within the disability rights movement for decades. However, using our current attitudes to look at their history runs the risk of inaccurately labeling them as a paternalistic, insensitive organization.

The reason? ARC originally stood for 'Association for Retarded Children' before it was changed to 'Association for Retarded Citizens' and finally evolved into its current name which it is claimed doesn't stand for anything.

Compassion and Choices is a group that does not espouse the attitudes of the Hemlock Society just as the ARC does not espouse what modern society would consider the pejorative name from which it evolved.

2) What is the big deal? If I need to I can put the barrel of my gun in my mouth and end my life that way.

Unfortunately, a statement of this type was made by a legislator at two of the hearings I participated in. This is not 'Death with Dignity.' Such an ignorant opinion is wrong on so many levels. The concept of a death with dignity is to be able to be surrounded by loved ones in the place of your choosing and to die with the least amount of pain, not just to yourself but to those you leave behind. The horror and trauma to whoever found you after such a violent death is unspeakable. And, committing suicide in this fashion will cause harm to others, whether family or not.

3) Listing the cause of death for anyone ending his or her lives with prescribed medication as being on the basis of the underlying terminal condition for which they have received the medication is dishonest and should not be allowed.

The very premise of the death with dignity legislation is that it can only be an option in the very narrow context of a person who has an underlying condition that will probably result in death within a six month window of time, regardless of any

interventions. In this context, death is more likely than not from the underlying illness. To seek out a less painful, controlled death in the face of impending terminal disease provides a degree of control that some may desire. No one is forced to take this option against his or her will. For those willing to hope for a miracle or who do not accept that they have no hope of recovery, they can continue to opt for any medical approaches to care that they wish to accept.

But, given the best opinions of their medical team, they may choose to avoid the pain and/or futile hospitalization in favor of the personal control of their management and a death at home amongst the ones they love on their personal terms. These people do not want to die. They are dying from the underlying disease and the reason for opting for a controlled death with dignity is personal. It is the underlying terminal condition that is the cause of their dying as they otherwise would not take such an option nor even be eligible for such a program. Hence, this option is only possible if death from the disease is impending and rightfully should be the listed as the ultimate reason for their deaths.

Further, this would allow for life insurance to be paid, which the beneficiaries would be eligible for in six months or less anyway.

4) Physicians already assist those who are nearing death by maximizing pain and sedative medications that they know may cause a person to die.

The fact that this practice goes on is well recognized within the medical community. Generally, the decision to provide such 'help' is made by the medical caregivers either independently or in agreement with the patient's family. The person whose death is being considered is generally uninvolved in the decision. If death with dignity is in fact suicide then this mode of being 'helped out' is murder.

The argument that a person who might opt for a death with dignity could be subject to the undue influence of the people who might stand to gain financially from such a decision fails to acknowledge that a health care provider who depends not on the patient but only on a family member in deciding to allow a person to die from the medication provided is even more likely to be influenced by someone such as a family member who might gain from the death.

Also, when a death occurs as a result of the aggressive pain and sedation efforts provided by a physician, the official cause of death is never listed as a drug overdose as would be the honest assessment; the cause of death is given as being due to the underlying terminal illness. This is as it should be and as it should be in the setting of a death with dignity.

5) A Death with Dignity Law would allow for undue influence from family members who stand to gain from the death of the patient.

Please see my previous comment to item 4 above.

The proposed Death with Dignity Law requires that the person seeking to use this law must make multiple requests, both verbally and in writing, with multiple witnesses and a cooling off period between requests. The person making the request must be mentally clear and competent to understand the options available for ongoing medical care. Anyone who is mentally impaired for any reason (including because of sedative or other medication use or because of depression) is not eligible to use this law.

The law requires a private evaluation (no one else present other than the patient with their doctor) to allow the doctor to confirm that no coercion unduly influencing the request is present.

The medication used to cause death can only be self-administered so if a physical disability prevents this, the person is not eligible to use this option. Another person cannot administer the drug to the patient under any circumstances.

6) There has been a great deal of concern raised that this law might lead to a 'slippery slope' of the law being used to kill people with disabilities.

As previously noted, the request for medication to allow a person to control his or her own death can only be made by a mentally clear, competent and fully informed person. Having said that, historically there have been some laws used (and misused) to euthanize people with disabilities in the past. This proposed law makes it clear that its use to end the lives of the mentally disabled is prohibited.

However, regardless of the legal requirements outlined in laws, abuse does happen. The proposed Death with Dignity Law

makes it clear when and how this law can be used. The fact that there are those who break laws does not mean that a law should not be passed. Use of this law improperly is murder and, despite all the laws our society has made, some people, as we know, will commit murder. That is not a flaw of the legislation.

The concern that passage of this law will set us on a 'slippery slope' of unavoidable decline into abuse against those with disabilities is not reasonable. As conservative columnist for the Washington Post George F. Will put it in a recent editorial, "Life, however, is inevitably lived on multiple slippery slopes: Taxation could become confiscation, police could become instruments of oppression, public education could become indoctrination, etc. Everywhere and always, civilization depends on the drawing of intelligent distinctions."

7) We must protect people with disabilities from being abused by the misuse of this law.

As I have previously noted, this Death with Dignity Law could not be legally used for people with any kind of cognitive dysfunction. Thus, those with cognitive disabilities of any type would not be eligible to invoke it.

In fact, as a person who has a disability myself, I consider it a remnant of the bias against those with disabilities that some have tried to argue that no one who has a disability is capable of advocating for themselves. There are many people with disabilities who have disabilities that do not affect their cognition. An injured veteran who needs a limb prosthesis or a person who is blind or hearing impaired are just a few examples of persons with disabilities who may not have cognitive deficits. These persons with disabilities can and should speak for themselves in matters pertaining to their personal life decisions.

Just as with any other cross section of our society, people with disabilities that do not impair their cognitive faculties will have personal choices that they should be allowed to make.

8) Groups that represent people with disabilities have come out in opposition to the Death with Dignity Law.

This, again, is a bias that undermines people with disabilities who are not cognitively impaired.

One of the most vocal opponents to this legislation has been the ARC of Maryland. As previously noted, the ARC lobbies

for people who specifically have cognitive impairments and, thus, for a segment of people with disabilities that would not be able to take advantage of this legislation in the first place. Frankly, they should not even be involved in this discussion at all as their efforts are aimed at protecting a group of individuals for whom the Death with Dignity Act would not apply.

When a group such as the ARC takes a position on legislation of this type, the position is not that of the disabled people they represent but rather the position of the Board of Directors few of whom are themselves disabled.

It is clear that at least some who raised objections to the death with dignity legislation did so on personal religious grounds but did not admit as much in their Annapolis testimony. Invoking their professional credentials, they side-stepped the fact that they were testifying primarily because of their religious beliefs.

NOTES

BREED-SPECIFIC LEGISLATION: THE PITFALLS OF PIT BULL PROHIBITIONS

By: Grant M. Barnhard

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INTRODUCTION

Seeking the unconditional love that a dog provides, Desiree Arnold—along with her husband and young son—brought Coco home to serve as their family pet. Coco was an affectionate puppy that grew up to be a gentle and beloved member of the family. Unfortunately for the Arnolds, the city they called home had previously enacted legislation banning all dogs whose physical characteristics resemble Pit bulls—a characterization that fit Coco. Although the ban had previously been under-enforced, things quickly changed for the Arnolds in 2003 when Animal Control officers seized Coco as part of a systematic collection of dogs deemed illegal based on physical appearance.[1]

In order to release her dog from Animal Control, Mrs. Arnold completed and signed multiple forms on which she had to admit that her dog was a prohibited animal and waive her right to a hearing under the Pit bull ordinance, admit that her dog was a Pit bull and agree to keep the dog outside of the city limits, and have a third-party sign a notarized statement pledging to take possession of the dog and remove it from the city.[2]

Desperate to save Coco's life, the Arnolds sent her to live with a friend outside the city.[3] Coco remained there until the Arnolds became concerned about the quality of care Coco was receiving.[4] The Arnolds searched tirelessly for another suitable home for Coco but had no success. They even made the life-changing decision to uproot their family and move.[5] For three months, the Arnolds tried to sell their house in the city, to no avail.[6] With nowhere to turn, they brought Coco back into their home.[7] After a neighbor alerted Animal Control, officers removed Coco from the Arnolds' backyard and brought her to a shelter

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[1] First Amended Complaint at 12, Arnold v. City of Denver, 2008 WL 7181778 (D. Colo. Oct. 27, 2008) (No. 1:08-cv-01342-REB).
[2] *Id.* at 6–7, 12–13.
[3] *Id.* at 13.
[4] *Id.*
[5] BEYOND THE MYTH: A FILM ABOUT PIT BULLS AND BREED DISCRIMINATION (Cover Y'all Productions 2010).
[6] *Id.*
[7] First Amended Complaint, *supra* note 1, at 13.

where she would be put down.[8] Animal Control personnel informed Mrs. Arnold that her dog would be killed on the morning of June 26 2008, only 3 days after Coco was seized.[9]

On June 25, Mrs. Arnold requested an administrative hearing to contest that Coco was prohibited under the ordinance.[10] Animal Control informed her that she had waived her right to a hearing when Coco was initially seized in 2003.[11] It wasn't until the Arnolds hired an attorney who initiated a lawsuit seeking a temporary restraining order and requesting a delay of Coco's killing that they were provided a hearing.[12] Later that day, Mrs. Arnold spoke with Doug Kelley, director of the city's division of Animal Control, who told her that Coco was not on the list of dogs to be put down on June 26.[13] On the morning of June 26, the court denied Mrs. Arnold's request for a temporary restraining order, but the defendants agreed to provide an administrative hearing to Mrs. Arnold and to keep Coco alive until completion of the hearing.[14] At the hearing, Animal Control officers agreed that Coco displayed only 11 of 25 physical characteristics that would subject her to the ban; still, they deemed Coco a Pit bull.[15] On August 5, a hearing officer upheld the city's subjective determination that Coco was banned under the ordinance.[16]

Mrs. Arnold, through her attorney, made one final attempt to save her dog by requesting placement of Coco at a rescue facility or other suitable location.[17] Animal Control denied the request without explanation.[18] Despite Coco's sweet temperament, position as a valued family member, and history of good behavior, Coco would be killed. On August 6 2008, an Animal Control officer leashed Coco and walked her to the euthanasia room where she was put down.[19] Volunteers at the Animal Control kennel were heartbroken over Coco's death,

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 14.
[12] *Id.* at 10.
[13] First Amended Complaint, *supra* note 1, at 14.
[14] *Id.*
[15] *Id.* at 14–15.
[16] *Id.* at 15.
[17] *Id.*
[18] *Id.*
[19] First Amended Complaint, *supra* note 1, at 15.

describing the dog they affectionately nicknamed "Coco-licious" as a kind and friendly dog.[20] In fact, two volunteers, who referred to themselves as Coco's "Aunt Steph and Uncle Jonathan," refused to be at the shelter that day to take part in Coco's killing.[21] The Arnolds retrieved Coco's body from Animal Control in a black garbage bag.[22]

Unfortunately, Coco's story is not unique. Thousands of dogs are confiscated and killed every year based on their breed or appearance. While Coco's story took place in Denver, Colorado, municipalities across the country have adopted various forms of breed-specific legislation ("BSL")—laws that restrict or ban ownership of certain dogs based on breed, most commonly Pit bulls.[23]

While BSL has been criticized for some time without much substantive change, those criticisms are getting louder and the movement away from BSL is gaining momentum. For the first time, breed-specific regulations are being repealed or rejected at a higher rate than are being enacted.[24] This Comment studies the reasons behind the transition, explores BSL's initial rise in popularity, and highlights the policy arguments that opponents of BSL are using to persuade states and cities to abandon breed-specific regulations. This Comment suggests that, by continuing to highlight the truth about the ineffectiveness of BSL at the local level, we may eventually be able to put an end to these unfairly prejudicial regulations. Part I of this Comment sets out the relevant background: it begins by defining BSL[25] and providing a history of BSL in the United States, starting with the rise of BSL and continuing up to the modern trend towards more breed-neutral regulations.[26] Part I then examines the rapid rise and fall of BSL within Maryland through a case study of *Tracey v. Solesky*.[27] Part I concludes by addressing the media's role in

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[20] BEYOND THE MYTH, *supra* note 5.
[21] *Id.*
[22] *Id.*
[23] *See infra* Part I.
[24] *Breed-Specific Legislation on the Decline*, NAT'L CANINE RES. COUNCIL, http://www.nationalcanineresearchcouncil.com/sites/default/files/Breed-specific-legislation-is-on-the-decline-2016.pdf (last visited Oct. 26, 2016).
[25] *See infra* Part I.A.
[26] *See infra* Part I.B.
[27] *See infra* Part I.C.

making the Pit bull the primary target of BSL.[28] Part II examines the constitutional challenges to BSL and shows that, although it makes for ineffective policy, BSL often withstands judicial challenges due largely to the broad police powers granted to each state.[29] Part III explores the policy arguments against BSL that are gaining traction with state and local government and explains how these arguments can be used to correct the misconceptions that legislators typically rely upon when enacting BSL.[30] Part IV proposes solutions that can be implemented in lieu of BSL and suggests that breed-neutral regulations provide a more effective and efficient way to reduce dog-bite-related injuries.[31]

I. BREED-SPECIFIC LEGISLATION

According to recent estimates, there are approximately 70 million dogs kept as pets in the United States, with approximately 43 million homes owning at least one dog.[32] In Maryland, over 800,000 households own at least one dog,[33] with "Pit bulls" being the second most popular breed of dog registered in the state.[34] While the nationwide dog population increased only two percent between 1986 and 1996, the number of dog bites requiring medical attention rose thirty-seven percent. Every year an estimated 350,000 people seek emergency room care for injuries from dog bites.[35] The Centers for Disease Control and Prevention ("CDC") project that, each year, Americans have a one in fifty

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[28] *See infra* Part I.D.
[29] *See infra* Part II.
[30] *See infra* Part III.
[31] *See infra* Part IV.
[32] *2012 U.S. Pet Ownership & Demographics Sourcebook*, AM. VETERINARY MED. ASS'N, https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx (last visited Apr. 9, 2015).
[33] Errin Roby, Comment, *Tort Liability Unleashed:* Solesky v. Tracey *and Landlord Duty to Third Parties*, 43 U. BALT. L.F. 61, 61 (2012).
[34] *Fact Sheet: Prince George's County Breed Ban*, MD. DOG FED'N (2013), http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/pg_fact_sheet_cost.pdf (last visited Oct. 26, 2016).
[35] Safia Gray Hussain, Note, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 FORDHAM L. REV. 2847, 2849–50 (2010).

chance of being bitten by a dog.[36] Compared with other significant causes of injury reported by the U.S. Consumer Product Safety Commission, dog bites are now the second leading cause of emergency room visits in the United States behind only baseball and softball injuries.[37]

Dog-bite-related fatalities, on the other hand, continue to be extremely rare. There were approximately 27 occurrences per year between 1999 and 2006, or roughly 3 fatal bites per 10 million dogs per year.[38] Put another way, for every 11 million people living in the United States, only 1 dies each year as a result of a dog bite and only 1 in 91,558 deaths overall are attributable to dog bites.[39] To put that into perspective, each of the following are more likely to kill an American than dog bites: lightning, forklifts, cows, front porch steps, kitchen utensils, bathtubs, strollers, stoves, coffee table corners, Christmas trees, slippers or balloons.[40] Children under the age of ten are three times more likely to drown in a five-gallon bucket than be killed in a dog attack.[41] Yet, despite the relatively stable and infrequent number of dog-related fatalities,[42] sensationalized media coverage—coupled with impulsive lawmaking—has swayed the public to believe that a specific breed of dog, the Pit bull, should be restricted or banned.[43]

Section A of this Part defines breed-specific legislation and explores the various forms of breed-specific laws. Section B

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[36] *Id.* at 2849.

[37] *Id.* at 2850.

[38] Gary J. Patronek et al., *Use of a Number-Needed-to-Ban Calculation to Illustrate Limitations of Breed-Specific Legislation in Decreasing the Risk of Dog-Bite Related Injury*, 237 J. AM. VETERINARY MED. ASSOC. 788, 788 (2010).

[39] Janis Bradley, *Dog Bites: Problems and Solutions*, ANIMALS & SOC'Y INST., Revised 2014, at 3, http://www.nationalcanineresearchcouncil.com/sites/default/files/Dog-Bites-Problems-and-Solutions-2nd-Edition_0.pdf.

[40] *See id*; *see also* JANIS BRADLEY, DOGS BITE: BUT BALLOONS AND SLIPPERS ARE MORE DANGEROUS 11 (2005).

[41] Bradley, *supra* note 39, at 3.

[42] *Id.* at 7 (providing that on a scale of one to six—one being an injury from which the person recovers quickly with no impairment and six being an injury likely to be fatal—ninety-nine percent of dog bites treated in emergency rooms are level one).

[43] This situation has been referred to as "the dog-bite epidemic." *See* Hussain, *supra* note 35, at 2848.

examines the historical rise of BSL and recent trend away from BSL, both of which are highlighted in Section C by an in-depth analysis of the Maryland Court of Appeals ruling in *Tracey v. Solesky* and the subsequent legislative action. Finally, Section D identifies the media as a primary reason that the Pit bull is at the center of nearly all BSL.

A. What is Breed-Specific Legislation?

Breed-specific legislation consists of rules that categorize certain breeds of dogs as inherently dangerous and impose restrictions only on those breeds in an effort to reduce the incidences of human injuries from dog bites.[44] Mainly found at the local level, breed-specific ordinances generally restrict or ban ownership and possession of certain breeds and breed-mixes based on a subjective analysis of a dog's physical characteristics.[45] BSL does not base the determination of a dog's dangerous character on any prior conduct; rather, all dogs of a target breed are subject to regulation based solely on identification as members of that breed.[46]

BSL generally falls into two categories: breed-specific bans and breed-specific restrictions. Breed-specific bans make it illegal to own or possess dogs that are presumed or determined to be members of the target breed.[47] Breed-specific restrictions impose separate mandatory requirements such as spay-neuter, muzzling, special liability insurance, special licensing, confinement and breed-specific pet limits.[48] Proponents of these laws contend that BSL resolves a public safety concern by removing the root cause of the dog bite problem—aggressive dogs.[49] Over the years, many breeds, primarily larger ones, have

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[44] Shaw Smith Williams, *Attacking the Innocent: Why Breed Specific Legislation Cannot Achieve its Stated Goals*, (May 1, 2013), Law School Student Scholarship, Paper 327, http://erepository.law.shu.edu/student_scholarship/327.
[45] *Breed-Specific Legislation (BSL) FAQ*, NAT'L CANINE RES. COUNCIL, http://www.nationalcanineresearchcouncil.com/public-policy/breed-specific-legislation-faq (last visited Apr. 11, 2015).
[46] Hussain, *supra* note 35, at 2859.
[47] *Id.*
[48] *Id.*
[49] Anthony Abordo, *Breed-Specific Legislation: Barking Up the Wrong Tree*, 10 FRESH WRITING: U. NOTRE DAME WRITING PROGRAM 49, 49 (2010),

been branded with this scarlet "A" resulting in the breed either being restricted or banned outright. Historically, Rottweilers, German Shepherds, Chow Chows, Akitas, and Doberman pinschers have all been targeted; however, the primary focus of today's BSL is the "breed" known as the Pit bull.[50]

An initial problem with BSL targeting Pit bulls is that the term "Pit bull" does not actually describe one specific breed of dog. Commonly misunderstood, the term "pit bull" is a generic category encompassing the American Staffordshire terrier, Staffordshire bull terrier, and American pit bull terrier.[51] Neither the American Kennel Club ("AKC") nor the United Kennel Club ("UKC") recognizes a breed or group by the name "pit bull."[52] Even so, BSL typically treats all dogs that exhibit physical traits common to these several breeds as members of a single breed. Thus, similarly named dogs—such as the bull terrier or bullmastiff—may be incorrectly designated as Pit bulls, leaving the dogs and their owners to face the unfortunate consequences.[53]

B. A Brief History of Breed-Specific Legislation

The concept of BSL has been around for nearly 100 years. One of the first official breed bans occurred in 1929 when

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https://freshwriting.nd.edu/system/issues/pdfs/000/000/036/original/2010.pdf?1397672998.

[50] Linda S. Weiss, *Breed Specific Legislation in the United States*, MICH. ST. U. C. L. ANIMAL LEGAL & HIST. CTR. (2001), https://www.animallaw.info/article/breed-specific-legislation-united-states.

[51] *See* Kristen E. Swann, Note, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839, 840 (2010) (noting that within the subgroup of dogs commonly referred to as "pit bulls," the AKC registers the Staffordshire bull terrier and the American Staffordshire terrier, and the UKC registers the Staffordshire bull terrier and the American pit bull terrier).

[52] *See Dog Breeds*, AM. KENNEL CLUB, http://www.akc.org/dog-breeds/?letter=P (last visited Oct. 26, 2016); *Breed Standards*, UNITED KENNEL CLUB, http://www.ukcdogs.com/Web.nsf/WebPages/Registration/BreedStandards (last visited Oct. 26, 2016).

[53] *See* Swann, *supra* note 51, at 840.

Australia banned import of German Shepherds.[54] Since that time, over thirty-six breeds and countless mixed-breed dogs have been regulated based almost entirely on appearance.[55] Usually emotional and impulsive in nature, BSL is often a knee-jerk reaction following a well-publicized and particularly brutal dog attack. In 1980, Hollywood, Florida enacted one of the United States' earliest breed-specific regulations after a nine-week-old boy was killed by a pet Pit bull while sleeping in his crib.[56] In 1984, the Pit bulls of a nine-year-old girl's relatives attacked and permanently disfigured her in the village of Tijeras, New Mexico.[57] Another Tijeras resident's dog required surgery after being attacked by a Pit bull.[58] On another occasion, Pit bulls broke into a fenced yard and killed a resident's chickens.[59] Although only one of these events involved an injury to a person, the village of Tijeras—population 312—where almost 25% of households owned at least 1 Pit bull, enacted a Pit bull ban.[60]

A few years later, in the aftermath of a five-year rise in pit bull attacks culminating in the mauling of a man bitten more than 70 times and the death of a three-year-old child, Denver, Colorado enacted arguably the nation's strictest BSL.[61] The Denver law enjoins residents from owning, transporting, harboring or selling "Pit bulls," defined as American Pit bull terriers, American Staffordshire terriers, and Staffordshire bull terriers, as well as any dog "displaying the majority of physical traits" of those breeds, or any dog with "distinguishing characteristics which

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[54] KAREN DELISE, THE PIT BULL PLACEBO: THE MEDIA, MYTHS, AND POLITICS OF CANINE AGGRESSION 75 (2007).

[55] *Breed Specific Legislation: How BSL Affects Various Community Members*, ANIMAL FARM FOUND., http://animalfarmfoundation.org/files/BSL-Talking-Points-ebook.pdf (last visited Apr. 11, 2015).

[56] Meagan Dziura, Comment, *Should We Beware of Dog or Beware of Breed? An Economic Comparison,* 10 J.L. ECON. & POL'Y 463, 471 (Spring 2014).

[57] Garcia v. Vill. Of Tijeras, 767 P.2d 355, 356–59 (N.M. Ct. App. 1988).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 358.

[61] Howard Pankratz, *Lawyers Aren't Ready to Drop Challenge to Denver Pit Bull Ban*, DENVER POST (July 31, 2008), http://www.denverpost.com/2008/07/31/lawyers-arent-ready-to-drop-challenge-to-denver-pit-bull-ban/.

substantially conform" to AKC or UKC standards for any of those breeds.[62] In Denver, grandfathered Pit bulls are permissible but must be sterilized and tattooed or micro-chipped with an identification number, and owners must carry at least $100,000 in liability insurance and post conspicuous signs indicating the presence of a "Pit Bull Dog" at each entrance to their property.[63] Punishments for non-compliance are severe: violations are a criminal offense, and the city euthanizes Pit bulls discovered within its limits.[64] To make matters worse, after a brief reprieve pending a State Supreme Court decision, the city of Denver reinstated the ban and killed 1,667 pit bulls in a two-year period.[65]

As of December 2014, an estimated 860 cities and 26 counties in 37 states have enacted some form of breed-specific laws.[66] While those numbers may seem high, the national trend is starting to move away from breed-specific regulations in favor of breed-neutral laws that hold all owners accountable for the humane care, control, and custody of their dogs.[67] Between January 2012 and May 2014, five states enacted BSL preemptions and more than seven times as many municipalities repealed or rejected proposed BSL than enacted it.[68] A number of U.S. cities that had previously supported BSL have reversed course in recent years. For example, just three years after enacting BSL in 2006,

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[62] DENVER, COLO., REV. MUN. CODE §§ 8-55(a), 8-55(b)(2) (2016).
[63] *Id.* § 8-55(d)(4)-(6), (9).
[64] *Id.* § 8-55(f).
[65] *Metro-Area Dog Bans: Are they Working?*, DAILY CAMERA (Apr. 21, 2008), http://www.dailycamera.com/ci_13095483.
[66] *See Estimated U.S. Cities, Counties, States and Military Facilities with Breed-Specific Pit Bull Laws*, SCRIBD, http://www.scribd.com/doc/56495216/Estimated-U-S-Cities-Counties-States-and-Military-Facilities-with-Breed-Specific-Pit-Bull-Laws (showing some form of BSL exists in each of the following states: Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming).
[67] *Breed-Specific Legislation on the Decline*, *supra* note 24.
[68] *See id.* (finding that during this period, at least 61 municipalities rejected BSL after discussing it and at least 97 repealed BSL they formerly had in place, while only 21 municipalities enacted new BSL).

the City Council of Oak Harbor Washington voted unanimously to repeal its breed-specific ordinance restricting pit bull ownership.[69] In Kansas, Topeka,[70] Bonner Springs, and Riverside have all gotten rid of their Pit bull bans, while Kansas City, the most populous city in the state's metro area, is said to be "seriously consider[ing] dropping its ban."[71] In 2012, Cincinnati, Ohio repealed its pit bull ban of nine years.[72] Similarly, Hallsville, Missouri, which had implemented a Pit bull ban over 20 years ago, dropped its ban after City Council voted unanimously to repeal the ban in November 2014.[73] Pawtucket, Rhode Island saw a Superior Court Judge strike down the city's Pit bull ban that had been in effect since 2004.[74] Juneau, Wisconsin, Grandview, Missouri, Roeland Park, Kansas, and Moreauville, Louisiana are the most recent cities to repeal BSL.[75] Cities considering proposed enactment of BSL are likewise deciding against it. For instance, after a Pit bull attacked a young girl, officials in Cedar

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[69] *Pit Bulls Freed From Muzzles*, WHIDBEY-NEWS TIMES (Nov. 6, 2009), http://www.whidbeynewstimes.com/news/69420532.html#.

[70] *See* Tim Hrenchir, *City Approves Animal Ordinance*, TOPEKA CAP. J. (Sept. 28, 2010), http://cjonline.com/news/local/2010-09-28/city_approves_animal_ordinance (reporting that the city of Topeka passed, by a 9-0 margin, a 39-page ordinance that eliminated the city's breed-specific rules requiring owners to obtain special licenses and to implant microchips in any Pit-bull-type dogs).

[71] Mike Hendricks, *In a Quiet Trend, Pit Bull Bans are Disappearing*, KAN. CITY STAR (Nov. 9, 2014), http://www.kansascity.com/news/government-politics/article3681525.html.

[72] Hannah McCartney, *Cincinnati Pit Bull Ban Repealed*, CITYBEAT (May 16, 2012), http://citybeat.com/cincinnati/blog-3479-cincinnati_pit_bull_ban_repealed.html.

[73] Angela Pearson et al., *Hallsville City Council Repeals 20-Year-Old Pit Bull Ban*, KOMU NEWS (Nov. 13, 2014), http://www.komu.com/news/hallsville-city-council-repeals-20-year-old-pit-bull-ban/.

[74] Shaun Towne, *Pit Bull Ban Lifted in Pawtucket*, WPRI EYEWITNESS NEWS (Nov. 18, 2014), http://wpri.com/2014/11/18/pit-bull-ban-lifted-in-pawtucket/.

[75] *Two Repeals from Tuesday, March 10, 2015,* STOP BSL (Mar. 12, 2015), https://stopbsl.org/category/bsl/bsl-repealed/.

City, Utah began discussing a breed ban.[76] Nine police officers, as part of their interview for the position of police lieutenant, researched BSL and gave a presentation to a city interviewing board; all nine candidates were against enactment of BSL.[77] Consequently, Cedar City dropped its plans for a breed ban in favor of a breed-neutral ordinance.[78]

C. *Tracey v. Solesky:* The Rapid Rise and Fall of Statewide Breed-Specific Regulations in Maryland

Maryland, like many other states, was not immune from feeling the pain of increasing injuries from dog bites. Reacting to mounting concerns over the growing number of dog bites, researchers from Baltimore published three studies about the frequency of dog bites within the city.[79] Their findings confirmed a rapid rise in dog bites in Baltimore City. Between 1953 and 1972, the number of reported dog bites grew consistently, more than doubling over that time frame from 2,884 in 1953 to 6,922 in 1972.[80] In 1974, authorities in Baltimore took action, setting higher standards for all dog owners, *regardless of breed*.[81] Those actions paid immediate dividends and by 1976, just two years

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[76] Sandy Miller, *Wrong End of the Leash: Breed-Specific Laws Target Symptoms Not Causes*, BEST FRIENDS MAG. (Mar. 2008), http://bestfriends.org/allthegoodnews/magazine/archives.cfm.
[77] *Id.*
[78] *See id.* (identifying two major flaws with BSL. First, it's too broad, as it targets all Pit bulls, including those that have never shown aggression, and second, people often misidentify other breeds as Pit bulls).
[79] *Maryland's Experience: The Public Record and the* Tracey v. Solesky *Ruling*, NAT'L CANINE RES. COUNCIL (Apr. 2014), http://www.animalfarmfoundation.org/files/Marylands_Experience_the_Public_Record_and_the_Tracey_Solesky_Ruling_2014.pdf.
[80] David Berzon, *The Animal Bite Epidemic in Baltimore, Maryland: Review and Update,* 68 AM. J. PUB. HEALTH 593, 593–95 (June 1978).
[81] *See Maryland's Experience, supra* note 79, at 2 (noting that those actions included enacting a comprehensive Animal Control Ordinance, increasing surveillance of animal bites, promoting inter-agency cooperation regarding bite incidents, appointing an advisory council to investigate and make recommendations, undertaking a campaign to educate citizens, conducting low-cost vaccination clinics each spring, intensifying enforcement of licensing and vaccination requirements, bringing litigation against violators, and amending ordinances pertaining to humane handling and public nuisance).

later, reported dog bites had fallen to 4,760—a decrease of 30 percent from the 1972 high.[82] Reported dog bites in Baltimore have continued to fall and in 2011 there were only 716 reported dog bites in Baltimore City.[83] Moreover, dog-bite-related fatalities remain uncommon in Maryland with only twelve deaths in the state over the last forty-seven years—an average of one every four years.[84]

Despite these notable improvements in Maryland's largest city, the Maryland Court of Appeals, the state's highest court, shocked dog owners throughout the state with an unexpected decision in the 2012 case, *Tracey v. Solesky.* The Court, in a 4-3 decision, held that Pit bulls and Pit bull mixes were inherently dangerous and as such, both Pit bull owners and landlords harboring Pit bulls on the property would be held strictly liable for any injuries the dog may cause. The Court's holding, while not a Pit bull ban, amounted to statewide breed-specific regulation within Maryland.

The case came about when a dog, believed to be a Pit bull, attacked a young boy named Dominic Solesky.[85] Solesky sustained life-threatening injuries during the attack for which he underwent multiple surgeries and spent a year in rehabilitation.[86] On March 24 2008, in the Circuit Court of Baltimore City, Solesky's parents sued the dog's owners and the landlord of the property from which the dog escaped.[87] The Soleskys asserted negligence and strict liability claims against the dog's owners and their landlord.[88] The claims against the owners were discharged in bankruptcy.[89]

The circuit court granted the landlord's motion for summary judgment,[90] holding that there was insufficient evidence of negligence to present to the jury.[91] On appeal, the Maryland Court of Special Appeals reversed, holding that the evidence

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[82] Berzon, *supra* note 80, at 593–95.
[83] *Maryland's Experience, supra* note 79, at 2.
[84] *Id.*
[85] *Tracey v. Solesky*, 50 A.3d 1075, 1078 (Md. 2012), *superseded by statute*, MD. CODE ANN., CTS. & JUD. PROC. § 3-1901 (West 2016).
[86] *Id.*
[87] *Solesky v. Tracey*, 17 A.3d 718, 720 (Md. Ct. Spec. App. 2011).
[88] *Id.* at 723.
[89] *Id.* at 720.
[90] *Tracey*, 50 A.3d at 1078.
[91] *Id.*

created a jury question about the extent of the landlord's prior knowledge of the dog's propensity for aggressive behavior.[92] On April 26 2012, the Maryland Court of Appeals affirmed and directed the Court of Special Appeals to remand for a retrial.[93] The Court noted that the trial judge had correctly applied the then-prevailing standard of negligence to the landlord's conduct.[94] But, the Court decided to modify the standard "as it relate[d] to attacks by Pit bull and cross-bred Pit bull dogs against humans."[95] Under the Court's new rule,

> upon a plaintiff's sufficient proof that a dog involved in an attack is a pit bull or a pit bull mix, and that the owner, or other person(s) who has the right to control the pit bull's presence on the subject premises (including a landlord who has the right and/or opportunity to prohibit such dogs on leased premises as in this case) knows, or has reason to know, that the dog is a pit bull or cross-bred pit bull mix, that person is strictly liable for the damages caused to a plaintiff who is attacked by the dog on or from the owner's or lessor's premises.[96]

The Court justified the modification based on what they deemed as Pit bulls' "aggressive and vicious nature" and "capability to inflict serious and sometimes fatal injuries."[97] Judge Green, joined by Judges Harrell and Barbera, dissented, contending that *Tracey's* new rule was "grounded ultimately upon perceptions of a majority of this Court about a *particular breed* of dog, rather than upon adjudicated facts showing that the responsible party possessed the requisite knowledge of the animal's inclination to do harm."[98] Judge Greene, recognizing the disputed accuracy of dog bite statistics and lack of expert testimony on Pit bulls' allegedly inherent dangerousness,[99]

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[92] *Id.*
[93] *Id.* at 1089–90.
[94] *Id.* at 1078.
[95] *Id.* at 1079.
[96] *Tracey*, 50 A.3d at 1089.
[97] *Id.* at 1080.
[98] *Id.* at 1090 (Greene, J., dissenting).
[99] *Id.* at 1090–91.

concluded that "[t]he issues raised involving breed-specific regulation are not appropriate for judicial resolution; rather, those issues are best resolved by the Maryland General Assembly."[100]

On May 25 2012, the defendant landlord moved for reconsideration, arguing that "the imposition of a 'new duty' on landlords was fundamentally unfair and unconstitutional as applied."[101] On August 21 2012, the Court granted the motion in part and denied it in part.[102] The Court denied the motion with respect to pure-bred Pit bulls, emphasizing that its decision was not as dramatic as the defendant claimed because it neither "prohibit[ed] the ownership or breeding of Pit bulls" nor "require[d] that persons who own such dogs get rid of them."[103] The Court granted the motion in part to delete any reference to cross-bred Pit bulls reasoning that there was "never any assertion, suggestion, or finding in this case that the dog was a cross-bred" and that it was "not at all clear what 'cross-bred' really means."[104]

The response to the opinion was swift. Several bills intended to abrogate the effects of the decision were quickly introduced in both the Maryland Senate and House of Representatives. According to the Fiscal and Policy Notes of the House and Senate bills that eventually became law, the decision in *Solesky* "drew criticism from dog owners, animal advocacy groups, landlords, and insurers as news reports emerged relating to landlords banning Pit bulls and animal shelters preparing for an influx of Pit bulls."[105] In response to the decision, the Frederick County Board of Commissioners released a statement in which they collectively "expressed great displeasure over [the] recent court case of *Tracey v. Solesky* held by the Maryland Court of Appeals that targets Pit bull and Pit bull mixed dogs. [The Frederick County Board of Commissioners] wholeheartedly

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[100] *Id.* at 1096.
[101] *Id.* at 1096 (majority opinion).
[102] *Tracey*, 50 A.3d at 1098.
[103] *Id.* at 1097.
[104] *Id.*
[105] Personal Injury or Death Caused by Dog, H.R. 73, 2014 Sess. (Md. 2014), http://mgaleg.maryland.gov/2014RS/fnotes/bil_0003/hb0073.pdf; Personal Injury or Death Caused by Dog, S. Res. 247, 2014 Sess. (Md. 2014), http://mgaleg.maryland.gov/2014RS/bills/sb/sb0247t.pdf.

support and are confident that our Animal Control Division has the proper policies in place to address aggressiveness in animals…Frederick County has not had the degree of incidents to merit this kind of extreme response."[106] Initially, lawmakers were unable to come to an agreement on the language of the proposed bills. Their efforts continued for two years until a bill was finally approved and signed into law in early 2014.[107] The new statute overturned the holding in *Tracey*, removing all breed-specific language and providing that a dog that causes an injury creates a rebuttable presumption that the dog's owner knew or should have known that the dog had vicious or dangerous propensities, regardless of breed.[108]

D. The Media Casts the Spotlight on the Pit Bull

As seen in Maryland, the Pit bull is the breed most frequently discriminated against in today's society, but that was not always the case. The bloodhound was one of the earliest dogs to be branded as inherently dangerous.[109] As America's conflict over slavery intensified, depictions of the bloodhound as a slave-catching dog in staged re-enactments of Uncle Tom's Cabin drove the increasingly negative attitudes towards the breed.[110] In 1925, the German shepherd replaced the bloodhound as the media's villain of choice after a proclamation by a New York City Magistrate that they should be banned.[111]

Years later, as television became more prominent and news stories became more sensationalized, public fear of the "dog bite epidemic" gained traction.[112] In the early 1970s, the Doberman pinscher, vilified in the movie "They Only Kill Their Masters," was portrayed by the media as the problem dog of the time.[113] Then, following the release of "The Omen" in 1976, which portrayed a Rottweiler as the guardian of Satan's child, Rottweilers became the breed that fell into the media's

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[106] *Maryland's Experience, supra* note 79, at 4.
[107] MD. CODE ANN., CTS. & JUD. PROC. § 3-1901 (West 2016).
[108] *Id.*
[109] Delise, *supra* note 54, at 28–32.
[110] *Id.*
[111] *Ban on Police Dogs in Queens Urged by Magistrate Conway*, N.Y. TIMES, Jan. 1, 1925.
[112] Swann, *supra* note 51, at 847.
[113] *Id.* at 843.

crosshairs.[114] Negative press about the Pit bull was nowhere to be found. In fact, during a ten-year period from 1966-1975, there was only one documented case of a fatal dog attack in the United States by a dog that could be classified as a Pit bull.[115] Then, in the summer of 1976, a five-year-old California boy was killed by a dog.[116] Unsure how to appropriately describe the dog, numerous newspapers described it as a Pit bull.[117] One particular article described the (incorrect) theory about this dog's "locking jaw" by explaining "[b]ecause a bulldog's lower jaw is longer than the upper jaw, it is physically impossible for the dog to let go while there is any tension on whatever it is holding in its mouth."[118] This began to lay the foundation for the media's demonization of the Pit bull.

By the 1980s, the Pit bull's extended time in the media spotlight was in full swing. In 1987, Sports Illustrated magazine ran a feature article about the pit bull's "badass cred" along with a cover photo of a vicious looking pit bull with the warning "Beware of This Dog."[119] Also around that time, a drug crisis gripped the United States as cocaine was exploding onto the scene. Linked to gangs and the drug trade, the Pit bull became synonymous with criminal deviance.[120] Drug dealers would reportedly secure drugs beneath the kennels or collars of these dogs for use in their trafficking enterprises.[121] The association between Pit bulls and drug dealers became so strong that courts began to allow ownership of a Pit bull to be admitted at trial as evidence of possessing "tools of the drug trade."[122] In some cases, just the alleged presence of a Pit bull was enough to justify police officers' no-knock entry in serving a warrant.[123] As one author has described it, "[t]he stigma attached to Pit bulls is not founded in logic, but in a tautology: Pit bulls are dangerous because they

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[114] *Id.*
[115] Delise, *supra* note 54, at 95.
[116] *Id.* at 117.
[117] *Id.*
[118] *Id.*
[119] Swann, *supra* note 51, at 844.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 844-45.
[123] *See* United States v. Jewell, 60 F.3d 20, 23 (1st Cir. 1995).

are preferred by criminals; criminals prefer Pit bulls because they are dangerous."[124]

Also during this time, news outlets began to push the extremes of their reporting even further. Stories came out comparing Pit bulls to deadly weapons and suggesting that Pit bulls were more dangerous than guns. In one such story, the author wrote that unlike guns, "[p]it bulls come fully loaded, and they are perfectly capable of initiating an assault all on their own."[125] This writer is not alone in his assertion. Another article colorfully described Pit bulls as ''the archetype of canine evil, predators of the defenseless. Unpredictable companions that kill and maim without discretion. Walking horror shows bred with an appetite for violence.''[126] Sensibly, these descriptions are more akin to entertaining fantasy than day-to-day reality. Nonetheless, the Pit bull stigma had permeated the public perception.

Public confusion regarding dog bites was further amplified by the imbalance in media coverage of such events depending on the type of breed that was identified.[127] Of the 72 stories that the New York Times published on Pit bulls between 1987 and 2000, 26 covered Pit bull attacks on people; 22 covered legislation restricting Pit bull ownership; and 9 described Pit bull owners, portraying them as the dregs of society.[128] In a separate study, one researcher tracked four incidents of severe dog bite injuries during a four-day period in 2007, one of which resulted in a human death.[129] Three of the incidents, including the one that ended in a human fatality, were attributed to dogs identified as breeds other than Pit bulls.[130] The two nonfatal injuries generated one story each and the fatality was covered in two articles.[131] The fourth incident, which was attributed to two Pit bulls, generated 230 newspaper articles.[132] This enormous

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[124] Swann, *supra* note 51, at 845.
[125] Craig Medred, *On the Danger Scale, Pit Bulls Exceed Any Loaded Gun*, ANCHORAGE DAILY NEWS, Feb. 17, 1992, at E4.
[126] Judy Cohen & John Richardson, *Pit Bull Panic*, 36 J. POPULAR CULTURE 285, 285 (2002).
[127] Bradley, *supra* note 39, at 9.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*

disparity in media coverage has contributed to the widely held perception that Pit bulls are more dangerous than other breeds.

II. Constitutionality of Breed-Specific Legislation

Part II explores how challenges to BSL have been approached in the courtroom. It begins by recognizing the broad scope of a state's police powers in regulating the health and safety of its citizens before providing a brief discussion of the most common constitutional arguments against BSL: that it violates both the equal protection clause and the due process clauses of the Constitution. Finally, Part II will show that, although the effectiveness of BSL is often contested, judicial challenges to BSL are rarely successful on constitutional grounds.

From the start, dog owners and activist groups have challenged breed-specific regulations as violating their constitutional rights. Those challenges have continued to this day.[133] Unfortunately for dog owners, the majority trend has been to uphold laws that impose special restrictions on certain breeds or ban them outright. Moreover, the U.S. Supreme Court has refused to disturb at least three decisions of state supreme courts, denying certiorari in all three instances.[134]

To appreciate the regularity of judicial challenges to BSL, one only needs to follow the complex path that the enactment of BSL took within the city of Denver, Colorado. Between 1984 and 1989, pit bulls were reported to have attacked and injured more than twenty people in Colorado, culminating in the death of three-year-old Fernando Salazar in 1986.[135] As a result, the local community called for stricter regulations, including bans on Pit

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[133] Molly Willms, *Fall River 'Ban' on Pit Bulls Draws Federal Suit*, COURTHOUSE NEWS SERV. (Mar. 2, 2015), http://www.courthousenews.com/2015/03/02/fall-river-ban-on-pit-bulls-draws-federal-suit.htm.

[134] *See* State v. Anderson, 566 N.E.2d 1224, *cert. denied*, 501 U.S. 1257 (1991); Hearn v. City of Overland Park, 772 P.2d 758, *cert. denied*, 493 U.S. 976 (1989); Toledo v. Tellings, 871 N.E.2d 1152, 1154 (Ohio 2007), *cert. denied*, 552 U.S. 1225 (2008).

[135] John Davidson, *Pet Beat: Tide May Be Turning for Denver's Pit-Bull Ban*, DENVER POST (June 19, 2010), http://www.denverpost.com/insideandout/ci_15328946.

bulls.[136] As previously noted, the Denver legislature responded in 1989 by enacting arguably the most severe anti-Pit bull legislation in the country.[137] Almost immediately, dog owners and dog-friendly organizations filed suit challenging the ordinance as unconstitutional.[138] That initial litigation concluded in 1991 with the Colorado Supreme Court's decision in *Colorado Dog Fanciers v. City and County of Denver*, which upheld the trial court's ruling that Denver's ordinance was constitutional.[139] After many years of public criticism, the State Legislature in 2004 passed House Bill 04-1279, which prohibited local governments from regulating dogs by specific breed.[140] Less than a month later, the City and County of Denver filed suit, seeking a ruling that the state's home rule authority[141] allowed Denver's ordinance banning Pit bulls to supersede H.B. 04-1279.[142] In its simplest form, the home rule law means that the local government has the authority to pass laws that are not consistent with the state's laws. In late 2004, the Denver District Court ruled—pursuant to the Colorado Constitution—that Denver's home rule authority superseded H.B. 04-1279.[143] And in 2005, the court sustained the original findings of *Colorado Dog Fanciers* and upheld the city ban as constitutional.[144] That did not stop the lawsuits, however, as plaintiffs in Colorado continue to file complaints seeking declaratory and injunctive relief, temporary restraining orders, and damages.[145]

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[136] Editorial, *Let's Outlaw Killer Dogs*, DENVER POST, June 12, 1989, at 4B; Editorial, *Tougher Rules and Stronger Enforcement on Pit Bulls,* ROCKY MOUNTAIN NEWS, May 12, 1989, at 82.
[137] DENVER, COLO. REV. MUN. CODE § 8-55(a)(2) (2016 West) (making it unlawful to own, possess, keep, exercise control over, maintain, harbor, transport, or sell any Pit bull within the city).
[138] Colo. Dog Fanciers v. City of Denver, 820 P.2d 644 (Colo. 1991).
[139] *Id.*
[140] H.B. 04-1279 *codified at* COLO. REV. STAT. § 18-9-204.5 (2016) (enacted 2004).
[141] *See* COLO. CONST. art. XX, § 6 (West 2015) (granting home rule status to municipalities with a population over 2,000 that adopt home rule charters).
[142] Complaint, City of Denver v. State, No. 04CV3756 (D. Colo. May 13, 2004).
[143] Order, City of Denver v. State, No. 04CV3756 (D. Colo. Dec. 9, 2004).
[144] City of Denver v. State, No. 04CV3756 (D. Colo. Apr. 7, 2005).
[145] *See, e.g.,* Dias v. City of Denver, 567 F.3d 1169 (10th Cir. 2009); First Amended Complaint, *supra* note 1.

Generally speaking, state and local legislators enjoy broad discretion to regulate dog ownership as a function of their police powers.[146] A state's police powers are those used by the state to protect the health, safety, and welfare of its citizens.[147] Even though a state's power is broad, it is not unlimited.[148] Constitutional challenges to BSL—while mostly unsuccessful—continue to be filed claiming that the regulations improperly infringe on the constitutional right of equal protection and due process.[149]

A. Equal Protection Challenges

There have been numerous ineffective challenges to BSL on equal protection grounds.[150] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall…deny to any person within its jurisdiction the equal protection of the laws."[151] Regulations that do not categorize based on a suspect class and do not affect fundamental rights are subject to a minimum scrutiny test, under which the essential question is whether the law being challenged is rationally related to a legitimate governmental goal or purpose.[152] When there is no suspect class, the Equal Protection Clause will not be offended unless the classification is "wholly irrelevant to the achievement of the [s]tate's objective."[153]

Opponents of BSL argue that a regulation targeting a specific breed violates owners' constitutional right to equal protection of the laws by singling out owners of that particular

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[146] Heather K. Pratt, Comment, *Canine Profiling: Does Breed-Specific Legislation Take a Bite Out of Canine Crime?*, 108 PENN. ST. L. REV. 855, 860–61 (2004).
[147] *See* Stone v. Mississippi, 101 U.S. 814, 818 (1879).
[148] *See* Sentell v. New Orleans, 166 U.S. 698, 706 (1897).
[149] Pratt, *supra* note 146, at 862.
[150] *See, e.g.,* Starkey v. Chester Township, 628 F. Supp. 196, 197 (E.D. Pa. 1986); Colo. Dog Fanciers, 820 P.2d at 652; State v. Peters, 534 So.2d 760, 763-64 (Fla. Dist. Ct. App. 1989); Hearn v. City of Overland Park, 772 P.2d 758, 766-68 (Kan. 1989); Garcia, 767 P.2d at 360-61; Greenwood v. City of North Salt Lake, 817 P.2d 816, 820-21 (Utah 1991).
[151] U.S. CONST. amend. XIV, § 1.
[152] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 601 (14th ed. 2001).
[153] Hearn, 772 P.2d at 766.

breed.[154] Courts have consistently applied the minimum scrutiny test, noting that dog owners in general—and pit bull owners specifically—do not compromise a suspect class, nor does dog or pit bull ownership implicate a fundamental right.[155] In rejecting one such equal protection claim, the court stated that "the constitutional guarantee of equal protection of the law does not guarantee that all dog owners will be treated alike; at most, the only guarantee is that all owners of defined pit bulls will be treated alike."[156] Applying this minimum scrutiny test, courts—often in reaction to horrific dog attacks—have easily held that a rational basis exists for imposing restrictions on certain breeds in an effort to protect the general health and welfare of the locality's citizens.[157]

Future equal protection challenges will likely continue to prove unsuccessful. Seeing as breed-specific laws are often promulgated in response to an actual attack or complaints from citizens, it will be nearly impossible for a plaintiff to prove the "wholly irrelevant" standard, while it will be relatively easy for states or municipalities to sustain the rational relation standard.[158] Once a state or municipality has identified a risk to its citizens' safety, health, or welfare, a plaintiff's ability to successfully undermine a government's rational relationship argument is greatly diminished.

B. Due Process Challenges

In addition to equal protection challenges, opponents of BSL claim that these regulations violate the Due Process Clause. The Fourteenth Amendment of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[159] Due process challenges fall into

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[154] *See e.g.,* Vanater v. Vill of S. Point, 717 F. Supp. 1236, 1245 (S.D. Ohio 1989); Colo. Dog Fanciers, 820 P.2d at 652; Peters, 534 So.2d at 763.
[155] *See e.g.,* Vanater, 717 F. Supp. at 1244; Colo. Dog Fanciers, 820 P.2d at 652; Peters, 534 So.2d at 763–64.
[156] Peters, 534 So.2d at 763.
[157] *See e.g.,* Vanater, 717 F. Supp. at 1245–46; Colo. Dog Fanciers, 820 P.2d at 652; Peters, 534 So.2d at 764. For a more detailed examination of Equal Protection challenges, see Pratt, *supra* note 147, at 866–71; Hussain, *supra* note 35, at 2847.
[158] Pratt, *supra* note 146, at 870.
[159] U.S. CONST. amend. XIV, § 1.

three categories, all of which have been raised in opposition to BSL: substantive due process challenges, which examine the substance of the law; procedural due process challenges, which evaluate the manner in which the law is administered; and challenges based on violations of the Takings Clause.

1. Substantive Due Process Challenges

Substantive due process challenges are often similar to equal protection challenges. The Due Process Clauses of the Fifth and Fourteenth Amendments require that laws bear a rational relationship to a legitimate government interest or goal, although legislative enactments are typically entitled to a strong presumption of constitutionality.[160] Opponents of BSL argue that a breed-based regulation or ban is not rationally related to a legitimate government interest.[161] But, establishing a rational relationship is fairly easy as courts only need apply the minimum scrutiny analysis.[162] Courts have had little difficulty determining that a breed-specific response is rationally related to the legitimate goal of public safety.[163] For example, the Supreme Court of Kansas held that breed-based regulations that were enacted following a vicious dog attack were rationally related to the legitimate goal of maintaining public safety, noting that "[d]ebatable questions as to reasonableness are not for the courts but for the legislature."[164]

2. Procedural Due Process Challenges

Some dog owners have argued that the language used in BSL is unconstitutionally vague and thus fails on procedural due process grounds.[165] A law is unconstitutionally vague if it does not provide those affected by the law with sufficient notice of the

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[160] *See* Russell Donaldson, *Annotation, Validity, and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as "Pit Bulls" or "Bull Terriers"*, 80 A.L.R. 4th 70, 94 (1990).
[161] Hussain, *supra* note 35, at 2865.
[162] Devin Burstein, Comment, *Breed Specific Legislation: Unfair Prejudice and Ineffective Policy*, 10 ANIMAL L. 313, 318 (2004).
[163] *See* Hussain, *supra* note 35, at 2865–66.
[164] Hearn, 772 P.2d at 764–65.
[165] Burstein, *supra* note 162, at 318.

conduct being regulated or prohibited.[166] Opponents of BSL argue that these regulations fail to put pit bull owners on proper notice because there is no official breed known as the "Pit bull" and as a result, it is difficult for owners of mixed-breed or adopted dogs to determine whether their dogs fall under such ordinances.[167] Due to the difficulty in properly identifying individual dogs as Pit bulls, constitutional challenges based on vagueness have had some, albeit little, success.[168] More commonly, these challenges are unsuccessful.[169] Courts have found that because the name Pit bull is recognizable by the general population, ordinances identifying "Pit bulls" were sufficiently clear and equally applicable to dogs registered to any of the UKC breeds commonly identified as Pit bulls.[170]

3. Due Process Challenges Based on the Takings Clause

Plaintiffs have also challenged BSL as violating constitutional rights by arguing that such laws result in the taking of property without just compensation.[171] Courts have generally dismissed these claims on the grounds that deprivations of private property are permissible when there is a legitimate

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[166] *Id.*

[167] *Id.*

[168] Burstein, *supra* note 163, at n. 57.

[169] *See, e.g.*, Greenwood, 817 P.2d at 819–20 (holding that even though the ordinance could have been written "more clearly" the statute was not unconstitutionally vague because it allowed dog owners to request a determination by the city manager as to whether the ordinance applied to their dog); Garcia 767 P.2d at 356 (holding that although American Staffordshire terrier was the more technical term, American Pit Bull Terrier was an acceptable designation); Vanater, 717 F.Supp. at 1239 (reasoning that because an ordinary person could easily find guidance in a dictionary or virtually any dog book to ascertain whether the ordinance applied to him or her, an ordinance prohibiting ownership of a "Pit Bull Terrier" was not unconstitutionally vague); Hardwick v. Town of Ceredo, No. 11-1048, 2013 WL 149628 (W. Va. Jan. 14, 2013) (holding that town ordinance prohibiting ownership of Pit bull terriers was not unconstitutionally vague nor did it violate defendants' due process rights).

[170] Pratt, *supra* note 146, at 870.

[171] *See, e.g.*, Garcia 767 P.2d at 356; *see also* Colo. Dog Fanciers, 820 P.2d at 653.

exercise of police power.[172] For example, in *Garcia v. Village of Tijeras*, the court found that there was no taking of property because all of the village residents were notified prior to the enforcement of the ordinance and had the opportunity to remove their dogs prior to enforcement.[173] In *Colorado Dog Fanciers v. City and County of Denver*, the Colorado Supreme Court struck down plaintiffs' claim that Denver's Pit bull ban amounted to an unconstitutional taking of property, reasoning that the ordinance did not constitute a taking because it permitted ownership of existing Pit bulls within the jurisdiction so long as the owner maintained a Pit bull license and complied with other requirements.[174]

III. POLICY ARGUMENTS AGAINST BREED-SPECIFIC LEGISLATION

Although constitutional challenges to BSL are rarely successful, this does not suggest that BSL makes for effective policy. BSL has been "increasingly criticized and deemed inappropriate and ineffective" for multiple reasons.[175] Part III identifies the growing list of arguments against BSL, points out many of the myths about Pit bulls, and describes the ineffectiveness of BSL at preventing dog-bite-related injuries. It continues by highlighting the impressive list of expert organizations that are publicly opposed to BSL. This Part concludes by suggesting that local governments have started to recognize the merit of these arguments, as evidenced by the recent shift away from breed-specific regulations. Accordingly, opponents of BSL should continue to reinforce these arguments at the local level in an effort to sustain a nationwide move away from breed-specific regulations.

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[172] *See, e.g.*, Garcia, 767 P.2d at 362; *see also* Sentell, 166 U.S. at 698.

[173] Garcia, 767 P.2d at 363.

[174] Colo. Dog Fanciers, 820 P.2d at 653 (noting that keeping a dog within city limits is only permissible for those owners who applied for and received a Pit bull license on or before August 7, 1989, the date that the ordinance was enacted).

[175] Jessica Cornelissen & Hans Hopster, *Dog Bites in the Netherlands: A study of victims, injuries, circumstances and aggressors to support evaluation of breed specific legislation*, 186 VETERINARY J. 292, 293 (2009).

A. Evidence Does Not Support Breed-Specific Legislation

Many studies now cast doubt on the theory that a dog's potential for aggressiveness is based solely, or even primarily, on breed. Other factors, such as heredity, experience, socialization, training, health, and victim behavior play a role.[176] In order to stand up scientifically, BSL relies on the assumption that a dog's physical characteristics accurately express its genetic constitution and that those genes determine behavior—a theory not yet substantiated.[177] Genes contribute to a dog's behavior only minimally.[178] For that reason, experts advise that a dog's propensity for aggression should be evaluated individually as opposed to the breed as a whole.[179]

Several factors are more compelling indicators of aggression than breed. Intact male dogs, for example, inflict seventy to seventy-five percent of reported dog bites.[180] One study found that dogs that bit were 2.8 times more likely to have been chained than unchained, suggesting that restraining dogs may impair socialization, thereby heightening aggression.[181] In another study of all 256 dog-bite-related fatalities between 2000 and 2009, researchers reliably identified seven controllable factors that were present in the attacks: no able-bodied person being present to intervene (87.1%); the victim having no familiar relationship with the dog(s) (85.2%); failure to neuter/spay the dog(s) (84.4%); a victim's compromised ability, whether based on age or physical condition, to manage interactions with the dog(s) (77.4%); the owner keeping dog(s) as resident animals rather than family pets (76.2%); prior mismanagement of the dog(s)

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[176] *Id.*
[177] Swann, *supra* note 51, at 853.
[178] *Id.* at 844.
[179] *Id.*
[180] B. Beaver, et al., *A Community Approach to Dog Bite Prevention: American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interactions*, 218 J. AM. VETERINARY MED. ASSOC. 1732, 1733 (2001) [hereinafter *AVMA Task Force*].
[181] Malcolm Gladwell, *Troublemakers: What Pit Bulls Can Teach Us About Profiling*, NEW YORKER (Feb. 6, 2006), http://www.newyorker.com/archive/2006/02/06/060206fa_fact? (studying a sample of 178 dogs that had a history of biting and 178 dogs that had no history of biting).

(37.5%); and abuse or neglect of the dog(s) (21.1%).[182] Four or more of the factors identified co-occurred in over 80% of the incidents.[183] In any event, breed was not one of the factors identified. The study found no evidence that one breed of dog is more likely to injure a person than another breed.[184]

Another study aids in the clarification of the relationship between breed and aggression. Researchers gathered a sample of more than 4,950 dogs, representing 33 different breeds.[185] They analyzed the severity and frequency with which members of each breed expressed aggression toward three different targets: other dogs, owners, and strangers. The results were surprising. Dachshunds, Chihuahuas, and Jack Russell terriers showed consistently high aggression towards all targets, contrary to their breeds' benign reputations.[186] Of the breeds that stood out as context-related aggressors, Rottweilers, Yorkshire terriers, Doberman pinschers, and poodles exhibited the highest degree of stranger-directed aggression.[187] Dog-directed aggression, on the other hand, was most common among Akitas, boxers, Australian cattle dogs, German shepherds and Pit bulls.[188] Basset hounds, beagles and cocker spaniels displayed the most owner-directed aggressive behavior.[189] The study's authors concluded that "it is inappropriate to make predictions about a dog's propensity for aggressive behavior based solely on its breed."[190] Regarding Pit bulls specifically, the authors noted that Pit bulls' "relatively average…scores for stranger-directed aggression…were

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[182] Gary Patronek et al., *Co-Occurrence of Potentially Preventable Factors in 256 Dog Bite-Related Fatalities in the United States (2000-2009)*, 243 J. AM. VETERINARY MED. ASSOC. 1726, 1726–36 (2013), http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/javma_dbrf_factors_00-09_dec_2013.pdf.

[183] *Id.*

[184] *Id.*

[185] Deborah Duffy et al., *Breed Differences in Canine Aggression*, 114 APPLIED ANIMAL BEHAV. SCI. 441, 445 (2008), http://140.122.143.143/yuyinghs/yuyinghsu/papers/DuffyHsuSerpell2008.pdf (identifying a 2008 study from the University of Pennsylvania).

[186] *Id.* at 453.

[187] *Id.* at 451.

[188] *Id.* at 456.

[189] *Id.* at 455.

[190] *Id.* at 452.

inconsistent with their universal reputation as a 'dangerous breed.'"[191]

Drawing further suspicion about the assumed relationship between breed and aggression is a study from Germany's University of Veterinary Medicine. In that study, researchers compared the behavior of a group of 70 golden retrievers with an aggregate of 415 allegedly aggressive dogs comprised of bull terriers, American Staffordshire terriers, Staffordshire bull terriers, Rottweilers, Doberman pinschers, and Pit-bull-type dogs.[192] Researchers observed no significant difference between the aggressive behaviors of the different breeds.[193] The authors highlighted the inadequacy of focusing on breed stating "the emotions of the dog and the effect of eliciting stimuli" are the determinants of dog bite propensity.[194]

Perhaps one of the most frequently cited arguments in favor of BSL is the "fact" that Pit bulls have "locking jaws" whose strength and bite greatly exceeds that of other dogs.[195] This misconception is so common that Miami-Dade County included it when drafting its breed-specific ordinance, stating "[t]he pit bull's massive canine jaws can crush a victim with up to two thousand (2,000) pounds of pressure per square inch—three times that of a German shepherd or Doberman pinscher—making the pit bull's jaws the strongest of any animal."[196] The source of that information is unsubstantiated and unknown, yet often repeated.[197] Indeed, the Ohio Court of Appeals noted the ubiquity and speciousness of this assertion, remarking that "contrary to

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[191] Duffy, *supra* note 185, at 455.

[192] Stephanie L. Ott et al., *Is There a Difference? Comparison of Golden Retrievers and Dogs Affected by Breed-Specific Legislation Regarding Aggressive Behavior*, 3 J. VETERINARY BEHAV. 134, 134–35 (2008), http://www.fairdog.dk/elements/documents/research/comparison-of-golden-retrievers-and-bslbreeds.pdf.

[193] *See id.* at 139 (finding that aggressive behavior appeared to be contextual and occurred most frequently in situations that triggered fear or anxiety in the dog).

[194] *Id.* at 140.

[195] Swann, *supra* note 51, at 860.

[196] Peters, 534 So.2d at 764 (quoting Miami-Dade, Fla. No. 422.5 (1989) (codified as amended at MIAMI-DADE, FLA., CODE OF ORDINANCES Ch. 5, art. 17 (2016)).

[197] Swann, *supra* note 51, at 860.

information relied upon and perpetuated by earlier case law and law review articles," the claim lacked scientific proof.[198]

Academic research on the bite strength of different animals also discredits the claims about Pit bulls' jaw strength. Dr. Brady Barr, a National Geographic Society herpetologist, studied bite strength by measuring various species' bite pressure by provoking the animals to bite a dynamometer, which registers the pressure applied in pounds per square inch ("psi").[199] In Barr's research, the American alligator exerted the greatest bite pressure at 3,000 psi.[200] By measuring the bites of German shepherds, Rottweilers, and Pit bulls, Barr concluded that domestic dogs exert approximately 320 psi.[201] A corroborating study found the bite pressure of adult dogs as ranging from 200 to 450 psi, depending on the dog's size.[202]

A separate study used an alternative method for measuring the bite strength of twenty healthy dogs scheduled for euthanization.[203] Prior to euthanization, researchers used electrodes to stimulate the dogs to bite on equipment positioned at the canine teeth and at the molars.[204] After euthanization, the scientists calculated bite force from skull measurements—an accepted practice for predicting bite force—before comparing those figures with the data collected pre-mortem.[205] The highest bite force from the canine teeth, measured in Newtons ("N"), was 926 N, from a German shepherd mix. The highest bite force from the molars was 3417 N, from a Labrador retriever mix.[206] By comparison, a pit bull mix measured 896 N and 1991 N at the

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[198] Tellings, 871 N.E.2d at 1152.
[199] *See* Bill Heavey, *That Bites!*, FIELD & STREAM, Aug. 2005, at 23.
[200] *Id.*
[201] Bill Murphy, *Pit Bull Panel Won't Request Ban on Breeds*, HOUSTON CHRON., Dec. 13, 2006 at B1.
[202] Alisha Perkins Garth & N. Stuart Harris, *Animal Bites in Emergency Medicine*, MEDSCAPE (Jan. 26, 2015), http://emedicine.medscape.com/article/768875-overview.
[203] Jennifer Lynn Ellis et al., *Calibration of Estimated Biting Forces in Domestic Canids: Comparison of Post-Mortem and In Vivo Measurements*, 212 J. ANATOMY 769, 769 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2423399/.
[204] *Id.* at 770–71.
[205] *Id.* at 771–72.
[206] *Id.* at 774.

canines and molars, respectively.[207] All in all, these studies disprove the myth of the Pit bull's "locking jaw."

B. Problems with Dog Bite Statistics

"Dog bite statistics are not really statistics, and they do not give an accurate picture of dogs that bite."[208]

According to researchers from the Veterinary Journal, "obtaining a reliable attack record is complicated due to scarce data on the reference population, incomplete breed registration, incorrect breed-identification, the number of non-purebred dogs and the narrow scope of relevant studies."[209] By extension, there are a number of reasons why breed-specific statistics are so hard to calculate: only the AKC and UKC collect nationwide data, only purebred dogs are registered, and purebred dogs are registered only if their owners choose to do so.[210] The limited information maintained by these organizations does little to clarify the actual popularity of the Pit bull in the United States. On the contrary, it magnifies the confusion. For instance, in 2007 the UKC ranked the American Pit bull terrier its 2nd most popular breed, but the AKC ranked the Staffordshire terrier, a comparable breed, its 84th most popular.[211]

Even more problematic is the tendency of those on both sides of the debate to extract only the most conspicuous figures, bypassing the critical analysis and context that give those incomplete numbers meaning. Proponents of BSL typically rely on one, decades-old study to bolster their argument.[212] That study by the CDC looked at dog-bite-related fatalities over a 20-year period to identify the breeds of dogs most commonly

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[207] *Id.*
[208] *AVMA Task Force, supra* note 180, at 1733.
[209] Cornelissen, *supra* note 175, at 293.
[210] *See* Jeffrey J. Sacks et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 J. AM. VETERINARY MED. ASS'N 836, 839 (2000) (noting that purebred dogs constitute only a fraction of the canine population).
[211] *See AKC Registration Statistics 2*, AM. KENNEL CLUB, http://www.akc.org/pdfs/press_center/popular_pooches.pdf; *2007's Top 10 UKC Breeds Registered*, UNITED KENNEL CLUB, http://www.ukcdogs.com/WebSite.nsf/WebPages/LrnTop10.
[212] *AVMA Task Force, supra* note 180.

involved in fatal attacks.[213] Researchers analyzed the 238 human fatalities from dog attacks between 1979 and 1998 for which the responsible dog's breed was identifiable.[214] Of the over twenty-five breeds implicated in these deaths, Pit-bull-type dogs and Pit bull mixes accounted for nearly thirty-two percent of the total fatalities.[215] The next closest breed—the Rottweiler and its mixes—accounted for eighteen percent of the total fatalities.[216] Proponents of Pit bull bans reference these figures as concrete support for BSL. But their arguments are not supported by the researchers' conclusions. In fact, according to Dr. Gail Golab, one of the researchers involved in the project, "[t]he whole point of our summary was to explain why you can't do that [draw conclusions about breed from numbers on dog-bite-related fatalities]. But the media and people who want to support their case just don't look at that."[217] Also, citing this study as support for BSL ignores the limitations that the study's authors disclosed. First, Pit bull and Rottweiler populations within the United States are unknown, so breed-specific bite rates cannot be calculated precisely.[218] Second, the dogs involved in the fatalities may have been misidentified as determining breed from physical characteristics is highly subjective.[219] To illustrate, of the 327 fatalities identified within the 20-year period, researchers were unable to locate breed or breed-mix identification for 89 of those incidents.[220] Following the study, the National Canine Research Council was able to locate breed attributions in 40 of the 89 incidents involving unidentified breeds; 37 of those cases involved dogs identified as other than Rottweiler and Pit bull.[221]

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[213] Sacks, *supra* note 210, at 839.
[214] Swann, *supra* note 51, at 856.
[215] *Id.*
[216] *Id.*
[217] *Dangerous Breeds?*, BEST FRIENDS MAG., Sept./Oct. 2004, at 14.
[218] Swann, *supra* note 51, at 856.
[219] *See id.* (noting that even experts may disagree on the breed determination of a certain dog).
[220] Sacks, *supra* note 210, at 839.
[221] *See* G. Patronek & S. Slavinski, *Zoonosis Update: Animal Bites*, 234 J. AM. VETERINARY MED. ASS'N 336, 337 (2009), https://www.avma.org/News/Journals/Collections/Documents/javma_234_3_336.pdf (concluding that this result confirmed researchers concerns regarding "differential ascertainment" of incidents because of breed bias).

Moreover, bite victims and witnesses are ill equipped to make on-the-spot breed identifications. A related study reported that most victims recalled only the color and size of the dog that attacked them.[222] Those two traits are insufficient to determine a dog's breed. To illustrate, in a study of 1,109 dog bite incidents, victims correctly identified the attacking dog's breed only 138 times.[223] Further, because the CDC study pulled some of its data from news stories, that data was likely slanted due to the media's preference for reporting stories with only certain breeds of dogs, leading to an underestimation of breeds reported.[224] Additionally, the authors of the study expressly cautioned from reading too much into their results because dog-bite-related fatalities represent a tiny fraction of the total injuries inflicted by dogs—a mere .00001% of dog bites each year.[225] In fact, the CDC has since concluded that their approach did not "identify specific breeds that are most likely to bite or kill, and thus is not appropriate for policymaking decisions related to the topic."[226] The American Veterinary Medical Association's ("AVMA") Canine Aggression Task Force has published a statement to the same effect stating, "[d]og bite statistics … do not give an accurate picture of dogs that bite. Invariably the numbers will show that dogs from popular large breeds are a problem. This should be expected, because big dogs can physically do more damage if they do bite, and any popular breed has more individuals that could bite."[227] The Task Force further noted that "[s]tatistics on fatalities and injuries caused by dogs cannot be responsibly used to document the 'dangerousness' of a particular breed, relative to other breeds."[228]

C. Breed-Specific Legislation Does Not Reduce Injuries From Dog Bites

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[222] Swann, *supra* note 51, at 856.
[223] *Id.* at 857.
[224] *Id.*
[225] *Id.*
[226] Jane Berkey, *Dog Breed Specific Legislation: The Cost to People, Pets and Veterinarians, and the Damage to the Human-Animal Bond*, ANNUAL AM. VETERINARY MED. ASS'N CONVENTION PROC. (2009), *reprinted in* ANIMAL FARM FOUND., THE FAILURE OF BREED SPECIFIC LEGISLATION 16–21 (2014), http://animalfarmfoundation.org/files/BSL-e-book-1-7-14.pdf.
[227] *AVMA Task Force, supra* note 180, at 1733.
[228] *Id.* at 1736.

Even when breed-specific bans have been imposed, those bans have not produced significant reductions in dog bites. For example, the State of Ohio—which had been the only state to enact a statewide ban on Pit bulls—repealed that legislation in February 2013 due to its ineffectiveness in reducing dog-bite-related injuries.[229] In Maryland, a 2003 task force recommended that Prince George's County repeal its Pit bull ban because it was costly and provided little public safety benefit.[230] Reports from Denver Colorado, Miami-Dade Florida, and Omaha Nebraska tell a similar story.[231] Since enacting a breed ban in 1989, Denver continually reports a higher rate of hospitalizations from dog-bite-related injuries than other breed-neutral Colorado counties.[232] In fact, some cities that have never enacted breed-specific legislation have been able to drastically reduce the number of reported dog bites.[233] And despite enactment of BSL in some areas, the nationwide total number of deaths caused by dog bites varies little from year to year.[234]

Other countries that have implemented breed bans have also not seen decreases in injuries from dog bites. The United Kingdom's ban on the sale and breeding of Pit bulls has had no impact on the number of dog attacks reported.[235] Similarly, Spain, Italy, Great Britain, and the Netherlands have all reported that breed-specific regulations have not resulted in a reduction of dog bite incidents.[236] As a result, both Italy and the Netherlands have repealed their breed-specific regulations.[237] In Spain, an analysis

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[229] Richard Schimel, Tracey v. Solesky: *The Court of Appeals of Maryland Mounts the Pit-Bully Pulpit*, 46 MD. B.J. 58, 60 (Apr. 2013).
[230] *Id.* at 60–61.
[231] Patronek, *supra* note 38, at 388.
[232] *Denver's Breed-Specific Legislation: Brutal, Costly, and Ineffective,* NAT'L CANINE RES. COUNCIL (2013), http://www.animalfarmfoundation.org/files/Denver-BSL-Brutal-Costly-and-Ineffective_Aug_2013.pdf.
[233] *Miami-Dade County: Two Decades of Breed-Specific Legislation has Produced No Positive Results*, NAT'L CANINE RES. COUNCIL. (2013) (finding that from 1971-2007, Minneapolis saw an 86% reduction in reported dog bites, from 1,692 to 239, and New York City saw a 90% reduction, from 37,488 to 3,776).
[234] Sacks, *supra* note 210, at 839.
[235] Hussain, *supra* note 35, at 2873.
[236] Patronek, *supra* note 38, at 388.
[237] *Dutch Government to Lift 25-Year Ban on Pit Bulls*, ASSOC. PRESS (June 10, 2008), http://www.foxnews.com/story/2008/06/09/netherlands-

of medically attended dog bites from the four years immediately preceding and the four years immediately following the adoption of BSL did not indicate any changes in frequency of bites.[238] In Ontario, after the enactment of a breed ban in 2005, the Toronto Humane Society surveyed various health departments and reported that the ban had not produced a reduction in dog bites.[239] Similarly, after the city of Winnipeg, Manitoba banned one type of dog, reports of dog bites actually increased, just involving other breeds of dogs.[240] Accordingly, a global review of the data suggests that BSL is not an effective way to reduce human injuries from dog bites.

D. Breed Specific Legislation is an Inefficient Way to Spend Government Funds

Besides being ineffective, BSL is an inefficient way to spend limited government resources. For example, in 2003, Prince George's County, Maryland created a task force to evaluate the effectiveness of its vicious animal legislation, including its Pit bull ban, and make recommendations for improvements.[241] The task force recommended repealing the ban and strengthening the city's dangerous dog laws.[242] The recommendations were based, in part, on the following cost concerns: (i) the cost of maintaining a single Pit bull throughout the entire determination and appeals process was approximately $68,000; (ii) fees from Pit bull registrations over a two-year period generated only $35,000 while the cost to the Animal Management Division for maintenance of Pit bulls over the same period was about $560,000; and (iii) the costs to the city were probably even higher

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will-lift-ban-on-pit-bulls-saying-no-decrease-in-bites.html; *Italy Scraps Dangerous Dog Blacklist*, AGENZIA NAZIONALE STAMPA ASSOCIATA (March 3, 2009).

[238] Belen Rosado et al., *Spanish Dangerous Animals Act: Effect on the Epidemiology of Dog Bites*, 2 J. VETERINARY BEHAV. 166, 166–74 (2007).

[239] Patronek, *supra* note 38, at 388.

[240] *Id.*

[241] *Report of the Vicious Animal Legislation Task Force*, VICIOUS ANIMAL LEGISLATION TASK FORCE (2003) (Presented to Prince George's County Council, July 2003), http://www.animalfarmfoundation.org/files/Report_of_the_Vicious_Animal_Legislation_-_Prince_Georges_County_-_2003.pdf.

[242] *Id.* at 14.

than reported because the reported figures did not include expenditures such as payroll, cross-agency costs or utilities.[243] The County, however, decided against following the recommendation of the task force and so the Prince George's County Pit bull ban remains in effect.

One organization—Best Friends Animal Society—has developed a formula to predict the annual costs of enforcing a breed ban at the city, county, and state level, including costs for animal control enforcement, kenneling, euthanasia, and defending litigation.[244] A state as large as California, for example, would have to spend close to $66 million to implement and enforce a statewide breed ban.[245] Considering that studies have shown that breed bans do not reduce injuries from dog bites, a return-on-investment analysis reveals that this would not be money well spent.[246]

E. Expert and Veterinary Support for BSL is Nearly Non-Existent

Many states have recognized that the costs of breed-specific legislation greatly outweigh any potential benefits. Indeed, twelve states have enacted legislation that specifically *prohibits* breed-specific regulations or bans.[247] Furthermore, on August 6 2012, the American Bar Association ("ABA") House of Delegates approved a resolution urging all state and local legislative bodies to repeal breed-specific provisions.[248] The

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[243] *Id.* at 7.
[244] *Best Friends Breed-Discriminatory Legislation (BDL/BSL) Fiscal Impact*, BEST FRIENDS ANIMAL SOC'Y (2012), http://bestfriends.guerrillaeconomics.net/.
[245] *Id.*
[246] *See supra* Part III.C.
[247] Schimel, *supra* note 229, at 61 (those states are Colorado, Florida, Illinois, Maine, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Texas, Washington, and Virginia).
[248] *Report to the House of Delegates 100,* A.B.A. (2012), http://www.abanow.org/2012/06/2012am100/ (last visited Apr. 20, 2015) ("[T]he ABA urges all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus

White House also opposes BSL; it released a statement saying, "research shows that bans on certain types of dogs are largely ineffective and often a waste of public resources."[249] In addition, a significant collection of organizations publicly oppose breed-specific legislation including the: AKC,[250] American Society for the Prevention of Cruelty to Animals ("ASPCA"),[251] AVMA,[252] Animal Farm Foundation,[253] Association of Pet Dog Trainers ("APDT"),[254]

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on the behavior of both dog owners and dogs, and to repeal any breed discriminatory or breed specific provisions.").

[249] *Breed-Specific Legislation Is a Bad Idea*, WE THE PEOPLE PETITION TO THE FED. GOV'T (DEC. 19, 2012), https://petitions.whitehouse.gov/petition/ban-and-outlaw-breed-specific-legislation-bsl-united-states-america-federal-level-0.

[250] *Canine Legislation Position Statements 7,* AM. KENNEL CLUB (2008), http://www.akc.org/pdfs/canine_legislation/PBLEG2.pdf (last visited Apr. 20, 2015) ("The AKC supports reasonable, enforceable, non-discriminatory laws to govern the ownership of dogs. The AKC strongly opposes any legislation that determines a dog to be "dangerous" based on specific breeds or phenotypic classes of dogs.").

[251] *Position Statement on Breed-Specific Legislation,* AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, http://www.aspca.org/about-us/policy-positions/breed-specific-bans.aspx (last visited Apr. 20, 2015) ("[T]he ASPCA opposes laws that ban specific breeds of dogs or that discriminate against particular breeds. These laws unfairly discriminate against responsible dog guardians based solely on their choice of breed.").

[252] *Dangerous Animal Legislation*, AM. VETERINARY MED. ASS'N, http://www.avma.org/issues/policy/dangerous_animal_legislation.asp (last visited Apr. 20, 2015) ("The AVMA supports dangerous animal legislation by state, county, or municipal governments provided that legislation does not refer to specific breeds or classes of animals.").

[253] *Resources for Community Activists: Breed Specific Legislation,* ANIMAL FARM FOUND., INC., http://www.animalfarmfoundation.org/pages/Breed-Specific-Legislation (last visited Apr. 20, 2015) ("Experts have proven that Breed Specific Legislation does not make communities safer for people or pets. It is costly, ineffective, and undermines the human-canine bond. There is no evidence to support breed specific legislation.").

[254] *Breed Specific Legislation Association of Pet Dog Trainers Position Statement*, ASS'N OF PET DOG TRAINERS (2001), http://www.apdt.com/about/ps/breed_specific_legis.aspx (last visited Apr. 20, 2015) ("The APDT supports the adoption or enforcement of a program for the control of potentially dangerous or vicious dogs that is fair, non-discriminatory and addresses dogs that are shown to be

Best Friends Animal Society,[255] CDC,[256] Humane Society of the United States ("HSUS"),[257] Maryland Veterinary Medical Association ("MVMA"),[258] National Animal Care and Control Association,[259] National Canine Research Council,[260] UKC,[261] and

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dangerous by their actions. The APDT opposes any law that deems a dog as dangerous or vicious based on appearance, breed or phenotype.").

[255] *Pit Bull Terrier Initiatives*, BEST FRIENDS ANIMAL SOC'Y, www.bestfriends.org (last visited Apr. 20, 2015) ("Best Friends opposes breed-discriminatory legislation (also called breed-specific legislation, BSL), which arbitrarily targets particular breeds. Breed-discriminatory laws are not only ineffective at improving community safety, they are extremely expensive to enforce and deplete needed resources from animal control.").

[256] *Injury Prevention and Control: Home & Recreational Safety Dog Bite Fact Sheet*, CENTERS FOR DISEASE CONTROL & PREVENTION (2008), http://www.cdc.gov/HomeandRecreationalSafety/Dog-Bites/dogbite-factsheet.html (last visited Apr. 20, 2015) ("There is currently no accurate way to identify the number of dogs of a particular breed, and consequently no measure to determine which breeds are more likely to bite or kill. Many practical alternatives to breed-specific policies exist and hold promise for preventing dog bites.").

[257] *Dogs and Breed Specific Legislation*, HUMANE SOC'Y OF THE U.S. (2010), http://www.humanesociety.org/animals/dogs/facts/statement_dangerous_dogs_breed_specific_legislation.html (last visited Apr. 20, 2015) ("The HSUS opposes legislation aimed at eradicating or strictly regulating dogs based solely on their breed for a number of reasons.... Legislation aimed at punishing the owner of the dog rather than punishing the dog is far more effective in reducing the number of dog bites and attacks. Well enforced, non-breed-specific laws offer an effective and fair solution to the problem of dangerous dogs in all communities.").

[258] *Position Statement*, MD. VETERINARY MED. ASS'N (2012), http://www.mdvma.org/newsletter/2012/fall/legislative.htm (last visited Apr. 20, 2015) ("The MVMA encourages and supports ordinances that promote responsible pet ownership and at the same time protects the public from dangerous and vicious animals. We oppose legislation that restricts or prohibits certain breeds of dogs, since we do not believe this is a workable solution.").

[259] *NACA Guidelines*, NAT'L ANIMAL CARE AND CONTROL ASS'N (2014), http://c.ymcdn.com/sites/www.nacanet.org/resource/resmgr/Docs/NACA_Guidelines.pdf?hhSearchTerms=%22breed+and+specific+and+legislation%22 (last visited Apr. 20, 2015) ("Dangerous and/or vicious animals should be labeled as such as a result of their actions or behavior and not because of their breed.").

the United States Department of Justice (DOJ).[262] Taken collectively, the opinions of these organizations highlight what the current body of research indicates about BSL: it is an irrational, ineffective, and inefficient approach to combating injuries from dog bites.[263]

IV. RECOMMENDATIONS

While studies have shown that dog-bite-related fatalities have remained relatively stable over the past few decades, the ubiquity of dogs in our society leads to the inevitable reality that dogs will occasionally bite people. As the previous Part emphasized, BSL is not an effective solution to the dog bite problem. The question remains, however, what else can be done to improve public safety and decrease the overall incidents of dog-bite-related injuries? Part IV, while recognizing that there is not a foolproof solution, proposes techniques that can be implemented that focus more on dog owners and less on the dogs themselves.

Nearly all authorities agree that simply encouraging the basics of responsible dog ownership, such as educating people in safe husbandry practices, can lead to dramatic decreases in

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[260] *Breed Specific Legislation FAQ*, NAT'L CANINE RES. COUNCIL, http://nationalcanineresearchcouncil.com/dog-legislation/breed-specific-legislation-bsl-faq/ (last visited Apr. 20, 2015) ("There is no scientifically valid evidence and no reasonable argument to support breed-specific legislation.").

[261] *UKC Position on Breed Specific Legislation*, UNITED KENNEL CLUB, http://www.ukcdogs.com/Web.nsf/WebPages/Library/UKCBSL (last visited Apr. 20, 2015) ("[The] UKC believes that breed specific legislation is a poor choice for communities interested in protecting citizens from dog bites and attack….singling out a breed to attach blame does not work to decrease dog attacks.").

[262] *Civil Rights Division Revised ADA Regulations Implementing Title II and Title III*, U.S. DEP'T OF JUST. (2010), http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html (last visited Apr. 20, 2015) ("The Department [of Justice] does not believe that it is either appropriate or consistent with the Americans with Disabilities Act (ADA) to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks….").

[263] Swann, *supra* note 51, at 859.

incidents of dog bites.[264] If communities decide to pursue additional enforcement measures, legislation should target only people who willfully disregard public safety in the keeping of their dogs—almost certainly a small minority.[265] A reduction in dog bites can be accomplished by creating community-wide support for the most basic responsible behaviors including humane care (providing proper diet, veterinary care, socialization and training), humane custody (licensing and permanent identification) and humane control (following leash laws and not allowing dogs to become threats to the community).[266] In Calgary, Alberta, where such policies are practiced, even though the human population increased between 1985 and 2008, reported dog bites decreased from 621 in 1985 to nearly 200 in 2008.[267] This decrease was accomplished with the help of a dedicated agency that clearly identified acceptable behavior on the part of the dog, provided services to facilitate owner compliance, and reserved enforcement for those who failed to comply.[268] Proper enforcement of existing regulations will aid in reducing dog bites by keeping citizens aware of their responsibilities when it comes to pet ownership. The most direct approach is to stringently enforce leash laws. For example, a study of thirty-six Canadian cities found that the communities with the highest rates of ticketing for Animal Control violations—primarily leash law and confinement infractions—had the lowest rates of reported dog bites.[269]

Additionally, governmental efforts should focus on behavior rather than breed. The only programs with any evidence of preventing repeat bites are those that have imposed restrictions on individuals whose dogs had previously injured

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[264] Bradley, *supra* note 39, at 19–21.
[265] *Id.* at 21.
[266] *Id.*
[267] *The Responsible Pet Ownership Bylaw*, CITY OF CALGARY (2014), http://www.calgary.ca/CSPS/ABS/Pages/Animal-Services/Responsible-pet-ownership-bylaw.aspx.
[268] *Id.*
[269] N.M. Clarke, *A Survey of Urban Canadian Animal Control Practices: The Effect of Enforcement and Resourcing on the Reported Dog Bite Rate*, UNIV. BRIT. COLUM. (July 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3552590/.

others and then monitored the individuals for compliance.[270] In addition to improved effectiveness, this type of system is financially acceptable. If the 14,000 Animal Control officers nationwide were responsible for monitoring the estimated 337,000 serious injuries from dog bites each year, that would result in an average of 24 follow-up cases per officer; certainly an efficient use of resources.[271]

Allocating resources more efficiently will also allow additional funds to be apportioned to providing proper pet education to pet owners and guardians, as well as the public at large. By increasing awareness on how to interact with and respond to dogs, people will be able to better manage those interactions, alleviating some of the husbandry factors found to co-occur in dog bite related fatalities.[272] Proper pet education is particularly important for children. In fact, sixty-seven percent of injurious dog bites to children have been shown to be preventable by changing the child's or the caregiver's behavior in interacting with the dog.[273] A modest 30-minute lesson by a trained dog handler incorporated into a normal school day can dramatically reduce high-risk behaviors towards unfamiliar dogs in elementary and middle school children.[274] Individually, these recommendations might seem overly simplistic, but taken together, they can result in significant positive change.

V. CONCLUSION

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[270] M. Oswald, *Report on the Potentially Dangerous Dog Program: Multnomah County, Oregon*, 4 ANTHROZOOS 247, 247-54 (1991), http://www.tandfonline.com/doi/abs/10.2752/089279391787057099.

[271] Bradley, *supra* note 39, at 21.

[272] *Id.*

[273] A. Kahn et al., *Child Victims of Dog Bites Treated in Emergency Departments: A Prospective Survey*, 162 EUR. J. PEDIATRICS 254, 254-258 (Apr. 2003), http://link.springer.com/article/10.1007/s00431-002-1130-6?view=classic#/page-1.

[274] *See* S. Chapman et al., *Preventing Dog Bites in Children: Randomized Controlled Trial of an Educational Intervention*, 173 W. J. MED. 233, 233-234 (Oct. 2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071097/; F. Wilson et al., *Prevention of Dog Bites: Evaluation of a Brief Educational Intervention Program for Preschool Children*, 31 J. COMMUNITY PSYCHOL. 75, 75-86 (Jan. 2003).

It has been said that every dog has its day. Unfortunately for the Pit bull, that sentiment has not been true for many years. While there is little doubt that reducing human injuries from dog bites is an important problem that requires community attention, BSL is not the answer. Breed bans and breed-specific regulations represent ineffective and inefficient policies that perpetuate misinformation and stereotypes. Although breed-specific policies have been around for a long time, the tide seems to be turning as more communities are recognizing the pitfalls of BSL and are moving towards breed-neutral laws. By continuing to educate communities and legislators about the misconceptions of BSL, animal advocates and Pit bull lovers are beginning to see results. For the first time in decades, it's beginning to look like the Pit bull may finally have his day.

ETHICAL IMPLICATIONS OF REPRESENTING TRAUMATIC BRAIN INJURY CLIENTS IN THE PERSONAL INJURY LITIGATION PROCESS

By: Isabela Ferraz

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I. OVERVIEW OF TRAUMATIC BAIN INJURY: BRAIN DAMAGE IN THE LEGAL CONTEXT

During 2010, about 2.5 million emergency room visits, hospitalizations and deaths, in the United States alone, were associated with a traumatic brain injury (TBI).

[1] This figure does not include those that did not seek medical treatment for their injuries, which are most likely to occur from commonplace activities such as car accidents, falling, playing sports, as well as less common occurrences like being struck by an object or assaulted.[2] Media coverage has led to increased awareness of the potential risk for TBI, concussions or other serious head injuries associated with certain sports beginning with children's athletic programs all the way up to the National Football League (NFL). Individuals with a traumatic brain injury may suffer from the following physical, cognitive, and emotional impairments: problems with speech, hearing, memory, concentration, attention span, planning, judgment, and impulse or emotional control.[3] All of these symptoms affect even the most routine aspects of daily life, let alone the ability to engage in legal proceedings. Personal injury litigation deals with the legal repercussions of the astounding number of TBI incidents occurring each day. The process becomes more nuanced with the added implications of representing a brain-damaged client suffering from the impairments mentioned. These nuances are largely ethical, and this paper aims to identify and discuss them, before ultimately providing guidance on how to proceed.

Attorneys are fiduciaries and must behave in accordance with their client's best interest. Even when a breach of this duty does not result in actual harm, but was unethical, an attorney may be forced to forfeit fees due to his or her unethical behavior.[4] The increased vulnerability of a potentially incapacitated client means

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[1] CENTERS FOR DISEASE CONTROL AND PREVENTION, *available at* http://www.cdc.gov/traumaticbraininjury (last visited Dec. 10, 2014).
[2] BRAIN INJURY ASSOCIATION OF AMERICA, *available at* http://www.biausa.org (last visited Dec. 10, 2014).
[3] *Id*.
[4] *Burrow v. Arce*, 997 S.W.2d 229, 231 (1999).

that all interactions can be scrutinized after the fact, despite the negative effects on attorney-client privilege. The American legal community must balance the desire for confidentiality and sanctity of attorney-client relationships with the public interest in protecting the mentally disabled. This balancing is particularly relevant in cases involving "mild" TBI, which represents 75% of total TBI cases.[5] This is because of the competing public interest that actually opposes protective measures for most TBI clients (that would also protect the attorney) in an ironic attempt to protect those with limited capacity by ensuring they are given the same legal rights and treatment. Therefore, lawyers considering personal injury litigation, and TBI in particular, should be aware of the increased responsibility and preventative measures available in order to avoid a judicial finding that an attorney should have known their client lacked capacity.

An attorney acting as a representative of a client takes on several enumerated functions.[6] One such function, that of evaluator, takes a particularly significant place in the context of traumatic brain injury. In order to fulfill that role, a personal injury attorney must begin by evaluating the mental capacity of the potential client. This process of evaluation continues throughout their relationship using a transactional approach rather than a one-time determination. Each traumatic brain injury is unique, and attorneys should be mindful of certain prevalent facts that can interfere with an initial decision regarding mental capacity. First of all, the symptoms of a brain injury may not appear until days, weeks or months after an accident, and it is common for deficits to only become observable once the person engages in a certain task, whether a professional or personal part of their daily life.[7] Physicians may overlook the brain injury, especially if the accident involves other serious injuries that are more readily apparent and for which there are better tools for diagnosis. The injured may not even seek medical attention following an accident because they are not aware that their brain has been injured. People may outwardly appear to be fine, even though they are feeling or acting differently.[8]

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[5] BRAIN INJURY ASSOCIATION OF AMERICA, *supra* note 2.
[6] MODEL RULES OF PROF'L CONDUCT pmbl. (1983).
[7] CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1.
[8] *Id*.

As a result, it becomes the brain injury lawyer's job to collect all of the information necessary to evaluate the extent of the client's injuries and how to go about seeking personal and financial recovery for their client.[9] Determining whether a client is mentally competent at any given point is no small task given the highly fact dependent, and at times underdeveloped, standards for evaluating mental capacity present in varying areas of law. An attorney is "responsible for meeting all of the client's needs in connection with that client's representation," and a traumatic brain injury case involves many needs spread over areas of law beyond personal injury including: "full or limited guardianship, the creation of a trust, government benefit laws, medical consent, debtor/creditor relationships, landlord/tenant, and domestic problems."[10] Therefore, it is imperative for a lawyer to be familiar with the capacity standards and ethical considerations in each of these areas because "there is no single standard of competency."[11] Attorneys must also consider state bar rules and ethics opinions, which, like the Model Guardianship Act, do not base capacity on a medical diagnosis such as TBI.[12] Jurisdictions are more concerned with how a person actually functions in a given situation, which accommodates the complexities and various forms of a traumatic brain injury.

The American Bar Association (ABA) accounted for the ethical implications that mental impairment, possibly from a traumatic brain injury, causes in the attorney-client relationship in Rule 1.14: Client with Diminished Capacity.[13] The rule starts by mandating that the attorney attempt to maintain as normal a relationship with the client as reasonably possible, despite the mental impairment. The comments to Rule 1.14 define a "normal client-lawyer relationship" as one that is "based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[14] Part (a) of Rule 1.14 taken together with this definition suggests that the client's dignity is the most important factor, which could undermine the fact that the client lacks capacity. Comment 1

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[9] THE COCHRAN FIRM, *available at* http://www.cochranfirm.com (last visited Dec. 10, 2014).
[10] Dussault, *supra* note 7, at 9.
[11] *Id*. at 13.
[12] *Id*.
[13] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
[14] MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (1983).

further supports this interpretation through the diction and examples it provides. For example, the phrase "severely incapacitated" is used to describe a person that only *might* lack the power to make legally binding decisions.[15] This choice of words may lead personal injury attorneys to believe that their client, who only suffers from a "mild" brain injury, is therefore sufficiently capable of making legally binding decisions in line with the "normal" attorney-client relationship they are entitled to. Additionally, the majority of individuals with a TBI may appear and sound totally normal, even to physicians who do not specialize in neurological areas, and especially to an attorney who just met the client and has no basis of comparison from their personal history to indicate that the client is not who they used to be.[16] To further complicate matters, most clients "with brain injuries often deny the existence of their own problems" because it is hard to admit they experience "memory loss, impaired intelligence, and diminished capacity to handle jobs and everyday responsibilities."[17]

Rule 1.14 does not ever explicitly define legal capacity, although comment 1 states that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[18] Comment 2 defines legal capacity negatively by laying out what the individual would not be able to do, as opposed to what they may still be able to do under comment 1. It says that an incapacitated client is one who "lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation."[19] Thus, it is reasonable to conclude that as long as the client can undergo the described mental process, they are deemed fit to make legally binding decisions. However, the subsequent examples describe situations, child custody decisions and elder law, where the law has established a relatively low standard for mental competency that is easy to meet.[20] Even though a five year-olds opinion on whom they want to live with has legal weight, and an elderly person can

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[15] *Id.*
[16] Bruce H. Stern & Jerey A. Brown, LITIGATING BRAIN INJURIES § 3:1 (2014).
[17] *Id.*
[18] MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (1983).
[19] *Id.*
[20] *See id.*

easily make a binding and valid will, a forty-five year-old individual with a TBI is likely to have deficits well beyond the natural limitations associated with infancy or old age. Accordingly, the attorney should consider the factors listed in comment 6 in order to determine the extent of the client's diminished capacity. The text of comment 6 indicates that the standard for legal capacity is a balancing test, and the primary factors to be weighed are: "the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[21] The attorney should make it a priority during the initial meetings with the client to obtain and assess all of the medical information necessary to apply these factors, and is permitted to consult a diagnostician to do so.[22] Nevertheless, the attorney will need to go through the test every time a decision is required since the factors themselves are designed around a decisional context. As this balancing test is discretionary, the attorney should proceed with caution and be aware that with much discretion comes much responsibility.

There will be many decisions that the client needs to make throughout the typical litigation process, including contractual, medical, and testamentary, all of which have different standards of competency. However, if a normal attorney-client relationship is not possible and the "lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm," then they may have to engage in "protective measures" as discussed below.[23] Protective measures may result in the court appointing a guardian or legal representative to the client for the entire litigation process. However, the ABA Model Rules advise the attorney to take the least restrictive approach available to protect the client. If the client does not have any kind of guardian, the presumption of capacity under Rule 1.14 exists up to the point where mental impairment affects a particular decision or transaction.[24] "Impaired judgment, memory, impulse control and susceptibility to undue influence" are examples of side effects that

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[21] MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (1983).
[22] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
[23] *Id*. *See* also *infra* p. 20.
[24] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).

will interfere with a legal decision.[25] Side effects of a TBI are unpredictable and may evolve over time, such as during a lengthy litigation process. Therefore, the attorney should judiciously determine whether or not the client has capacity to make legally binding decisions from the outset, while continuing to verify along the way.

The Supreme Court of the United States outlined the test for mental competence to stand trial in the 1975 decision of *Drope v. Missouri*.[26] Although this test applied in the criminal context, the Court stipulated factors, which may also be applicable in the civil context. Typically, burdens of proof and legal standards are more stringent in criminal law because of the nature of what's at stake. Therefore, meeting this test serves as an effective precaution for determining whether a TBI client is able to stand trial, part of the objectives of representation. The attorney should use the following language as a guide: "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings."[27] Although the attorney should be able to determine whether their client could stand trial if necessary, it is significantly more likely that the case will never go to trial.[28]

The Restatement (Second) of Contracts addresses how mental illness relates to contractual capacity. Comment b recognizes not only that there are many types and degrees of mental incompetency, but also a range of causes such as "the effects of brain damage caused by accident."[29] The standard is designed to provide the needed flexibility for mental illness while balancing the public policy interest that favors enforceability of contracts when they are voluntary since they are made by the parties for the parties. Comment b demonstrates a relatively thorough understanding of the intricacies of brain injuries and mental impairment. It accounts for symptoms that may indicate mental illness, lack of capacity only for certain transactions,

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[25] Dussault, *supra* note 7, at 14.
[26] 420 U.S. 162.
[27] *Id.*
[28] James Hirby, *Pre-trial Settlement Percentage: Statistics on Personal Injury Settlements*, THE LAW DICTIONARY, *available at* http://thelawdictionary.org/article/pre-trial-settlement-percentage-statistics-on-personal-injury-settlements (last visited Dec. 10, 2014).
[29] RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

impulse control problems, and partial understanding.[30] If the client has diminished capacity, but is still able to make a decision, the attorney should consider if the result is "one which a reasonably competent person might have made."[31]

Since a personal injury attorney represents the brain-damaged client during the litigation process, the provisions of the rule concerning the other contracting party's knowledge of the mental illness are less relevant or applicable than the attorney's assessment. If the client is able "to understand in a reasonable manner the nature and consequences of the transaction,"[32] then the attorney may presume contractual capacity, but verify the presumption according to the reasonableness of the result. The Court of Appeals of New York ruled that the standard for contractual capacity used by the lower courts needed to be changed.[33] The old test was whether the person could understand the transaction, even if they did not grasp every aspect of it. The new standard became whether or not the person was capable of acting reasonably, with the factual evidence to be determined on a case-by-case basis. In that case, Mrs. Ortelere's psychiatrist testified that "she was incapable of making a voluntary 'rational' decision," regarding her application for retirement.[34] The testimony taken together with the circumstances giving rise to her retirement, a mental breakdown, was enough for the court to find that she acted the way she did as a result of serious mental illness.[35]

A recent judicial decision[36] has changed the 19th century common law, which said that contracts made by the mentally incompetent were void. The Court ruled that such contracts are now only voidable, and so the client would have the burden of establishing a lack of capacity.[37] This ruling emphasizes the need for attorneys to be diligent in their assessment of a client's mental capacity to enter into contracts such as power of attorney, fee agreements, and settlements.

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[30] *See id*.
[31] *Id*.
[32] *Id*.
[33] *See Ortelere v. Teachers' Ret. Bd. of N.Y.*, 250 N.E.2d 460, 461 (1969).
[34] *Id*.
[35] *Id*. at 463.
[36] *See Hernandez v. Banks*, 65 A.3d 59 (2013).
[37] *Id*. at 61.

In *Thompson v. Smith*, the court found that whether or not someone is capable of making a valid will is an assessment of mental standing at one point in time, when executing the document.[38] The person does not have to be of average intelligence, possess perfect memory, or a mind that is "wholly unimpaired by age, sickness or other infirmities."[39] They do have to know what they own and intend to give away, to whom they are giving it, and how. The court then uses what may be construed as contradictory (or at least confusing) language by saying a person is legally competent if he or she "generally, fully understands his purposes and the business he is engaged in, in so disposing of his property."[40] Does the testator have to only *generally* understand they are disposing of their property, or must they *fully* understand the matter and their reasons for doing so? The testator does not have to have an ordinary capacity to do business, but "the smallest capacity to understand what she was doing and to determine intelligently whether or not she would do it," is not enough. The judicial interpretation falls somewhere in between, but it is important to note that courts consider the right to personally decide what to do with one's property "is among the most prized privileges secured by the law."[41] This means there is hefty public policy in favor of facilitating and upholding wills, which will color the determination of testamentary capacity. Compared to other areas of law, this public policy is a stronger counter-weight on the opposing policy in favor of protecting the incapacitated. Therefore, in a TBI case, it is advisable for the attorney to use this standard as the bare minimum that the client must meet in order to find legal capacity.

The federal appellate court for the D.C. Circuit explained the standard for the mental capacity required to make health care decisions in a 2007 decision.[42] The court differentiated between finding someone to be mentally disabled and finding they lack capacity to make healthcare decisions.[43] The former does not necessarily determine the latter. The D.C. Code rule cited in the case provides more specificity and regulations on evaluating

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[38] 103 F.2d 936, 936 (D.C. 1939).
[39] *Id*. at 944.
[40] *Id*.
[41] *Id*.
[42] *Doe ex rel. Tarlow v. District of Columbia*, 489 F.3d 376.
[43] *Id*.

capacity than the ABA Model Rules, perhaps indicating that healthcare decisions require more protection than legal ones.[44] Still, attorneys with TBI clients should be aware that the legal proceedings involve healthcare, particularly assessing future needs and preparing for them, and so it would not be futile to examine this standard and apply it analogously. The safeguards include having two different physicians, one of which must be a psychiatrist (which could qualify as a diagnostician or expert that Rule 1.14 encourages attorneys to consult[45]), to certify the determination that mental capacity is lacking. In addition, the certification must be in writing and provide clear evidence (akin to the clear and convincing standard attorneys must meet) that the person does not meet one or more of the three elements that make up the standard. The first element requires the person to understand the choice to be made; they must have "sufficient mental capacity to appreciate the nature and implications of a health-care decision."[46] The second requires the person to consider the particular treatment or services in question and be able to "make a choice regarding the alternatives presented," which could mean no treatment at all.[47] The final element verifies the person's ability to communicate their decision unambiguously.[48] The ABA definition of informed consent that an attorney must obtain from a client for certain decisions regarding the representation closely parallels these elements. Rule 1.0(e) reads: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[49] The client must be able to communicate a clear decision, usually in writing, based on the lawyer's information and explanation, which under Rule 1.4 must be sufficient to allow the client to understand what the choice is about and what the alternatives are.[50] In the legal context, there is an emphasis on the efficacy of the attorney's communication, as opposed to just the client's abilities. This implies a duty to try to facilitate and

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[44] *See id*. at 378.
[45] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
[46] *Tarlow*, 489 F.3d at 378.
[47] *Id*.
[48] *Id*.
[49] MODEL RULES OF PROF'L CONDUCT r. 1.0 (1983).
[50] MODEL RULES OF PROF'L CONDUCT r. 1.4 (1983).

stimulate the client's understanding, and by extension their capacity to decide, that a physician may not have. The medical standard is not only in line with the legal considerations, but the three simple steps offer a handy checklist that gets to the bottom of the capacity issues. TBI attorneys may use it as a manageable tool for ethical decision-making throughout the representation.

II. ETHICAL IMPLICATIONS RAISED DURING STAGES OF PERSONAL INJURY LITIGATION INVOLVING A TRAUMATIC BRAIN INJURY

A. Taking on a New Case

The very first question an attorney must answer when approached by someone seeking representation in a personal injury lawsuit is: who exactly is the client? At the foundation of an attorney's compliance with each and every Model Rule of Professional Conduct is a "clear understanding and designation of exactly with whom the attorney/client relationship exists."[51] Rule 1.2(a) clearly specifies that the client is in charge and the lawyer shall abide by his or her decisions.[52] Rule 1.14 comment 2 serves as a reminder of common decency by spelling out that a client with diminished capacity deserves the same amount of attention and respect that an attorney is obligated to provide to all clients.[53] The drafters had to balance competing policy concerns in cases of individuals with diminished capacity. On one hand, they want to prevent lawyers from simply taking over and perhaps condescendingly believing that the client is wrong and so choosing to decide what is in the client's best interest. On the other hand, an individual may truly lack the cognitive functionality to make an informed decision, regardless of whether the attorney believes it is right or wrong.

In personal injury cases, it is not uncommon for an attorney to be approached by a family member or other interested party on behalf of the actual client. The family member may believe that they are in fact the client since their loved one has brain damage and is not willing or able to seek out legal representation on their own. The attorney may have duties beyond those to the actual

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[51] Dussault, *supra* note 7, at 4.

[52] MODEL RULES OF PROF'L CONDUCT r. 1.2 (1983).

[53] MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. (1983).

client if that client is the legal guardian of a minor or cognitively impaired unrepresented third party.[54] Policy considerations dictate the extension of an attorney's duties to this protected class of persons in order to prevent harm. The attorney is in the most advantageous position to bear the burden of identifying and protecting the rights of their client's ward. In *Trask v. Butler*, the court adopted a six-factored test to clarify when the attorney owes a duty to non-represented third parties.[55] This is not a universal test, but an example of what TBI attorneys should look out for. The threshold question is whether or not the transaction was intended to benefit the ward. If it was not, no further inquiry is required, but most guardianship transactions are about the wellbeing of the ward. Consequently, the extent to which it was intended to benefit the injured ward, and the following five factors have to be considered and balanced against each other: foreseeability of harm to the third party, degree of certainty that they were harmed, extent of the causal connection between the attorney's conduct and the harm, public policy of preventing future harm to the third party, and the potential chilling effect or undue burden on the legal profession if the attorney is found liable.[56] Only the court can adequately assess the final two factors because they are policy considerations, but the attorney can still analyze his or her actions in terms of the first four in order to substantiate any professional decisions regarding an act on behalf of a guardian client that could affect the ward.

However, if the attorney will be advocating for the individual who has suffered a traumatic brain injury, and not for a derivative claim such as loss of consortium, then that individual is the client for all intents and purposes. If the brain-injured person is not present with the family member during the initial contact with the attorney, Rule 7.3 prohibits an attorney from offering legal services by engaging in targeted communication with the brain-injured person.[57] The best alternative would be for the attorney to inform the family member of this rule and who the client legally would be, and then the family member can inform the brain-injured person and suggest he or she contact the attorney. The potential for abuse is a major policy concern emphasized in

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[54] Dussault, *supra* note 7, at 3.
[55] 872 P.2d 1080, 1080 (1994).
[56] *Id*. at 843.
[57] MODEL RULES OF PROF'L CONDUCT r. 7.3 cmt. (1983).

the comments to Rule 7.3.[58] The attorney should be wary of this concern throughout the retention process. It is safe to assume that these concerns become more significant in personal injury cases where the solicited person has suffered a traumatic brain injury:

> The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest….The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.[59]

However, the ABA Model Rules do allow advertisements made to the general public, which is a reality of personal injury litigation.[60] In addition, the attorney is allowed to send information about their legal services as long as it does not involve real-time contact, i.e., by mail or email.[61] The Rule does not mention whether or not this method can be used to target a specific person, and explains that this method is allowed because "it [is] possible for the public to be informed" without being subjected to "persuasion that may overwhelm a person's judgment."[62] In sum, an attorney should avoid contacting a specific brain-injured person through any means, especially considering the information above noting the effects traumatic brain injury have on a person's emotional stability and judgment, which are the policy concerns explicitly highlighted in the comments to the ABA Model Rule on Solicitation of Clients.[63]

Identifying the client is essential not only so that the attorney knows who he or she must answer to, but also to avoid creating a concurrent conflict of interest. A concurrent conflict of interest may arise under Rule 1.7 if the attorney's obligations to another client or third person materially interfere with the representation of a client.[64] A family member or other interested third party may

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[58] *See id*.
[59] *Id*.
[60] *Id*. at cmt. 1.
[61] *Id.* at cmt. 3.
[62] *Id*.
[63] MODEL RULES OF PROF'L CONDUCT r. 7.3 (1983).
[64] MODEL RULES OF PROF'L CONDUCT r. 1.7 (1983).

consult with the attorney and ask for certain promises with regard to the representation of the injured person, such as which damages to seek, that may adversely and materially affect the client and the attorney's duty to advocate for that client. The family member may also seek to be represented by the same attorney for a claim of infliction of emotional distress or loss of consortium arising causally out of the same facts leading to the injured person's claim. There may be policy limits on the amount of damages that can be awarded for a personal injury, thus taking on the family member as a client could materially limit the lawyer's representation of the injured person. Rule 1.7(b) does allow a lawyer to proceed with the representation of a family member if: the lawyer reasonably believes he or she can properly represent both clients, it is not illegal, the clients are not opponents in the same proceeding, and "each affected client gives informed consent, confirmed in writing."[65] That last element is the reason an attorney should simply try to avoid representing anyone other than the injured person in a given case. The attorney would be required to evaluate the capacity of each client to provide informed consent, and possibly have an independent attorney determine that they would not advise the client not to consent under the circumstances.[66] It is likely that the brain-damaged client would not be able to provide informed consent that is legally sufficient to satisfy this requirement.[67]

An attorney should utilize an engagement letter as a tool to clarify who exactly is the client, the attorney's duties to that individual and any other parties, and the scope of the representation.[68] This signed letter protects the attorney from any questions or doubts about the attorney-client relationship that the client, family members, or the courts may have. The attorney must also explain each term of the engagement letter with the client to ensure there is a mutual understanding about the overall details and goals of the representation ahead of time.[69] Attorneys mistakenly believe that their retainer agreement functions as a unilateral delimitation of the scope of

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[65] *Id.*
[66] Dussault, *supra* note 7, at 12.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 10.

representation to the immediate claim.[70] Rule 1.2(c) requires any limitation of scope to be "reasonable under the circumstances," and the client must give "informed consent."[71] Informed consent can be achieved through the inclusion of a waiver clause in the signed and reviewed engagement letter specifying the limited scope. However, the client must have the legal capacity to make a knowing and intelligent waiver for the clause to be considered valid.[72] Without a limitation on the scope, the courts may find the attorney to be fully retained for the life of the matter in order to protect the client, especially if they lack capacity or have an ongoing injurious condition.[73]

The fee agreement may be separate from the engagement letter, but it should correspond to the scope and obligations of the attorney to the client and any other parties. In personal injury cases, there are many financial complexities that the attorney is responsible for, including the resolution of all state and federal statutory liens, rights of subrogation, and reimbursement claims. This involves ensuring certain proceeds from an award or settlement are paid to the appropriate third parties, usually health insurance entities. The settlement of these debts may be contrary to the client's wishes for the expenditure of their monetary compensation. Regardless, compliance with the applicable laws trumps client preference.[74] As one can imagine, clients are not thrilled about this, especially if they are suffering from emotional or behavioral difficulties such as mood swings or extreme impulsivity as a result of their brain injury. It becomes vital for the attorney to inform them of these obligations early on so there are no surprises later. While Rule 1.5(c) grants attorneys the right to arrange for contingency-based compensation, any fee agreement is a contract between the client and the lawyer.[75] This means the client must have contractual competency for the written and signed contingent-fee agreement to be enforced. The attorney must take on this role of financial planner for their client, especially if the client does not have a guardian who typically manages the settlement. The attorney should explain the

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[70] *Id.* at 4-5.
[71] MODEL RULES OF PROF'L CONDUCT r. 1.2 (1983).
[72] Dussault, *supra* note 7, at 10.
[73] *Id.*
[74] *Id.*
[75] MODEL RULES OF PROF'L CONDUCT r. 1.5 (1983).

process of compliance with these third-party payments, and include a detailed provision in the written fee agreement. The attorney can incur personal financial liability for significantly more than the amount previously owed if these third-party rights are not handled properly throughout litigation, beginning with reporting the pending lawsuit all the way to disbursement of the funds.

Before preparing a fee agreement, the attorney should find out who has provided the client's health care and related services since the traumatic brain injury occurred, and whether or not the client is a Medicare beneficiary. A client under social security disability is automatically eligible for Medicare, so it is important to be thorough and understand the fundamentals of healthcare lien and Medicare compliance. Granted, most personal injury attorneys aren't also experts in this area of law. Given the complexities of the federal and state statutory regimes, and the severity of the penalties for improper compliance, it has become customary for personal injury attorneys to outsource this portion of the resolution process to either settlement consultant attorneys or lien resolution companies such as Garretson Resolution Group. It is also ethical to charge the client for these services as part of litigation costs, so long as the amount charged is reasonable and agreed upon in advance in a valid fee agreement. Comments to Rule 1.5 state that it is necessary to ensure the client understands all the factors that are directly involved in the computation of the fee.[76] The ABA Ethics Committee warns that it is generally unethical to alter a fee agreement later in the litigation process, unless there is an unanticipated reason for modification.[77] Additionally, it is considered reasonable for a client to infer and anticipate that settlement costs like lien resolution and Medicare compliance services are included in the contingency fee if they were not specifically added and agreed upon.[78] In such a case, the personal injury attorney would be responsible for payment.

B. Initial Proceedings

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[76] MODEL RULES OF PROF'L CONDUCT r. 1.5 (1983).
[77] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 458 (2011).
[78] Dussault, *supra* note 7, at 9.

Rule 1.4 sets certain communication standards that the attorney must meet, and, as discussed above, an essential element of a client's legal capacity is the ability to make an informed decision based on those communications.[79] When the client has suffered a traumatic brain injury, the attorney must be extra careful to comply with the requirement to "explain a matter to the extent reasonably necessary," since symptoms of the injuries may affect the client's memory, concentration, and reasoning abilities.[80] Possible accommodations will depend on the client, but could include shorter meetings, repetition of important points, written explanations, having a family member participate, and visual aids. The need to have a third-party present during meetings with the client may arise in order to put the client at ease, aid in explanation, and remind the client about relevant information after the meeting has ended. Generally, there is no exception to the rule of privilege when dealing with an incapacitated client, and all communication done in the presence of a third person is no longer confidential.[81] Since the third person or the attorney may be asked to testify about the communication, TBI attorneys should weigh this concern against the benefits of having a third-party present. The attorney must be patient and anticipate behavioral impairments from the injury affecting the client's punctuality, emotional reactions, and attention span. "Adequacy of communication depends in part on the kind of advice or assistance that is involved," so the attorney is urged to adapt in order to suit each client's specific needs, including adjusting methods of informing and consulting with the client to account for diminished capacity.[82]

In addition, the attorney may have to take steps beyond what they can personally do to accommodate the cognitively impaired client. Rule 1.14(b) gives lawyers permission to pursue protective measures, including the appointment of a guardian, particularly when the injury infiltrates the client's life and legal proceedings to such an extent that the client is likely to be harmed by the inability to act in his or her own interest.[83] Federal Rule of Civil

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[79] MODEL RULES OF PROF'L CONDUCT r. 1.4 (1983).

[80] *Id*.

[81] *United States v. United Shoe Mach. Corp*, 89 F.Supp. 357, 362 (D. Mass. 1950).

[82] MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5-6 (1983).

[83] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).

Procedure 17(c) is another recourse that provides authority for the court to engage in protective measures when a party to litigation is unable to act in furtherance of their own interests.[84] There is a strategic advantage for the plaintiff's case to have a court-appointed guardian as the protective measure taken: the judge will have already concluded that the plaintiff is injured and incapacitated and the guardian can serve as a witness.[85] However, the ABA, and courts more generally, have been very clear about preferring, and possibly requiring, implementation of the least restrictive measure appropriate in the case, and a guardian is as restrictive as it gets. Approved alternatives include:

> involvement of other family members who are concerned about the client's well-being, use of a durable power of attorney or a revocable trust where a client of impaired capacity has the capacity to execute such a document, and referral to support groups or social services that could enhance the client's capacities or ameliorate the feared harm.[86]

Thus, it is not enough for a lawyer to believe that the client's decisions are "ill-considered," because perceived errors in judgment do not necessarily mean it is not in the client's own interest.[87] In other words, the test is not whether the client actually acts in their "best interest," but whether they are capable of doing so. Under Rule 2.1, an appropriate response to a perceived lack of judgment would be for the lawyer to assume his or her role as an advisor and offer a "candid assessment of the client's conduct and its possible consequences," while suggesting alternatives.[88] On the other hand, if the attorney has an existing longstanding relationship with the client and knows they are not acting in their best interest, they may seek to appoint a guardian even if the attorney is not presently engaged in specific legal work on behalf of the client.[89] The attorney may consult the client's family members to aid in this decision so as to avoid overstepping

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[84] Fed. R. Civ. P. 17(c).
[85] Dussault, *supra* note 7, at 15.
[86] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[87] *Id.*
[88] MODEL RULES OF PROF'L CONDUCT r. 2.1 (1983).
[89] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).

in terms of control. Only observations about the client's behavior needed to assess capacity and determine whether or not to seek appointment of a guardian may be revealed.[90]

The power to appoint a guardian is merely permissive, not mandatory, so it is acceptable for an incapacitated person not to have a guardian. If the lawyer "reasonably determines" that the client is incapable of handling his or her own affairs, they *may* seek to have a guardian appointed.[91] A client's disabilities vary when it comes to decision-making, and jurisdictions have recognized that an individual may be capable of deciding they want to hire a lawyer, but not of handling separate legal matters.[92] Assuming the client had the capacity to enter into a representation agreement establishing the principal/agent relationship, a lawyer's authority to act on behalf of the principal may be suspended or terminated in certain cases unless a protective measure is taken.[93] Therefore the decision to appoint a guardian must be made carefully. If the representation agreement was well executed, it likely included a durable power of attorney clause. This clause plans ahead for a client who may lose capacity, since the victim of a TBI may develop new symptoms. Frequently, a durable power of attorney makes the decision on whether to appoint a guardian obsolete, and may be grounds for dismissal of a petition for guardianship.[94] New York State has purposely implemented the durable power of attorney since 1975 for this exact reason.[95] It is preferable to a guardian because it is done before the client loses capacity, and the attorney and client together are able to decide the specific and general powers the lawyer will have without the need for the court to interfere and possibly appoint someone the client does not even know.

Scope of the representation, hopefully delineated at the time of hire, also plays a role in determining the kind of guardianship that would be appropriate. If it is limited to a single litigation matter, a *guardian ad litem* may be the least restrictive option. It is more likely that the scope will be broader in a TBI case because of all the needs involved, and so it is possible that the only way a

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[90] *Id.*
[91] *Id.*
[92] N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Ethics Op. 746 (2001).
[93] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[94] N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Ethics Op. 746 (2001).
[95] *Id.*

lawyer will be able "to fulfill his continuing responsibilities to the client" is through the "appointment of a general guardian or a guardianship over the client's property."[96] Still, a lawyer should seek to appoint a guardian for financial matters, leaving personal affairs up to the client whenever possible. In cases where the client does not have a health care proxy, appointment of a limited guardian to make healthcare decisions would be appropriate.[97] "Individuals [can] have some residual ability to function with some independence, but still require assistance in certain areas."[98]

New York's Mental Hygiene Law advocates for a customized and least-restrictive approach to guardian appointments. Each proceeding will involve an appointed "court evaluator" whose duties involve consulting and interviewing the alleged ward, as well as investigating and reporting on that person's condition.[99] The statute lists many other requirements the court evaluator must meet, including specific questions requiring detailed responses.[100] The standard for appointment the New York judicial system must abide by is equally, if not more, comprehensive.[101] The statute provides an additional test the court must use to determine legal capacity, and by extension if appointment of a guardian is legal. The lawyer should appropriate this test for his or her own evaluation of mental capacity to be completed before filing a petition with the court. The test must satisfy a *clear and convincing* standard of evidence, a step beyond mere preponderance of the evidence.[102] The court must clearly and convincingly find that due to functional limitations 1) "the person is unable to provide for personal needs and/or property management, and 2) the person cannot adequately understand and appreciate the nature and consequences of such inability."[103] The statute contains several facts that will substantiate an affirmative finding under both parts of the test including any mental illness, such as TBI and its prognosis.[104]

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[96] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[97] N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Ethics Op. 746 (2001).
[98] Dussault, *supra* note 7, at 13.
[99] N.Y. MENT HYG §81.09 (1993).
[100] *Id.* at § 81:09.
[101] *Id.* at § 81:02.
[102] *Id*.
[103] *Id*.
[104] *Id*.

Another step in the guardianship proceedings is deciding who the petitioner will be. The American Bar Association acknowledges that the personal injury attorney may feel uncomfortable petitioning the court for a guardian, particularly when the incapacitated client is not onboard.[105] Still, according to Rule 1.14(b), it is perfectly acceptable for a lawyer to petition the court under the extraordinary circumstances in which the provision to seek a guardian applies.[106] The ABA Ethics Committee confirms this interpretation, but proceeds to explicitly emphasize that the same attorney cannot under any circumstances represent a third party petitioner, which would violate Rule 1.7(a).[107] Deciding who will petition the court is an illustrative example on why an attorney needs to be well-informed on ethical matters because the rules vary according to jurisdiction. The New York State Bar picks up where the ABA left off by imposing restrictions on when the lawyer can petition the court for an appointment. First, the client must either be deemed incapacitated or give consent to having a guardian appointed.[108] Then, the lawyer must dually determine that there is no other less restrictive option, and no one else is available to serve as petitioner.[109] Finally, the lawyer cannot be a witness if the petition is contested.[110] California takes it a step further: "three California ethics opinions conclude that a lawyer must not petition the court to have a conservator appointed for the lawyer's client, because doing so would violate the lawyer's duties of confidentiality and loyalty."[111]

The lawyer must also decide whether to support or recommend a certain person as guardian. The lawyer may not be required to provide any input at all, but should do so if their unique position has allowed them to make a good faith determination that a certain guardian is also acting in the best interests of the client. A good faith determination should contain

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[105] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[106] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
[107] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[108] N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Ethics Op. 746 (2001).
[109] *Id.*
[110] *Id.*
[111] Legal Information Institute, Cornell University Law School, *California Legal Ethics*, *available at* http://www.law.cornell.edu/ethics/ca/narr/CA_NARR_1_14.HTM#1.14 (last visited Dec. 10, 2014).

a "reasonable assessment of the person or entity's fitness and qualifications."[112] Family members or other concerned parties may approach the attorney with offers to act as guardian, but an independent representative might be the best option to reduce the potential of exploitation and the attorney's responsibility to oversee the guardianship. Generally, the TBI attorney should only seek to be the appointed guardian "where immediate and irreparable harm will result from the slightest delay."[113] For example, if the client is going to be evicted the attorney may have to act quickly, but should then seek to have a formal guardian appointed as soon as possible.[114] Once the guardian is appointed, the TBI attorney may represent him or her so long as they are in compliance with their duty of candor toward the tribunal under Rule 3.3.[115] To comply, the attorney must disclose any expectation they have of representing a potential guardian, and as long as this self-interest is disclosed, the attorney can recommend or support the selection of that guardian without creating a conflict of interest in violation of Rule 1.7(b).[116] The attorney must also disclose any information they may have about the client's preference about the guardian.[117] The disclosure of confidential information normally covered under the attorney-client privilege and Rule 1.6 may be required, "but only to the extent reasonably necessary" to aid in the petition and guardianship proceedings.[118] Rule 1.14(c) allows an attorney to disclose the information only to those who need to know, such as the court, petitioner, or guardian.[119] Appointment of a guardian is seen as somewhat of a last resort because it may be expensive or traumatic and as such adverse to the client's best interest.[120] The decision to commence proceedings is therefore highly deferential to the attorney who has the competency and duty to act in furtherance of the client's best interests. Accordingly, guardianship may be sought at any time from before litigation begins, to the middle of litigation, and

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[112] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[113] *Id.*
[114] *Id.*
[115] *Id. See also* MODEL RULES OF PROF'L CONDUCT r. 3.3 (1983).
[116] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996). MODEL RULES OF PROF'L CONDUCT r. 1.7 (1983).
[117] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 404 (1996).
[118] *Id.*
[119] MODEL RULES OF PROF'L CONDUCT r. 1.14 (1983).
[120] Dussault, *supra* note 7, at 14.

all the way to the close of litigation as part of a settlement management device.

C. Settlement

"Ninety-five percent to ninety-six percent of personal injury cases are settled pretrial."[121] Given this statistic and the fact that settlement decisions are explicitly left up to the client,[122] TBI attorneys must be prepared to ethically ensure the settlement is in their client's best interest. Since the amount of damages sought depends on the severity of the brain injury, the attorney cannot argue for the fullest extent of damages obtainable while dismissing the corresponding consequences of the injury on the attorney-client relationship. In keeping with the client communication requirements, and to reduce liability exposure, the lawyer must meet with the client and explain the pros and cons of any available settlement that details what amount the client himself will receive. Preferably, this would include having the client sign a detailed acknowledgment form (especially if they choose not to accept the settlement). Under Rule 1.8(e), the attorney is only allowed to financially assist the client with an advance on litigation expenses.[123] Since the client may require essentials like living expenses, they may have taken out loans tied to their expected settlement compensation. It is the attorney's personal responsibility to ensure that any such creditors and all state and federal statutory liens are fully resolved before disbursing settlement funds to the client.[124] Hopefully the attorney did the work up front to inform the client of any legal obligations to satisfy outstanding debts in order to avoid competing claims to the settlement funds. Most likely the option to settle these matters and best fit the client's personal, financial, and ongoing healthcare needs is a customized structured settlement.

A TBI attorney probably does not have the competency level sufficing to independently handle the structured settlement details like lien resolutions, Medicare and Medicaid compliance, special needs trusts, and medical record review. The defendant's

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[121] Herby, *supra* note 29.
[122] MODEL RULES OF PROF'L CONDUCT r. 1.2 (1983).
[123] MODEL RULES OF PROF'L CONDUCT r. 1.8 (1983).
[124] Dussault, *supra* note 7, at 31.

insurance broker should also not be in charge of structuring the settlement because they cannot be trusted; the attorney should use an independent structured settlement broker. These are extremely important legal obligations that may cause devastating harm to the client if not fulfilled. For example, Medicare may refuse to pay future benefits if their interests, convoluted and numerous, are not taken into account at the time of settlement. The attorney may be released from personal liability if the amount set aside for Medicare turns out to be inaccurate by demonstrating a good faith attempt to get it right. However, the client will still be in trouble and without much-needed benefits. The client might end up losing Medicare eligibility after a settlement without the preparation of a supplemental trust. The attorney's first obligation is to notify Medicare that a case is pending if they discovered at the time of representation that the client was eligible. The attorney should find out the full amount of any liens and health plans by asking to see the actual contract language. The attorney must also report the settlement details, including attorney's fees. Before releasing any funds, the attorney should secure a final demand letter from Medicare that protects the attorney from being personally accused of underpaying. The client may also qualify for a Medicaid waiver program designed to integrate individuals like TBI clients into the community by providing homecare services that would otherwise occur within an institution, unfairly discriminating against them.[125] These are just some of the responsibilities involved in the settlement process, namely ones the attorney can handle alone. However, a structured settlement for a TBI client with lifelong deficits is a puzzle containing many more distinctively complex pieces that require outside assistance.

In anticipation of the financial complexities of a structured settlement, the attorney should have included a charge in the fee agreement to cover the outsourcing of all the specialized legal work. This is the first requirement an attorney must satisfy in order to allocate the cost to the client.[126] In order for the client to have made a valid informed decision at the time the retainer and fee agreements were executed, they must have had any potential liens on their property and the separate cost for the services of specialized attorneys, like the Garretson Resolution Group,

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[125] *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).
[126] N.Y. CNTY. LAWYERS' ASS'N., Ethics Op. 739 (2008).

explained to them.[127] While it is ethically and legally permissible to have the client bear the cost of these services, the TBI attorney shall be responsible, and can be held personally accountable, for the final product.[128] In order to assign the cost to the client, the attorney must satisfy three additional requirements: the actual charges are reasonable and do not contain any surcharge added by the attorney; the outsourcing must result in a net benefit to the client on each matter resolved (should not pay more than the matter costs to have it resolved); and the outsourcing "complies will all principles of substantive law," including contingency fee limitations.[129]

Estate of Treadwell v. Wright delivers an example of the financial liability that may befall an attorney for improper settlement management, while also serving as an example of the legal principles previously discussed concerning the extension of an attorney's duties to incapacitated third parties.[130] In that case, "the attorney was held financially responsible for [improperly] releasing personal injury settlement funds," to his client, a guardian.[131] The attorney is responsible for ensuring that the ward's funds are protected and properly managed, even when the ward is not the client. More recently, a TBI attorney in Virginia had disciplinary charges filed against him (and the details published and made publicly available), for behavior concerning an incapacitated client's settlement resolution.[132] The client had taken out a loan against the future settlement funds that became a lien five times the original amount, which the attorney claimed he would not have allowed had he been representing the client at the time.[133] The attorney withheld about twice the amount of the loan from the client, but the creditor did not accept it and filed a bar complaint without even attempting to resolve the matter with the attorney first.[134] State bars take a strong stance on an attorney's

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[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] 61 P.3d 1214 (2003).
[131] *Id*.
[132] Peter Vieth, *VSB Lawyers Drop Ethics Charges Over Unpaid Lien*, Va. Lawyers Wkly. (Nov. 7, 2011), *available at* http://valawyersweekly.com/2013/11/07/vsb-lawyers-drop-ethics-charges-over-unpaid-lien (last visited Dec. 10, 2014).
[133] *Id*.
[134] *Id*.

obligation to protect liens, and the lienholders will aggressively pursue their claims, possibly damaging an attorney's reputation in the process. The attorney *should not* attempt to resolve any settlement disputes between the client and third party interests on his or her own.[135] If for some reason, outside resolution services are not hired or are unable to resolve the matter, and the interested parties do not come to an agreement, the attorney *must* hold on to the funds and *may* ask that the court settle the dispute.[136] All settlements involving a disabled or incapacitated person are subject to court review,[137] so the attorney should make sure settlement management is ethical from beginning to end. A personal injury attorney may remain on file with the court as the attorney on record for the TBI client, incurring legal obligations well beyond the settlement of the case. While attorneys are discouraged from withdrawing while a legal matter is pending because it is likely to cause "material adverse effect" to the client, especially a brain-damaged one, they may do so once the litigation process is over.[138] In order to ethically end the relationship with the client, the attorney should file a Notice of Withdrawal with the court to give all interested parties (the client, government agencies, independent attorneys or guardians, the tribunal, and businesses) legally sufficient notice.[139]

III. CONCLUSION

Representing a person with less than full legal competency ultimately requires the attorney to assume additional roles beyond those listed in the Preamble of the ABA Model Rules of Professional Conduct. As the Alabama Bar so eloquently put it: "For every degree that [the lawyer] by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client...he raised by an equivalent degree the standard of conduct which the Court must require of him in his dealings with the client."[140] The financial liability an attorney assumes as a de facto insurer of the client's

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[135] MODEL RULES OF PROF'L CONDUCT r. 1.15 cmt. 4 (1983).
[136] MODEL RULES OF PROF'L CONDUCT r. 1.15(e) (1983).
[137] Dussault, *supra* note 7, at 11.
[138] MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (1983).
[139] Dussault, *supra* note 7, at 31.
[140] ALA. ETHICS COMM'N. Op. 03 (1995).

transactions is further evidence of the immense responsibility and assemblage of functions a personal injury lawyer takes on to ethically represent a client with a traumatic brain injury.[141] Further, an attorney must function as an advisor to the client, and the advice is not complete without discussing ethical implications. Rule 2.1 recognizes the impact of ethics on legal advice: "ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[142]

"The legal profession is largely self-governing…[and] carries with it special responsibilities… [such as] observance of the Rules of Professional Conduct. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."[143] Considering that enforcement of these Rules is primarily based on voluntary compliance, which promotes the coveted independence of the legal profession, it is important that attorneys actively seek to identify the unique ethical implications in each case they take on.[144] If, under Rule 2.1 an attorney must consider the ethical consequences of their client's behavior, it follows that the higher ethical standard attorneys are held to requires them to consider the consequences of their own behavior. The realm of traumatic brain injury litigation presents several ethical challenges that an attorney may need advice on. Accordingly, these challenges engender one final role an attorney must assume: educator. Navigating the Rules and successfully applying them to varying scenarios ensues from experience, and it is an experienced attorney's duty to help educate the next generation in furtherance of the overall integrity of the legal profession.[145]

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141 Dussault, *supra* note 7, at 4.
142 MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (1983).
143 MODEL RULES OF PROF'L CONDUCT pmbl. (1983).
144 *Id*.
145 MODEL CODE OF PROF'L RESPONSIBILITY Canon 6.2 (1980).

CREATING A NEW FOOD LABEL: UNDERSTANDING NEW CULTURAL EXPECTATIONS AND WHY FARMERS MUST INCREASE THE DAILY COMFORT LEVEL ("DCL") OF THEIR LIVESTOCK

By: Brad Landau

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I. INTRODUCTION

Even in 2016, farm animals, also known as livestock, [1] in the United States have little or no legal rights of their own.[2,3] When anyone walks into their local grocery store, a packaged meat section is certainly waiting down one of the aisles. The same is also true for dairy products, as well as packaged chicken, quail, duck, and the like of those poultry species' eggs.[4] Often, consumers ask themselves where the farm animal products[5] they consume come from,[6] but that is usually as far the

[1] This Note uses the term "livestock" to refer to all farm animals born, raised, and slaughtered for profit. *See* United States v. Park, 536 F.3d 1058, 1059–60 (9th Cir. 2008) (finding after an extensive discussion, "the term 'livestock' is ambiguous at best and much broader than the traditional categories of horses, cattle, sheep, and pigs.").

[2] Since the time of this writing, the US Court of Appeals for the Ninth Circuit and US District Court for the District of Utah have rendered final decisions in the California egg case and Utah Ag-Gag case, respectively.

[3] *See* Cheryl Leahy, *Large-Scale Farmed Animal Abuse And Neglect: Law And Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 75 (2011) ("There are no federal laws that govern the on-farm treatment of farmed animals. That is to say that no federal statutes or regulations govern the way that animals are treated from the time they are born or hatched to the time they are sent off to be slaughtered."); Sarah R. Haag*, FDA Industry Guidance Targeting Antibiotics Used In Livestock Will Not Result In Judicious Use Or Reduction In Antibiotic-Resistant Bacteria,* 26 FORDHAM ENVTL. LAW REV. 313, 316 (2015) ("Many [animal cruelty] statutes exempt acceptable animal husbandry practices or exclude farm animals from their purview.").

[4] *See, e.g.*, Lauren Salkeld, *A Visual Guide to Eggs*, EPICURIOUS, www.epicurious.com/archive/seasonalcooking/farmtotable/visual-guide-eggs (last visited Nov. 12, 2016).

[5] The term "farm animal products" is used throughout this Note to refer to all food items that contain, in large amounts and small traces, meat, poultry, and/or dairy from farm animals.

[6] *See* Emily Fox, *Our (Dis)Connection with Meat*, COMMONPLACE, http://www.mhlearningsolutions.com/commonplace/index.php?q=node/5950 (last visited Nov. 12, 2016) (explaining the disconnection between meat products and consumers who "tend not to know about the meat industry as a whole. Because the industry's primary focus is economic success, they maintain a level of secrecy from the American public.").

inquiry goes.[7] The answer to this question is that all farm animal products come from farms[8] and slaughterhouses[9] where farm animals are born, raised, and/or slaughtered for profit, in unfathomable numbers.[10]

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[7] *See* Kim Summer Moon Wilson, *Hidden Crimes, Voiceless Victims: Inside Factory Farming and Slaughterhouses*, MANATAKA AMERICAN INDIAN COUNCIL, http://www.manataka.org/page1434.html (last visited Nov. 12, 2016) (explaining that consumers "do not realize, and maybe do not want to know," about the inside operations of farms where farm animals are born, raised, and/or slaughtered for profit); *see also* William Berry, *The Big Lie*, PSYCHOLOGY TODAY (Mar. 23, 2014), https://www.psychologytoday.com/blog/the-second-noble-truth/201403/the-big-lie (quoting Friedrich Nietzsche whom said, "[s]ometimes people don't want to hear the truth because they don't want their illusions destroyed.").

[8] *See* 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (the United States Environmental Protection Agency ("EPA") estimates there to be "[n]ationally… 1.3 million farms with livestock.").

[9] I am well aware that many farms and slaughterhouses are often referred to as "factory farms." However, I will not refer to farms and slaughterhouses as factory farms in this Note because there are farmers in the United States whom do not enjoy the use of that term to describe their farm. *See* Wanda Patsche, *Let's Take the "Factory" Out of Factory Farms*, MINNESOTA FARM LIVING (June 2, 2014), http://www.mnfarmliving.com/2014/06/lets-take-factory-factory-farms.html (explaining that Minnesota City, Minnesota farmer Wanda Patsche is "most frustrated with hearing people say… Factory Farms" to describe her farm).

[10] *See generally*, *Poultry Slaughter 2015 Summary*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV. (Feb. 2016), http://usda.mannlib.cornell.edu/usda/current/PoulSlauSu/PoulSlauSu-02-25-2016.pdf (finding that in 2015, 8,822,695 chickens, 232,398 turkeys, and 27,749 ducks were killed for slaughter); *Livestock Slaughter 2015 Summary*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV. (Apr. 2016), http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-20-2016.pdf (finding that the total number of federally inspected slaughtered cattle, calves, hogs, sheep and lamb, goat, and bison in 2015 totals 145,849,000); *Chickens and Eggs 2015 Summary*, U.S. DEP't OF AGRIC. NAT'L AGRIC. STATISTICS SERV. (Feb. 2016), http://usda.mannlib.cornell.edu/usda/current/ChickEgg/ChickEgg-02-25-2016.pdf (finding that "Layer numbers during 2015 averaged 350 million."); *2012 Census of Agriculture*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV. (May 2014), www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Ch

In the United States, animal advocates,[11] consumers,[12] and younger generations[13] are creating and shaping a social reality of food consumption that is different from previous generations (i.e., new cultural expectations).[14] They expect farmers to (1) be transparent in their operations and say "no" to farm secrecy

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apter_1_US/usv1.pdf (finding that in 2012, 805,552 chukars, 13,281 emus, 106,462 geese, 460,932 guineas, 52,245 Hungarian partridge, 6,540 ostriches, 46,998 peacocks or peahens, 2,436,570 pheasants, 415,365 pigeons or squab, 6,304,956 quail, 1,424 rheas, 7,564,783 roosters, and 372,483 other poultry were raised as livestock in the United States); *Milk Production*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV. (July 21, 2016), http://www.usda.gov/nass/PUBS/TODAYRPT/mkpr0716.pdf (finding that in June 2016, "[t]he number of milk cows on farms in the 23 major States was 8.65 million."); *U.S. Dairy Goat Operations*, U.S. DEP'T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV. (Mar. 2012), www.aphis.usda.gov/animal_health/nahms/goats/downloads/goat09/Goat09_is_DairyGoatOps.pdf (finding that in 2011, "the number of milk goats [in the United States] increased to 360,000.").

[11] KATHY RUDY, LOVING ANIMALS: TOWARD A NEW ANIMAL ADVOCACY ix (2011) (explaining that the term "animal advocate" may refer to (1) those who "don't eat [farm animal products] or wear leather," (2) those who "rescue injured wildlife for rehabilitation and release them back into the wild," or (3) to those who just "really love animals and share a large portion of their lives with them.").

[12] The term "consumer" is used throughout this Note to refer to those who consume farm animal products.

[13] *See generally*, RUBY ROTH, THAT'S WHY WE DON'T EAT ANIMALS: A BOOK ABOUT VEGANS, VEGETARIANS, AND ALL LIVING THINGS (2009); Ruby Roth, *We Don't Eat Animals: Press & Praise*, wedonteatanimals.com/press-praise (last visited Apr. 26, 2016) (explaining that Ruby Roth's children books are "creating a new generation of children guided by justice, compassion, and empathy for those who have no voice," and that Ruby Roth's children books are "creat[ing] the much needed healers and leaders of tomorrow.").

[14] A "new culture expectation" is a branch of social change. In essence, the people of one generation are not likely to change their belief systems, but new generations are able to accept a social reality different from the one experienced by their parents. *See* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 973–74 (1997); Kerri Harper, *Stereotypes, Childcare, And Social Change: How The Failure To Provide Childcare Perpetuates The Public Perception of Welfare Mothers*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 387, 391–92 (2000/2001).

statutes (also known as Ag-Gag laws),[15] and (2) fade out certain animal husbandry practices.[16] Farmers and their industry representatives have already acknowledged that they are willing to proactively work towards new cultural expectations.[17] Therefore, the issue pertinent to this Note is whether a new term and phrase, and new third-party food label, can help farmers achieve the two new cultural expectations stated above.

Following this introduction, Part II gives birth to, and describes the benefits of, a neologism known as "Daily Comfort Level" or DCL.[18] Part III explains that even though many farmers and their national organizations state their best interest is to treat farm animals well they have been the subject of undercover video recordings of their farm operations. The industry response to these recordings has been the passage of the Ag-Gag law which is aimed at silencing constitutionally protected speech and is akin to the secrecy of a mafia family lifestyle. Part IV examines recent state laws that fade out certain animal husbandry practices. Lastly, Part V proposes a new third-party food label that can assist farmers to say "no" to Ag-Gag laws and fade out certain animal husbandry practices. By doing this, farmers who are beginning to fade out certain animal husbandry practices can build trust with consumers and avoid contractual cancellations with major food companies. The conclusion of this Note makes clear that consuming farm animal products is a desire for many that will not cease overnight, or in the foreseeable future, and therefore the paramount and realistic[19] idea is to increase the

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[15] For a discussion of Ag-Gag laws, see *infra* Part III.B.

[16] *See infra* Part IV (summarizing new state legislation passed by both voters and legislatures that fade out certain animal husbandry practices).

[17] *Animal abuse in the dairy industry is not tolerated*, DAIRY FARMERS OF AMERICA, www.dfamilk.com/animal-abuse-the-dairy-industry-not-tolerated (last visited Nov. 12, 2016) (explaining that farmers would like to have animal advocacy organizations "work with the industry to proactively address their concerns.").

[18] For more information about this new term and phrase, see *infra* Part II.A.

[19] Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 702 (1998) ("Being 'realistic' has superficial appeal because it seems easier than implementing a radical legal solution that goes against common sense.").

DCL for farm animals that are born, raised, and/or slaughtered at the farm.

II. NEW CULTURAL EXPECTATIONS TO KNOW HOW FARM ANIMALS ARE TREATED WHILE BORN, RAISED, AND SLAUGHTERED

This Part introduces a new term and phrase that communicates to consumers the idea of (1) farmers saying "no" to Ag-Gag laws that bring the farming profession into disrepute, bad taste, and reflects unfavorably on other farmers, and (2) farmers fading out certain animal husbandry practices. While there may be upfront expenses associated with fading out certain animal husbandry practices, the favorable results far outweigh these costs.

A. The Necessity Of Coining A New Term and Phrase: Daily Comfort Level ("DCL")

The purpose of coining a new phrase, or a neologism, is to assist people toward communicating efficiently with one another.[20] Neologisms expand vocabulary, expand language, and expand the mind's capacity to represent the world.[21] Neologisms are important and necessary in a rapidly changing world.[22] For example, Donald Watson, founder of the Vegan Society, coined the term "vegan" in 1944 to refer to individuals who abstain from the consumption and use of animal products.[23] The rise of popularity of veganism to the current 2.5 percent, or 8 million Americans are

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[20] *Neologism*, MERRIAM-WESBTER, http://www.merriam-webster.com/dictionary/neologism (last visited Nov. 12, 2016) ("a new word or expression or a new meaning of a word.").

[21] Rita Gray et al., *Neoport*, www.soc.hawaii.edu/leon/409af2008/gray/gray-report1.htm (last visited Nov. 12, 2016).

[22] Becky Sweat, *How Can We Cope in a World of Rapid Change?,* UNITED CHURCH OF GOD (Aug. 1, 2010), www.ucg.org/the-good-news/how-can-we-cope-in-a-world-of-rapid-change.

[23] Gary L. Francione, *A Moment of Silence for Donald Watson, Founder of The Vegan Society*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (July 1, 2014), http://www.abolitionistapproach.com/moment-silence-donald-watson-founder-vegan-society/#.VyAByvkrLb2.

now eating vegan diets was unfathomable 70 years ago.[24] The first all-vegan primary and secondary school became a reality in California this past fall 2015.[25]

The neologism brought forth in this Note requires some background to understand why it is needed. First, eight states[26] have statutes criminalizing or prohibiting activities commonly employed by animal advocates that go undercover and investigate, videotape, and expose the true comfort of farm animals.[27] While these state statutes have individual names of their own, they are commonly referred to as "Ag-Gag laws."[28] Ag-Gag laws vary from state to state in terms of breadth, strength, and scope. [29] One Ag-Gag law has already been held

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[24] Trupti Rami, *Veganism in Seven Decades*, N.Y. MAG.COM (Jan 12, 2014), nymag.com/news/intelligencer/vegan-celebrities-2014-1/?utm_content=bufferdf47b&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

[25] Joseph Erbentraut, *America Is About To Get Its First All-Vegan School Cafeteria For Kids*, HUFFINGTON POST (Mar. 5, 2015, 1:41 PM), http://www.huffingtonpost.com/2015/03/05/muse-school-vegan-cafeteria_n_6802848.html.

[26] These eight states are Utah, North Dakota, Kansas, Montana, Iowa, South Carolina, Missouri, and North Carolina. *See* UTAH CODE ANN. § 76-6-112 *et seq.* (West 2016); N.D. CENT. CODE ANN. § 12.1-21.1-02 *et seq.* (West 2016); KAN. STAT. ANN. § 47-1827 *et seq.* (West 2016); MONT. CODE ANN. § 81-30-103 *et seq.* (West 2016); IOWA CODE ANN. § 717A.3A *et seq.* (West 2016); S.C. CODE ANN. § 47-21-30 *et seq.* (West 2016); N.C. GEN. STAT. § 99A-1 *et seq*. (West 2016); MO. ANN. STAT. § 578.013 *et seq.* (West 2016).

[27] Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ELR 10960, 10962 (2012); *see also* Larissa U. Liebmann, *Fraud and First Amendment Protections of False Speech: How United States v. Alvarez Impacts Constitutional Challenges to Ag-Gag Laws*, 31 PACE ENVTL. L. REV. 566, 568 (2014) ("Ag-Gag laws can be defined as laws intended to undermine the ability of groups to conduct long-term, employment-based undercover investigations at agricultural production facilities.").

[28] The term "Ag-Gag" was coined by Mark Bittman in a 2011 New York Times editorial. *See* Mark Bittman, Op-Ed., *Who Protects the Animals?* N.Y. TIMES, Apr. 27, 2011, *available at* http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/.

[29] Larissa Wilson, *Ag-Gag Laws: A Shift In The Wrong Direction For Animal Welfare On Farms*, 44 GOLDEN GATE U.L. REV. 311, 312 (2014).

unconstitutional by a federal court.[30] Generally when consumers learn about Ag-Gag laws, they begin to lose trust in farmers for lack of transparency in the food production system.[31]

Second, in the past decade, four common animal husbandry practices have been faded out through various state's laws.[32] These practices include the use of battery cages for egg-laying hens,[33] the use of gestation crates for pregnant pigs,[34] the

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[30] Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015), *appeal docketed*, No. 15-35960 (9th Cir. Dec. 10, 2015).

[31] Andrew Amelinckx, *New Study Finds "Ag-Gag" Laws Erode Trust in Farmers*, MODERN FARMER (March 29, 2016), http://modernfarmer.com/2016/03/ag-gag-laws-erode-trust-farmers/ (discussing a recent study that finds a "measurable reduction in trust in farmers by respondents" who "learned about Ag-Gag legislation."); *see also* Charlie Arnot, *Ag-Gag Challenged: Opening Barn Doors Best Approach To Building Trust*, THE CENTER FOR FOOD INTEGRITY (Aug. 10, 2015), www.foodintegrity.org/2015/08/ag-gag-challenged-opening-barn-doors-best-approach-to-building-trust/ ("ag-gag laws do not promote the transparency that… consumers want, expect – and deserve – when it comes to food production."); Dan Murphy, *Meat of the Matter: Why ag-gag laws are bad*, DROVERS MAGAZINE (Aug. 20, 2015, 5:24 PM), http://www.cattlenetwork.com/community/contributors/meat-matter-why-ag-gag-laws-are-bad ("Without a sense of trust on the part of the public, the toughest ag-gag law ever conceived will only do more harm than good."); Katy Proudfoot, *'Ag-gag' – more harm than good*, AGRI-VIEW (June 2, 2016, 1:00 AM), http://www.agriview.com/ag-gag-more-harm-than-good/article_f76e91ff-8b7d-5614-8664-74e5fb00de86.html ("Although ag-gag laws may erode trust in farmers, creating proactive strategies like those to prevent animal abuse is sure to boost public perception and trust in an industry that prides itself in good animal care.").

[32] For further discussion of these state laws, see *infra* Part IV.

[33] *Cage-Free vs. Battery-Cage Eggs*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html (last visited Nov. 12, 2016) (explaining that battery cages, on average, provide individual egg-laying hens with "only 67 square inches of cage space — less space than a single sheet of letter-sized paper on which to live her entire life.").

[34] *Veterinary Report on Gestation Crates*, HUMANE SOC'Y VETERINARY MED. ASS'N 1 (Apr. 2013), www.hsvma.org/assets/pdfs/hsvma_veterinary_report_gestation_crates.pdf ("Gestation crates are stalls with metal bars and concrete floors that are used by the commercial pork production industry to individually

use of veal crates for male calves,[35] and tail-docking cattle.[36] However, many more animal husbandry practices must be faded out as well, so that farm animals can live with increased comfort. This includes, but is not limited to, fading out (1) farrowing crates for pregnant pigs,[37] (2) tail-docking infant pigs,[38] (3) teeth clipping infant pigs,[39] (4) beak cutting infant hens,[40] (5)

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confine pregnant pigs. The industry standard is only 0.6-0.7 m (2.0-2.3 ft.) by 2.0-2.1 m (6.6-6.9 ft) in size, which is only slightly larger than the pigs themselves, and restricts movement so severely that the pigs are unable to turn around.").

[35] *Veal Calves on a Factory Farm*, MASSACHUSETTS SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.mspca.org/animal_protection/farm-animal-welfare-cows/ (last visited Nov. 12, 2016) (explaining that [c]lose to one million male calves are raised and slaughtered for veal each year.").

[36] Elissa Sosland, *Dairy Cattle On-Farm Standards*, ANIMAL WELFARE INSTITUTE 2 (Feb. 23, 2011), https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/DairydairycommentstoOLCSB-1298561512-document-37063.pdf (explaining that tail-docking cattle is known to cause terrible chronic pain, tetanus, and gangrene).

[37] *Pork Production Phases: Farrowing*, U.S. ENVTL. PROT. AGENCY, http://infohouse.p2ric.org/ref/02/01244/www.epa.gov/agriculture/ag101/porkphases.html (last updated July 11, 2005) ("Just before giving birth, called farrowing, sows are normally moved into a 'farrowing [crate].'").

[38] *See* Nicolette Hahn Niman, Op-Ed., *The Unkindest Cut*, N.Y. TIMES (Mar. 7, 2005), http://www.nytimes.com/2005/03/07/opinion/the-unkindest-cut.html (explaining that piglet's "tails are generally clipped off with wire cutters – and without anesthetic." And "[t]he pork industry's rationale for tail docking is that pigs bite each other's tails and that the tails can then become infected. When pigs' tails are cut off, the stubs stay intensely sore and so, the theory goes, the bite will cause so much pain that the bite will move away from the biter." But "[l]ike a dairy cow, a pig uses its tail not only to shoo away insects but also to communicate.").

[39] *See* Mark J. Estienne et al., *Effects Of Clipping Pig Needle Teeth On Sow And Pig Injuries And Performance*, VIRGINIA COOP. EXTENSION (Nov. 2001), http://www.sites.ext.vt.edu/newsletter-archive/livestock/aps-01_11/aps-0431.html (explaining that infant pigs historically have their teeth clipped "to prevent potential damage to the sow underline and consequentially, a reluctance to allow nursing." The study concludes that teeth clipping of infant pigs "has no positive or negative impacts on pig and sow performance.").

dehorning cattle,[41] (6) intentionally killing millions of infant male egg-layer chicks,[42] (7) castrating infant male farm animals without anesthesia,[43] and (8) confining farm animals to crowded conditions in cold, damp barns.[44]

Currently, there is no word to refer to the cultural expectation of farmers (1) saying "no" to Ag-Gag laws that brings the farming profession into disrepute, bad taste, and reflects unfavorably on other farmers, and (2) fading out certain animal husbandry practices. Therefore, I create and offer a neologism, known as "Daily Comfort Level," or "DCL" to refer to these expectations. Furthermore, this Note presents a proposed new food label called "DCL Certified," discussed at length in Part V.

B. Increasing DCL For Farm Animals May Be A Double-Edged Sword, But The Benefits Are Real

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[40] *How to Decipher Egg Carton Labels*, HUMANE SOC'Y OF THE U.S., www.humanesociety.org/issues/confinement_farm/facts/guide_egg_labels.html (last visited Nov. 12, 2016) (explaining that "[m]ost producers remove parts of hens' beaks in the first few days of life.").

[41] *An HSUS Report: The Welfare of Calves in the Beef Industry*, HUMANE SOC'Y OF THE U.S. 4, www.humanesociety.org/assets/pdfs/farm/welfare_calves.pdf (last visited Nov. 12, 2016) ("When confined in enclosures... during transportation... animals with horns may cause injuries and bruising. In order to prevent these injuries and to facilitate easier handling, the horn buds or horns are often removed.").

[42] *Egg industry grinds millions of baby chicks alive*, ANIMAL News (Sep. 7, 2009), blogs.discovery.com/animal_news/2009/09/horrific-egg-industry-grinds-millions-of-baby-chicks-alive.html ("[A]n estimated 200 million male chicks [are killed] per year… [because] male chicks serve no purpose to egg companies - alive - because they don't lay eggs, and don't grow fast enough to be sold for meat.").

[43] Jean-Loup Rault et al., *Farm Animal Welfare Fact Sheet*, U.S. DEP'T OF AGRIC. (Summer 2011), www.ars.usda.gov/SP2UserFiles/Place/50201500/Castration%20Fact%20Sheet.pdf (The USDA explains that castration of male farm animals "can be perceived as objectionable by the general public" and that "data indicates that in all species, castration is a painful procedure, regardless of age." The USDA further explains that even though "[d]ata on the exact prevalence of castration is lacking... usually, castration is performed without anesthesia.").

[44] *Benefits of Pasture Farming*, ORGANIC PRAIRIE, www.organicprairie.com/pasture_benefits_p2 (last visited Nov. 12, 2016).

And Significant

Developing a farm and managing budgets are all key business plans for any successful farmer.[45] Because farming is a business, the mission of farmers is to ensure, as any business does, that a profit is realized.[46] By definition, a double-edged sword is something that has or can have both favorable and unfavorable consequences.[47] Increasing DCL for farm animals is an inherent double-edged sword because there may be upfront expenses for farmers, whether that be from retrofitting farm operations or decreasing the number of farm animals owned.[48] However, farmers should ultimately have no qualms with any upfront expenses to increase DCL for farm animals since positive profits can be realized shortly thereafter.[49]

Moreover, many major food companies have announced they will no longer contract with farmers who are not willing to fade out certain animal husbandry practices.[50] Once farmers

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[45] *See Farm Business Planning*, BEGINNING FARMERS, www.beginningfarmers.org/farm-business-planning/ (last visited Nov. 12, 2016).

[46] Eric J. McNulty, *Doing the Right Thing or Making a Profit – Which Comes First?*, HARVARD BUSINESS REVIEW (Feb. 18, 2013), https://hbr.org/2013/02/doing-the-right-thing-or-makin.

[47] *Double-Edged Sword*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/double-edged%20sword (last visited Nov. 12, 2016) (defining *double–edged sword* as "something that has both good and bad parts or results"; *see also* United States v. Mohamed, 459 F.3d 979, 989 (9th Cir. 2006) ("Discretion is a double-edged sword, and a district court may exercise its discretion as much to the detriment of a defendant as to the benefit.").

[48] *See infra* note 140 and accompanying text (giving examples of farmer's upfront expenses to increase DCL for their farm animals).

[49] *See infra* Part IV (illustrating positive profits realized by farmers after they increase DCL for their farm animals).

[50] *See infra* note 276 and accompanying text (explaining that major food company Nestlé announced that it will no longer contract with farmers who do not meet its new farm animal treatment standards); *see also* Anna Schecter, *Tyson Foods changes pig care policies after NBC shows undercover video*, NBC NEWS (Jan. 10, 2014, 2:39 AM), investigations.nbcnews.com/_news/2014/01/10/22245308-tyson-foods-changes-pig-care-policies-after-nbc-shows-undercover-video (explaining that Tyson Foods recognizes killing piglets with blunt force

increase DCL for their farm animals and fade out certain animal husbandry practices, they will no longer have to fear contractual cancellations with many major food companies.[51]

III. STATE LEGISLATURES ASSIST FARMERS IN KEEPING AGRICULTURE PRACTICES SECRET AND THE SAME

Farmers are often accused of performing harsh techniques toward their farm animals in response to rising pressures for larger quantity of production at lower prices.[52] When this occurs, farmers fail to provide their farm animals with quality of living that breathing individuals need.[53] These accusations primarily arise when undercover investigators "work" at farms and secretly record farming operations.[54] This Part explores how many farmers and their national organizations acknowledge that treatment of farm animals is a high priority concern, yet do not want to be told by the public how to conduct their operations.[55] It is also explained that if farmers continue to operate in secrecy, farmers may be analogized with other negatively perceived secret business-like operations.[56]

"has been historically acceptable… but may not match the expectations of today's customers or consumers.").

[51] *See infra* Part V.C.; *see also* Schecter, *supra* note 50 (explaining that after the release of an undercover video of a farm where animal abuse was "commonplace and constant," Tyson Food terminated its contract with the farm after NBC publicly showed the video).

[52] Jonathan R. Lovvorn and Nancy V. Perry, *California Proposition 2: A Watershed Moment For Animal Law*, 15 ANIMAL L. 149, 151 (2009).

[53] *Id*.

[54] *See infra* Part III (explaining that in response to undercover video documentations, farmers swiftly and successfully urged state legislators to protect the secrets of their farms through "Ag-Gag laws," and that this business secrecy is similar to that of an American classic, *The Godfather*).

[55] Jeff DeYoung, *Animal welfare discussed at National Cattlemen's Beef Association meeting*, IOWA FARMER TODAY (Feb. 14, 2014, 1:48 PM), www.iowafarmertoday.com/news/livestock/animal-welfare-discussed-at-national-cattlemen-s-beef-association-meeting/article_facbb472-95b0-11e3-898a-001a4bcf887a.html (quoting Dean Danilson, Vice President in the office of animal well-being with Tyson Foods, whom says "[i]f we don't make the changes, someone else will make them for us. No one wants to see that happen.").

[56] *See* Amelinckx, *supra* note 31.

A. Many Farmers And Their National Organizations Often Give Meaningless Statements About The Treatment Of Farm Animals.

National organizations that represent farmers, such as the National Pork Producers Council, claim that "farmers treat their animals well because that's just good business."[57] Other national organizations, such as the Dairy Farmers of America and the North American Meat Institute, proclaim that the health and treatment of farm animals is a key concern of the industry, and that abuse is never tolerated.[58] It is indeed wonderful that these national organizations acknowledge consumer and public concerns for treatment of farm animals, but often their statements on the issue are meaningless.

For example, the North American Meat Institute claims on its website that the "health and welfare of animals is a key concern of the meat and poultry industry… [f]ederal laws govern animal health and *humane treatment of animals*."[59] However, this statement completely fools consumers into believing that even one federal law exists regarding the humane treatment of farm animals throughout their life when in reality there is not one.[60]

The Dairy Farmers of America openly states that it will take prompt action against employees who abuse animals by either disciplining or terminating them.[61] However, in response to the undercover investigation videos, the Dairy Farmers of America makes clear that it does not appreciate such footage was ever released publicly and blames the investigator for allowing animal abuse to occur while the footage was recorded.[62] This logic

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[57] Marc Kaufman, *Critics Skewer Pork Industry Over Pigs' Confinement*, L.A. TIMES (Aug. 19, 2001) articles.latimes.com/2001/aug/19/news/mn-35784.

[58] *See infra* note 59–62 and accompanying text (discussing statements by the North American Meat Institute and the Dairy Farmers of America).

[59] *Animal Health/Welfare*, NORTH AMERICAN MEAT INSTITUTE, https://www.meatinstitute.org/ht/d/sp/i/243/pid/243 (last visited Apr. 26, 2016).

[60] Leahy, *supra* note 2; Haag, *supra* note 2.

[61] *See* DAIRY FARMERS OF AMERICA, *supra* note 16.

[62] *Id.* (discussing a press release from the Dairy Farmers of America that states "it is disheartening that groups like Mercy For Animals, which claims to have animal care and wellness at heart, seek change through

is perplexing at best and makes it hard to believe that treatment of farm animals is a key concern of the industry.

B. Many Farmers Enjoy Ag-Gag Laws Aimed At Silencing Constitutionally Protected Speech

Two Ag-Gag laws, one in Idaho and one in Utah, are being challenged by animal advocates in federal courts as unconstitutional.[63] Idaho's Ag-Gag law was struck down as unconstitutional on August 3, 2015[64] for suppressing constitutionally protected speech in violation of the First Amendment[65] and being motivated by unconstitutional animus against animal advocates in violation of the Equal Protection clause of the Fourteenth Amendment.[66] Although the State of Idaho filed an appeal,[67] the federal district court's decision marked the first time that an Ag-Gag law was held unconstitutional.[68] In both cases, the states' motions to dismiss were denied as there were adequately alleged First and Fourteenth Amendment violations in the Complaint.[69] The Utah matter is still pending.

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deceit and misconception [such as undercover videos], rather than working with the industry to proactively address their concerns.").

[63] *Ag Gag*, ANIMAL LEGAL DEF. FUND, http://aldf.org/cases-campaigns/timelines/ag-gag/ (last visited Nov. 12, 2016).

[64] IDAHO CODE ANN. § 18-7042 *et seq.* (West 2016), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015), *appeal docketed*, No. 15-35960 (9th Cir. Dec. 10, 2015).

[65] *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1208–09.

[66] *Id*. at 1211.

[67] Animal Legal Def. Fund v. Wasden, No. 15-35960 (9th Cir. Dec. 10, 2015).

[68] Kimberlee Kruesi, *Judge: Idaho's Anti-Dairy Spying Law Is Unconstitutional*, YAHOO NEWS (Aug. 3, 2015), https://www.yahoo.com/news/judge-idahos-anti-dairy-spying-law-unconstitutional-223514855.html?ref=gs.

[69] Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1014 (D. Idaho 2014) (finding that Idaho's law "raises First Amendment concerns because it restricts protected speech"); *Id.* at 1024 ("ALDF States a Plausible Equal Protection Claim."); *Id.* at 1026 ("ALDF's allegations arguably reveal an animus toward animal-rights activists."); *see also* Animal Legal Defense Fund v. Herbert, No. 2:13-CV-00679-RJS (D. Utah Aug. 8, 2014) (Judge Robert J. Shelby, "Order Granting In Part And Denying In Part Defendants' [Utah] Motion To Dismiss").

The statutory purpose and legislative history behind Idaho's and Utah's Ag-Gag laws speaks volumes for the proposition that many farmers want to operate in secrecy. In February 2014, Idaho's Ag-Gag law was passed with the explicit intent of silencing speech by whistleblowers and animal advocates.[70] The law was prompted after the public release of undercover video footage of workers beating, kicking, and jumping on cows at the Bettencourt Dairies' Dry Creek Dairy facility in Hansen, Idaho.[71]

The Idaho bill's sponsor, State Senator Jim Patrick, compared undercover animal advocate investigators to "marauding invaders"[72] and even went so far as to compare the targets of Ag-Gag laws (i.e., animal advocates) to Al Qaeda.[73] The bill's co-sponsor, State Representative Steven Miller, said that the bill was motivated by animal advocate organization's efforts to bring economic harm to Bettencourt Dairies.[74] Tony VanderHulst, Chairman of the Idaho Dairymen's Association, told the House Agriculture Committee, "[t]his is not about hiding anything."[75] Mr. VanderHulst further explained that "[t]his is about exposing the real agenda of these radical groups that are engaging in farm terrorism."[76] The Idaho Dairymen's Association attorney, Dan Steenson, likewise proclaimed that he drafted the Idaho Ag-Gag bill because "extremist groups implement vigilante tactics… to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse[,]"[77] and when "[f]acing this type

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[70] *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1205 (finding that the Ag-Gag laws "underlying purpose is to silence animal activists.").
[71] *Id*. at 1199; Greg Moore, *'Ag-gag' bill moves toward passage*, IDAHO MOUNTAIN EXPRESS (Feb. 26, 2014), archives.mtexpress.com/index2.php?ID=2007150979#.VSLK4fnF8-M.
[72] *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1200; *see also* Will Potter, *URGENT: Idaho "Ag-Gag" Law Would Make It Illegal to Photograph Factory Farm Cruelty*, GREEN IS THE NEW RED (Feb. 20, 2014), www.greenisthenewred.com/blog/idaho-ag-gag-law/7635/.
[73] Potter, *supra* note 72.
[74] Moore, *supra* note 71.
[75] Betsy Z. Russell, *Idaho House panel backs 'ag-gag' bill, 13-1*, THE SPOKESMAN-REVIEW (Feb. 20, 2014), www.spokesman.com/stories/2014/feb/20/idaho-house-panel-backs-ag-gag-bill-13-1/.
[76] *Animal Legal Def. Fund*, 118 F. Supp. 3d at 1201.
[77] *Id.*

of assault in the court of public opinion, farmers have no opportunity to defend themselves."[78] Additionally, the Idaho Farm Bureau Federation Inc., the Idaho Heartland Coalition, the Food Producers of Idaho Inc., and the Idaho Cattle Association supported Idaho's Ag-Gag law.[79]

Utah's legislature passed a similar Ag-Gag law in 2012.[80] Utah's Ag-Gag law was allegedly passed with the explicit intent of silencing or impeding speech by whistleblowers and animal advocates.[81] State Representative John Mathis, the bill's sponsor, stated that his intent in introducing the legislation was to stop "national propaganda groups"[82] from using farm footage to advance their agendas, which he said was "egregious to [him]."[83] Representative Mathis further stated that "[t]he animal welfare movement has become an animal rights movement, and that's wrong."[84]

Representative Mathis further equated animal advocates to "animal-rights terrorists" because he views them as advocates that hope to destroy the agriculture industry.[85] State Senator David Hinkins, another sponsor of the bill, said it was needed to stop "the vegetarian people [who are] trying to kill the animal

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[78] Russell, *supra* note 75.
[79] Dan Flynn, *Amicus Brief: Idaho's New 'Ag-Gag' Law is About Conduct, Not Speech*, FOOD SAFETY NEWS (June 11, 2014), http://www.foodsafetynews.com/2014/06/idaho-agriculture-protection-law-is-about-conduct-not-speech/#.VyAzGPkrLb0.
[80] UTAH CODE ANN. § 76-6-112 (West 2016).
[81] ANIMAL LEGAL DEF. FUND, *supra* note 63.
[82] Josh Foftin, *Filming on farms banned by proposed Utah law*, DESERET NEWS (Feb. 26, 2012, 12:00 AM), www.deseretnews.com/article/765554350/Filming-on-farms-banned-by-proposed-Utah-law.html.
[83] Ladd Brubaker, *Bill targets animal rights activists' videos, photos on farms*, DESERET NEWS (Feb. 15, 2012, 2:00 PM), www.deseretnews.com/article/865550197/Bill-targets-animal-rights-activists-videos-photos-on-farms.html?pg=all.
[84] *Id.*
[85] Dennis Romboy, *House passes bill to stop 'animal-rights terrorists' shooting video on farms* DESERET NEWS (Feb. 24, 2012, 5:00 PM), www.deseretnews.com/article/865550866/House-passes-bill-to-stop-animal-rights-terrorists--shooting-video-on-farms.html?pg=all.

industry."[86] Even Sterling Brown and Mike Kohler of the Utah Farm Bureau and Utah Dairy Producers, respectively, are friends and supporters of Representative Mathis.[87] Sterling Brown insists that undercover investigations at farms "have done more of a disservice than anything positive."[88]

It is understandable that farmers may be upset by undercover videos due to possible misrepresentations.[89] However, Ag-Gag laws are not the solution because they generally lead to distrust of farmers among consumers,[90] and have been found unconstitutional by federal courts.[91]

C. Many Farmers Are Being Secretive In A Way That Is Reminiscent Of An American Classic: *The Godfather*

[86] Will Potter, *Exposing animal cruelty is not a crime*, CNN (June 26, 2014, 11:59AM), www.cnn.com/2014/06/26/opinion/potter-ag-gag-laws-animals/.

[87] Zaid Jilani, *Utah Rep. Introduces Bill To Make Filming Farm Abuse A Major Crime, Praises Industry Donor "Friends" At Hearing*, REPUBLIC REPORT (Feb. 29, 2012, 2:15 PM), www.republicreport.org/2012/utah-rep-intros-factory-farm-bill/.

[88] Joseph Jerome, *'Ag-Gag' Laws Chill Speech, Threaten Food Supply*, AMERICAN CONSTITUTION SOCIETY (Apr. 17, 2012), www.acslaw.org/acsblog/'ag-gag'-laws-chill-speech-threaten-food-supply.

[89] *See* Murphy, *supra* note 31 (explaining that many farmers "have expressed opposition to allowing the capture and subsequent dissemination of undercover videos — typically heavily edited — to expose alleged cases of animal abuse to the media."); Ashley Stewart, *'Ag-gag' bill would outlaw undercover video at farms*, THE CAPITOL RECORD (Jan. 20, 2015), http://www.capitolrecord.org/2015/01/ag-gag-bill-would-outlaw-undercover-video-at-farms/ (Washington Rep. Joe Schmick, a farmer, says that an Ag-Gag bill he sponsors will protect farmers from unfair sabotage as they are "scared of misrepresentation."); Don Jenkins, *Ag-gag bill has few friends as farm groups stay silent*, CAPITAL PRESS (Jan. 21, 2015, 9:25 AM), http://www.capitalpress.com/Washington/20150121/ag-gag-bill-has-few-friends-as-farm-groups-stay-silent (Washington Rep. Joe Schmick, a farmer, "didn't want to shield wrongdoing, but he wanted to protect producers from being victimized by film editing that makes good agricultural practices look bad.").

[90] *See* Amelinckx, *supra* note 31; Arnot, *supra* note 31; Murphy, *supra* note 31; Proudfoot, *supra* note 31.

[91] *See supra* Part III.B.

The Godfather[92] is arguably one of the best-known and most popular movies of all time, as demonstrated by its #2 ranking on the American Film Institute's top 100 movies.[93] Directed by Francis Ford Coppola, and based on the book and screenplay by Mario Puzo and Francis Ford Coppola, *The Godfather* is a story of a family and their powerful mafia "family" headed by Don Vito Corleone (Marlon Brando), and the business that intertwines the two.[94] When Don Vito's youngest son, Michael Corleone (Al Pacino), reluctantly joins the mafia, he becomes involved in the inevitable cycle of violence and betrayal.[95] Although Michael tries to maintain a normal relationship with his wife, Kay Corleone (Diane Keaton), he is drawn deeper into the family business.[96] So much deeper that in the last scene of *The Godfather,* Michael is confronted by his sister Connie Corleone (Talia Shire), pleading and begging to know why Michael killed her husband Carlo Rizzi (Gianni Russo).[97] Kay then privately questions Michael herself about the death of Carlo:

"KAY: Michael, is it true?

MICHAEL: Don't ask me about my business, Kay...

KAY: Is it true?

MICHAEL: Don't ask me about my business...

KAY: No.

MICHAEL: (as he slams his hand on the desk) Enough! (then) All right. This one time –

this one time I'll let you ask me about my affairs...

KAY: (whispering) Is it true? -- Is it?

MICHAEL: (quietly, shaking his head) No.

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[92] *The Godfather*, (Paramount 1972).

[93] Candace M. Besherse, *The Godfather: Seven Lessons on Providing Effective Counsel*, 2011 ARMY LAW. 32, 32 (2011); *see also AFI's 100 Years . . . 100 Movies 10th Anniversary Edition*, AMERICAN FILM INSTITUTE, http://www.afi.com/100Years/movies10.aspx (last visited Apr 26, 2016).

[94] *The Godfather Screenplay by Mario Puzo and Francis Ford Cappola Based on a Novel by Mario Puzo*, SCREENWRITE.IN, www.screenwrite.in/Screenplays/Godfather.pdf (last visited Apr. 26, 2016).

[95] *Id.*

[96] *Id.*

[97] *Id.*

KAY: (after a sigh of relief and Michael kisses and hugs her) I guess we both need a
drink, huh?"[98]

While fans of *The Godfather* are well aware that Michael outright lied to Kay, reassuring his wife that he played no role in Carlo's death, this Note demonstrates that many farmers have the same secretive mindset as that of a mafia family. Illustrated by the statutory purpose and legislative history of recent Ag-Gag laws, many farmers enjoy raising farm animals and operating in secrecy[99] for rich and powerful industries.[100] Therefore, this Note equally represents before farmers what Kay represents before Michael; that farmers must break away from their secrecy and routinely address (not only once and dishonestly as Michael did) whether they will say "no" to Ag-Gag laws and fade out certain animal husbandry practices.

IV. VOTERS AND STATE LEGISLATURES ARE PASSING LAWS THAT FADE OUT CERTAIN ANIMAL HUSBANDRY PRACTICES

Farmers are a vital part of the United States economy. The egg industry provides 123,100 jobs, $6.1 billion in wages, and $25.8 billion in economic activity.[101] The dairy industry provides more than 900,000 jobs, $29 billion in wages, and $140 billion in economic activity.[102] These large figures, however, are still less

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[98] *Id.*

[99] *See supra* Part III.B.

[100] *See e.g.,* Kim Souza, *Tyson Foods posts record fiscal year sales of $41.37 billion, net income up more than 41% (Updated)*, THE CITY WIRE (Nov. 23, 2015, 7:12 AM), http://talkbusiness.net/2015/11/tyson-foods-posts-record-sales-of-41-37-billion-net-income-up-more-than-41/ ("Tyson Foods finished its fiscal year on a record-setting pace, with total sales of $41.373 billion up 10.1% over fiscal 2014").

[101] *Poultry Industry Provides 1,337,030 Jobs and 265.6 Billion in Economic Impact To U.S. Economy*, THE POULTRY FEDERATION (Oct. 3, 2012), http://www.thepoultryfederation.com/news/poultry-industry-provides-1337030-jobs-and-265-6-billion-in-economic-impact-to-u-s-economy.

[102] James Robson, *Data tells compelling dairy stories*, CHEESE MARKET NEWS,

than the meat and poultry packing industry that provides 526,290 jobs, more than $19 billion in wages, and $154.8 billion in economic activity.[103] Along with their suppliers, distributors, and retailers, the meat and poultry packing industry's economic ripple generates roughly 6% of the United States GDP.[104] In addition, the largest United States meat and poultry producing company, Tyson Foods Inc.,[105] was reported to reach $42 billion in revenue at the end of its 2015 fiscal year.[106]

But even with these large figures, the meat, poultry, and dairy industries are facing mounting pressure due to new cultural expectations. It has ben noted, for example, that 8 million Americans are now eating vegan diets,[107] and that roughly 30 to 40 percent of Americans (i.e. 96-128 million Americans) identify as "flexitarian."[108] In 2001, only nine American law schools offered an *Animal Law* course, but now almost all American law schools offer one.[109] When an individual is educated that many

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http://www.cheesemarketnews.com/guestcolumn/2015/24jul15_02.html (last visited Nov. 12, 2016).

[103] *The United States Meat Industry At a Glance*, AMERICAN MEAT INSTITUTE (Mar. 2011), http://www.meatami.com/ht/a/GetDocumentAction/i/89473.

[104] *Id.*

[105] Jeffrey McCracken & David Welch, *Tyson Raises Hillshire Bid to $7.7 Billion*, BLOOMBERG (June 9, 2014, 4:32 PM), http://www.bloomberg.com/news/2014-06-09/tyson-agrees-to-buy-hillshire-for-7-7-billion.html ("Tyson Foods Inc., the largest U.S. meat company…"); *see also* Dan Charles, *Tyson Foods To Stop Giving Chickens Antibiotics Used By Humans* (Apr. 28, 2015, 5:15 AM), NPR, www.npr.org/sections/thesalt/2015/04/28/402736017/tyson-foods-to-stop-giving-chickens-human-used-antibiotics ("Tyson Foods, the country's biggest poultry producer…").

[106] *See* Souza, *supra* note 100.

[107] Watters, *supra* note 24.

[108] Pat Crocker & Nettie Cronish, *Everyday Flexitarian*, www.nettiecronish.com/books/everyday-flexitarian/ (last visited Nov. 12, 2016) (explaining that a "flexitarian" refers to a vegetarian who occasionally consumes meat, or a mindful meat consumer who occasionally seeks out vegetarian meals).

[109] *Where Should You Go To Law School?*, ANIMAL LEGAL DEF. FUND, aldf.org/resources/law-professional-law-student-resources/law-students-saldf-chapters/where-should-you-go-to-law-school/ (last visited Nov. 12, 2016).

farm animals live in and breathe in their own feces,[110] images and thoughts of obvious discomfort are generated. Combine those same images and thoughts with learning that farm animals, such as pigs, chickens, cows and calves, are all intelligent species that can feel real human emotions,[111] and then the images of discomfort become even stronger.

This Part first examines several successful and recent state ballot measures,[112] which are only allowed to take place in twenty-four out of the fifty states.[113] It then examines several recent pieces of enacted state legislation. These ballot measures and pieces of state legislation have increased DCL for farm animals by fading out certain animal husbandry practices.

A. Ballot Measures Are Increasing DCL For Farm Animals

Farm animals raised as part of the meat, poultry, and dairy industries are among the least-protected class of animals ever, and they always have been.[114] However, there are new cultural expectations to know how farm animals are born, raised, and/or slaughtered at the farm. A grand example can be observed from a first of its kind, successfully passed ballot measure in California. A second and third example can be observed from

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[110] *See* peta2TV, *Cows Forced to Live, Eat in Their Own Feces at Dairy Farm*, YOUTUBE, https://www.youtube.com/watch?v=j-2qGJZKwd8 (uploaded Aug. 14, 2014) ("After a disturbing tip, PETA visited a dairy farm and found emaciated cows… trudging through deep manure.").

[111] *See Animals and Human Experience the Same Emotions*, PHYS.ORG (Sep. 6, 2005), phys.org/news6250.html; Natalie Angier, *Pigs Prove to Be Smart, if Not Vain*, N.Y. TIMES, Nov. 10, 2009, at D1, *available at* http://www.nytimes.com/2009/11/10/science/10angier.html?_r=1&; Carolynn L. Smith & Sarah L. Zielinski, *The Startling Intelligence of the Common Chicken*, 310 SCIENTIFIC AMERICAN (Feb. 1, 2014), *available at* www.scientificamerican.com/article/the-startling-intelligence-of-the-common-chicken/; *Meet the Animals: Cows*, FARM SANCTUARY, www.farmsanctuary.org/learn/someone-not-something/110-2/# (last visited Nov. 12, 2016).

[112] Ballot measures provide American citizens the opportunity to bypass the legislature by discussing and voting on policy issues at the local and state levels. *See What is a ballot measure?*, CITIZENS IN CHARGE, www.citizensincharge.org/learn/primer (last visited Apr. 26, 2016).

[113] *Id.*

[114] Leahy, *supra* note 2; Haag, *supra* note 2.

successfully passed ballot measures in Florida and Arizona; each first of their kinds as well.

1. California's Ballot Measure: Proposition 2; And Its Corollary: AB 1437

The *Prevention of Farm Animal Cruelty Act*,[115] also known as Proposition 2, was successfully passed in the California November 2008 general election.[116] [117] California voters passed Proposition 2 with a majority vote of 63.5 percent.[118] Proposition 2 took effect January 1, 2015 and added a new chapter to the California Health and Safety Code, stating in pertinent part that "a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely."[119] Proposition 2, which is enforced by holding violators to misdemeanor penalties not to exceed $1,000, and/or 180 days in county jail,[120] applies to "any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm."[121]

Following the success of Proposition 2, California Assemblyman Jared Huffman[122] introduced, in 2009, a bill titled *Shelled eggs: sale for human consumption: compliance with animal care standards*, also known as AB 1437.[123] Signed into law by

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[115] Debra Brown, *Official Voter Information Guide*, CALIFORNIA GENERAL ELECTION 82 (Nov. 2008), http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf.
[116] *Id.*
[117] *Bill Analysis*, SENATE FOOD AND AGRIC. COMM. (June 16, 2009), www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_cfa_20090615_204633_sen_comm.html.
[118] *Id.*
[119] CAL. HEALTH & SAFETY CODE § 25990 (West 2016).
[120] *Id*. at § 25993.
[121] *Id*. at § 25991.
[122] Lindsay Barnett, *All Things Animal In Southern California And Beyond*, L.A. TIMES (July 8, 2010, 4:46 PM), latimesblogs.latimes.com/unleashed/2010/07/gov-schwarzenegger-signs-bill-to-require-outofstate-egg-producers-to-comply-with-proposition-2-space.html.
[123] *Bill Number: AB* 1437, LEGISLATIVE COUNSEL'S DIGEST (Feb. 27, 2009), www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_bill_20090227_introduced.html.

former California Governor Arnold Schwarzenegger in July 2010,[124] and effective the same day as Proposition 2,[125] it states in pertinent part that "a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in [the California Health and Safety Code]."[126] In other words, AB 1437 requires all eggs sold in California to comply with the standards of Proposition 2, regardless of being laid in-state or out-of-state, thus, ensuring in-state egg producers that they will not be put at a competitive disadvantage by stricter California regulations.[127]

Undoubtedly, Proposition 2 caused a great deal of panic to California egg producers as California ranks between the 5th and 7th largest egg producing state.[128] In 2008, California's 19.4 million egg-laying hens produced 4.9 billion eggs valued at $323 million.[129] But on the other hand, California's pork production is relatively small,[130] responsible for only 0.09 percent of California's 2014 $45 billion agricultural market.[131] Veal

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[124] Barnett, *supra* note 122.
[125] CAL. HEALTH & SAFETY CODE § 25996 (West 2016).
[126] *Id.*
[127] Robin Manley, *Caged Resistance: California's Proposition 2 and Animal Welfare*, BROWN POLITICAL REVIEW (Feb. 22, 2015), www.brownpoliticalreview.org/2015/02/caged-resistance-californias-proposition-2-and-animal-welfare/.
[128] *See U.S. Egg Industry Egg Facts – Q1 2014*, AMERICAN EGG BOARD, www.aeb.org/farmers-and-marketers/industry-overview/69-farmers-marketers/market-data-trends (last visited Nov. 12, 2016); *About the U.S. Egg Industry*, AMERICAN EGG BOARD, www.aeb.org/farmers-and-marketers/industry-overview (last updated Oct. 5, 2016).
[129] *Economic Impact on California of the Treatment of Farm Animals Act*, PROMAR INTERNATIONAL EXECUTIVE SUMMARY (May 16, 2008), http://digital.library.ucla.edu/websites/2008_993_089/sites/default/files/Economic%20Impact%20Study%20May%202008.
[130] *Farm Income and Wealth Statistics*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV, http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/annual-cash-receipts-by-commodity.aspx#.VJJQhSvF8-P (last updated Aug. 30, 2016) (California's pig sales for 2014 is roughly $38 million).
[131] Richard Howitt et al., *Harsher drought impacts forecast for California agriculture*, CALIFORNIA WATERBLOG (June 2, 2015),

production in California is nonexistent.[132] Therefore, Proposition 2 is thought of as a symbolic gesture and an expression of the state's stance toward pork production and veal crates.[133]

a. While There May Be Upfront Expenses For Farmers To Adjust To Proposition 2, California Voters Want Eggs That Focus On Hen Treatment

Before the Proposition 2 vote took place, California egg producers claimed that if it passed, a great negative effect on the state's economy would ensue.[134] California egg producers concluded that California may lose $18.5 million in state tax revenue, $5 million annually in local property tax revenue, and result in the loss of about 3,400 jobs.[135] California egg producers also made the argument that Proposition 2 would eliminate

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californiawaterblog.com/2015/06/02/harsher-drought-impacts-forecast-for-california-agriculture/.

[132] Gene Gregory, *United Voices*, UNITED EGG PRODUCERS 1 (Nov. 11, 2008), http://www.va-agribusiness.org/Resources/Documents/United%20Egg%20Producers%20Editorial%20-%20Reflections%20on%20California%20Ballot%20Initiative%20-%20November%202008.pdf ("While there is no veal in the state…").

[133] Melissa Cronin, *NY "Blackfish" Bill To Ban Captive Orcas Approved By Senate Committee*, THE DODO (Mar. 25, 2014), https://www.thedodo.com/ny-blackfish-bill-to-ban-capti-482618752.html (explaining that while New York does not have any orcas in captivity, a bill introduced to stop the possession and harboring of killer whales in New York State aquariums and sea parks is seen as a "symbolic gesture and an expression of the state's stance").

[134] It is important to note that these arguments were made by California egg producers before the Proposition 2 vote took place, and therefore well before AB 1437 became law in 2010. Currently, most California egg producers have changed their position, and now support the State of California in defending Proposition 2 from a constitutional attack by neighboring states before the United States Court of Appeals for the Ninth Circuit. *See* Brief for Association of California Egg Farmers as Intervenor-Defendant-Appellee Supporting Defendants-Appellees, Missouri v. Harris, No. 14-17111, (9th Cir. filed June 1, 2015), 2015 WL 3533956.

[135] *See* PROMAR INTERNATIONAL, *supra* note 129.

nearly all commercial egg production.[136] The support of this argument rested on the notion that to provide the average chicken that has a total wingspan of 28 inches with a reasonable size cage,[137] a minimum of 784 square inches of space (28 x 28) or 5.4 square feet would be required per chicken, which would be uneconomical.[138] Therefore, Proposition 2 would essentially require that each egg-laying hen receive an additional 717 square inches of space over the industry norm.[139] This increase in required space was alleged by California egg producers to be uneconomical and would result in the virtual disappearance of the California egg industry.

Since the Proposition took effect, California egg producers were found to be incorrect in their assessment for three reasons. First, California commercial egg production may have decreased by roughly 40 percent due to budget costs,[140] but it certainly did not virtually disappear. Second, each chicken does not need 784 square inches of space to comply with Proposition 2, but rather 116 square inches of space.[141] Third, California egg producers did

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[136] *Id.*

[137] Commonly, the vast majority of egg-laying hens in the United States, and California, are confined to living conditions known as battery cages where they receive only 67 square inches of cage space. *See Cage-Free vs. Battery-Cage Eggs*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html (last visited Nov. 12, 2016).

[138] PROMAR INTERNATIONAL, *supra* note 129, at 1-2.

[139] *Id.*; 784 square inches (new cage size) – 67 square inches (industry norm cage size) = 717 square inches.

[140] A few illustrative examples are that California egg producers have used their own money, up front, to increasing henhouse space, retrofit henhouses, or halve the number of chickens owned in order to comply with Proposition 2. *See* Rose Hayden-Smith, *How California's chicken industry is rapidly changing*, UNIV. OF CAL. (Apr. 20, 2016), http://universityofcalifornia.edu/news/how-californias-chicken-industry-rapidly-changing ("In 2014, there were 18 million commercial laying hens in California. By Jan. 1, 2015, there were only 11 million commercial laying hens."); David Pierson, *Egg prices likely to rise amid laws mandating cage-free henhouses*, L.A. TIMES (Dec. 28, 2014, 8:27 PM), www.latimes.com/business/la-fi-cage-free-eggs-20141229-story.html#page=1 (San Diego County egg farmer, Frank Hilliker, spent $1 million retrofitting his farm to comply with Proposition 2).

[141] Dan Charles, *How California's New Rules Are Scrambling The Egg Industry*, NPR (Dec. 29, 2014, 6:07 PM),

not anticipate 63.5 percent of California voters[142] increasing the DCL for egg-laying hens, thereby implicitly agreeing to purchase more expensive eggs.[143]

The price of a dozen eggs is now expected to increase by 36%.[144] But many California residents are not complaining. For example, at Peta Luma Market, a locally owned and operated community market, no criticisms have been received due to the price increase for a carton of eggs.[145] At the Old Town Market and Red Barn Market, no one has complained about egg prices.[146] There are of course California residents whom are not happy with the egg price increase, and those voices will not go unnoticed.[147]

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www.npr.org/sections/thesalt/2014/12/29/373802858/how-californias-new-rules-are-scrambling-the-egg-industry ("California's state veterinarian, Dr. Annette Jones, turned to animal welfare experts at the University of California, Davis… [to determine that] each chicken is legally entitled to at least 116 square inches of floor space.").

[142] *See* SENATE FOOD AND AGRIC. COMM., *supra* note 117 and accompanying text.

[143] *See* Charles, *supra* note 141 (Ronald Fong, the president and CEO of the California Grocers Association, is confident that California's consumers will pay higher prices for eggs that meet California's new rules).

[144] Cogan Schneier, *Egg industry sprinting to keep up with cage-free demand*, POLITICO (Mar. 4, 2016, 7:40 AM), http://www.politico.com/story/2016/03/egg-industry-fears-being-overrun-by-cage-free-demand-220249 (farmers have "36 percent higher operating and capital costs per dozen [cage-free] eggs than conventional caged systems.").

[145] E.A. Barrera, *New law sends egg prices soaring*, PETALUMA ARGUS COURIER (Jan. 22, 2015), www.petaluma360.com/news/3406641-181/new-law-sends-egg-prices.

[146] Juanita Adame, *Egg Prices Rising Fast, Some Take Drastic Measures*, KEYT, www.keyt.com/news/egg-prices-rising-fast-some-take-drastic-measures/33362936 (last updated Aug. 30, 2016, 1:23 AM); *see also* Claudia Boyd-Barrett, *Jump in egg prices driven by new housing law for chickens*, VENTURA COUNTY STAR (Feb. 5, 2015), www.vcstar.com/business/jump-in-egg-prices-driven-by-new-housing-law-for-chickens_38403195 (explaining that at Red Barn Market in Ventura, customers are "prepared to pay more if it means better treatment for chickens," and that customers are ready to "compensate with other things [that they] buy on sale, so it evens out.").

[147] *See, e.g.*, Gabrielle Karol, *$5 for a dozen eggs in California?*, ABC (June 12, 2015, 8:01 PM), http://www.abc10.com/money/5-for-a-dozen-eggs-in-california/181911613 (at Sacramento's Folsom Boulevard

But as the most inhabited state in the United States, with 39,144,818 residents as of 2015,[148] a majority of California voters actively spoke on Election Day 2008 that they wanted to increase the DCL for egg-laying hens and are willing to pay more for those eggs. Egg producers throughout the United States now realize the powerful will of the majority in California.[149]

b. Legal Challenges Brought Against Proposition 2 Have Failed So Far

Some California egg producers are still upset with Proposition 2 and have argued before the United States Court of Appeals for the Ninth Circuit that it "does not specify minimum cage sizes for egg-laying hens," and should be "void for vagueness." [150] The Ninth Circuit found this argument to be without merit because "[a]ll Proposition 2 requires is that each chicken be able to extend its limbs fully and turn around freely... [and] [t]his can be readily discerned using objective criteria."[151]

Savemart location, shopper Ed Talbert thinks the increase in egg prices is "ridiculous."); Lesley McClurg, *Egg Prices Soar To Record High*, CAPITAL PUBLIC RADIO (June 23, 2015), www.capradio.org/articles/2015/06/23/why-the-price-of-california-eggs-is-skyrocketing/ (Raley's Supermarket shopper, Teri Stapleton, is "on the fence" about egg prices, and "most of the customers… weren't happy about current prices, [but] no one said they're buying fewer eggs.").

[148] *State & County QuickFacts: California*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/06 (last visited Apr. 26, 2016).

[149] Following Election Day 2016, Massachusetts became the first state to "prohibit farming methods that keep animals severely constrained for virtually their entire lives, including the use of veal crates for baby calves, gestation crates for mother pigs and battery cages for egg-laying hens." This law, passed by Massachusetts's voters, takes effect in 2022 and "bar[s] the sale of meat and eggs produced using those methods, even from animals that were farmed outside the state." *See* Nico Pitney, *Massachusetts Voters Pass Historic Animal Protection Law*, HUFFINGTON POST (Nov. 8, 2016, 11:15 PM), http://www.huffingtonpost.com/entry/massachusetts-animals-question-3_us_581e4893e4b0e80b02ca7afe.

[150] Cramer v. Harris, No. 12-56861, 591 F. App'x 634, 635 (9th Cir. Feb. 4, 2015).

[151] *Id*.

On this basis, the court held that "a person of reasonable intelligence can determine the dimensions of an appropriate confinement that will comply with Proposition 2."[152]

Another legal argument against both Proposition 2 and AB 1437 involves many large egg-producing states.[153] The states of Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa, argued in federal court that California's laws are unconstitutional because they require that all eggs sold in California be produced in a way that is compliant with the requirements of Proposition 2, thereby "violat[ing] the Commerce and Supremacy Clauses of the United States Constitution."[154] The states asserted that they had quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system.[155] The United States District Court for the Eastern District of California granted the California Attorney General's motion to dismiss for lack of standing because "[i]t is patently clear plaintiffs are bringing this action on behalf of a subset of each state's egg farmers and their purported right to participate in the laws that govern them, not on behalf of each state's population generally."[156] Due to the nature of the allegations in the complaint, and the arguments made at hearing, the court held that "leave to amend would be futile, as plaintiffs lack standing to bring this action on behalf of each state's egg farmers."[157] The losing states have now appealed to the United States Court of Appeals for the Ninth Circuit.[158]

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[152] *Id.*

[153] Proposition 2 and AB 1437 has indeed affected out-of-state egg producers whom want to bring their facilities into compliance with new California laws if they want to sell their eggs in California. For example, Jim Dean, CEO of Centrum Valley Farms in Iowa, says compliance with Proposition 2 and AB 1437 will force his company to retrofit a 1.5-million-bird facility down to 800,000 birds. This retrofit, and other similar retrofits, will cost Jim Dean millions of dollars. *See* Alan Bjerga, *Hens living larger as U.S. egg producers scramble to meet California's new rules*, PORTLAND PRESS HERALD (Dec. 29, 2014), www.pressherald.com/2014/12/29/hens-living-larger-as-u-s-egg-producers-scramble-to-meet-californias-new-rules/.

[154] Missouri v. Harris, 58 F. Supp. 3d 1059, 1062 (E.D. Cal. 2014), *appeal docketed*, No. 14-17111 (9th Cir. Oct. 24, 2014).

[155] *Id.* at 1064.

[156] *Id.* at 1078.

[157] *Id.*

[158] Missouri v. Harris, No. 14-17111 (9th Cir. Oct. 24, 2014).

2. Florida's Constitutional Amendment and Arizona's Ballot Measure

Two similar, but distinct, ballot measures preceded Proposition 2. In 2002, Florida voters passed the *Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*.[159] This state constitutional amendment passed with a majority vote of 55 percent[160] and faded out Florida's use of gestation crates for pregnant pigs beginning in 2008.[161] The measure affected only two pig farms in the state,[162] owned by Stephen Basford and Henry Mathis,[163] whom together totaled cash receipts over $7 million in pig sales for the year 2000.[164] Florida State legislators actually attempted to compensate the two farmers[165] that chose to go out of business rather than retrofit their farms and provide pregnant pigs with enough room to turn around.[166] However, former Florida Governor Jeb Bush

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[159] FLA. CONST. ART. X, § 21(a) (West 2016) ("It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely."); *see also* Advisory Op. to the AG, 815 So. 2d 597, 597–600 (Fla. 2002) (per curiam) (finding that the ballot measure "meet[s] the legal requirements of" the Florida Constitution and existing Florida statutes).

[160] John Kennedy, *Pork Spending For Pig Farmers Hit By Ban? It's Possible*, ORLANDO SENTINEL (Apr. 16, 2005), articles.orlandosentinel.com/2005-04-16/news/0504160475_1_pregnant-pigs-hog-industry-mathis; *but see* K.K. DuVivier, *Perspectives: Ballot Initiatives and Referenda: Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1051–52 (2007) (explaining that in 2006 Florida voters passed a constitutional amendment requiring a "supermajority of sixty percent approval to pass future citizen-initiated constitutional amendments.").

[161] FLA. CONST. ART. X, § 21(g) (West 2016) ("This section shall take effect six years after approval by the electors.").

[162] Gary Fineout, *Florida court orders state to pay former pig farmer*, CAPITAL PRESS, www.capitalpress.com/content/AP-FL-Pregnant-pigs-072413 (last updated Sep. 9, 2013, 6:51 AM).

[163] Kennedy, *supra* note 160.

[164] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[165] Fineout, *supra* note 162.

[166] *Florida's Historic Ban On Gestation Crates*, ANIMAL RIGHTS FOUNDATION OF FLORIDA, http://arff.org/gestation-crates (last visited Nov. 12, 2016).

vetoed the funding.[167] But this gubernatorial action did not hinder Mr. Basford from compensating his losses because when Mr. Basford sued the State of Florida in 2010 for shutting down his pig farm, he secured a $505,000 judgment on appeal.[168] It is unknown why Henry Mathis never sued the State of Florida.

From this lawsuit, it can be determined that the benefits conferred on Florida pig farmers are real and significant for three reasons. First, Florida's payment of $505,000 to Mr. Basford is arguably de minimis[169] when compared to the $63 billion Florida spending budget.[170] Second, Florida's new and improved pig farmers totaled cash receipts of nearly $3.15 million in 2014.[171] And third, Florida's pig farmers are now complying with the internal policies of many major food companies that do not want to contract with farmers who use gestation crates.[172]

In 2006,[173] Arizona voters passed Proposition 204, also known as the *Humane Treatment of Farm Animals Act*.[174] This law, sparked by the possibility of a second large-scale pig farm operation coming into the state,[175] passed with a majority vote of

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[167] Fineout, *supra* note 162.

[168] State v. Basford, 119 So. 3d 478, 480 (Fla. Dist. Ct. App. 2013), *rehearing denied*, State v. Basford, 2013 Fla. App. LEXIS 14732 (Fla. Dist. Ct. App. Aug. 29, 2013) (the amount of $505,000 amount was determined from the taking of improvements on Mr. Basford's real property as a result of Florida's constitutional amendment).

[169] The Latin phrase "de minimis" means something "so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

[170] Kennedy, *supra* note 160.

[171] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[172] *See infra* Part V.C.

[173] *See* ARIZ. REV. STAT. ANN. §§ 13-2910.07 (A)(1)-(2) (West 2016) ("[A] person shall not tether or confine any pig during pregnancy or any calf raised for veal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) lying down and fully extending his or her limbs; or (b) turning round freely.").

[174] *See Proposing Amendment to Title 13, Chapter 29, Arizona Revised Statutes by Adding Section 13-2910.07; Relating to Cruel and Inhumane Confinement of Animals*, ARIZ. SEC. OF STATE (July 2006), http://apps.azsos.gov/election/2006/General/BallotMeasureText/PROP204(I-07-2006).pdf.

[175] *Arizona Animals*, ANIMAL DEF. LEAGUE OF ARIZ. 1 (2007), www.adlaz.org/sites/default/files/ADLA%20Newsletter%20Fall%2020

62 percent[176] and created a new statute fading out the use of gestation crates for pregnant pigs, as well as veal crates for calves beginning in 2013.[177] It is important to note that Arizona does not produce veal,[178] and therefore, the *Humane Treatment of Farm Animals Act* is thought of as a symbolic gesture and an expression of the state's stance[179] toward veal crates. Before passage of the *Humane Treatment of Farm Animals Act*, Arizona pig farmers totaled cash receipts of $41 million in pig sales in 2005.[180] Following its enactment, Arizona pig farmers totaled cash receipts of nearly $58 million in 2014.[181]

B. State Legislation Is Increasing DCL For Farm Animals

States legislatures are also fading out certain animal husbandry practices. Oregon, Colorado, Maine, Michigan, and Rhode Island have all successfully passed and are currently implementing legislation fading out gestation crates for pregnant pigs, and in certain instances, veal crates for calves and/or battery cages for egg-laying hens.

In 2007, Oregon became the first state to limit its use of gestation crates for pregnant pigs through legislation.[182] The legislation known as the *Prohibition Against Restrictive Confinement Act*,[183] became effective in 2013.[184] At first glance,

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07.pdf. There were also several small-scale pig farms operating in Arizona before this law was passed. *Id*. at 2.

[176] *Animals Win Big at Ballot Box*, HUMANE SOC'Y OF THE U.S (Nov. 7, 2006), http://www.humanesociety.org/news/press_releases/2006/11/arizona_michigan_ballot_110706.html.

[177] *See* ARIZ. SEC. OF STATE, *supra* note 174.

[178] Mat Thomas, *Animals Win at Ballot Box*, VEGNEWS.COM, www.animalrighter.org/uploads/1/0/5/5/10550341/animalswinatballotbox.pdf (last visited Nov. 12, 2016).

[179] Cronin, *supra* note 133.

[180] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[181] *Id.*

[182] *See* OR. REV. STAT. § 600.150(2) (West 2016) ("A person commits the offense of restrictive confinement of a pregnant pig if the person confines a pregnant pig for more than 12 hours during any 24-hour period in a manner that prevents the pregnant pig from: (a) [l]ying down and fully extending its limbs; or (b) [t]urning around freely.").

[183] *Prohibition against restrictive confinement*, OREGONLAWS.ORG, www.oregonlaws.org/ors/600.150 (last visited Nov. 12, 2016).

this law appears to bring negative economic impacts to Oregon, but this is not so. Looking back as far as 2000, Oregon possessed 37,300 pigs and totaled cash receipts of $5.6 million in pig sales.[185] But in 2005 Oregon's numbers dropped, as it possessed only 19,000 pigs and totaled cash receipts of $4.9 million in pig sales.[186] By 2012, Oregon possessed 12,500 pigs and totaled $3 million in pig sales.[187] The most recent statistics for 2015 shows that Oregon possesses 10,000 pigs and totaled cash receipts of $1.9 million in pig sales.[188] These numbers reasonably indicate that Oregon was already on the verge of a reduction in the amount of pigs owned and sold, regardless of its new law being passed.

Following Oregon's leadership one year later in 2008, and brokering a deal with animal advocacy groups who wanted to bring to fruition a ballot measure including fading out battery cages for egg-laying hens,[189] the Colorado legislature passed the

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[184] *Oregon's Governor Signs Gestation-sow Crate Ban into Law*, PORK NETWORK (Jan. 18, 2011, 1:13 AM), www.porknetwork.com/pork-news/oregons-governor-signs-gestation-sow-crate-ban-into-law-114062169.html.

[185] *See Commodity Data Sheet All Livestock & Poultry Products, Value of Sales*, OREGON STATE UNIVERSITY (Nov. 2008), https://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/49400/2007AllLivestock.pdf?sequence=1; *see also* U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[186] *See* OREGON STATE UNIVERSITY, *supra* note 185; *see also* U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[187] *See* Eric Mortenson, *OSU to close swine barn, sell off its hogs*, 6 OREGON PORK QUARTERLY 1 (2013), *available at* www.oregonporkproducers.com/wp-content/uploads/2015/03/10-2013.pdf; *see also* U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[188] *See Oregon Agriculture Facts & Figures*, OREGON DEP'T OF AGRICULTURE (Aug. 2016), *available at* https://www.oregon.gov/ODA/shared/Documents/Publications/Administration/ORAgFactsFigures.pdf; *see also* U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[189] *Colorado Governor Signs Ban on Veal Crates, Sow Stalls*, AMERICAN ASSOCIATION OF SWINE VETERINARIANS (May 21, 2008), https://www.aasv.org/news/story.php?id=3019.

Confinement of Calves Raised for Veal and Pregnant Sows Act.[190] This law faded out Colorado's use of veal crates for calves beginning in 2012, and gestation crates for pregnant pigs beginning in 2018.[191] Although the fading out of gestation crates for pregnant pigs has yet to take effect, it does appear that Colorado farmers are prepared to comply with the new law as Colorado's total cash receipts for pig sales have steadily grown from $135 million in 2009 to $256 million in 2014.[192] With no available literature saying otherwise, it is unlikely that Colorado's farmers would work hard to nearly double pig sales, to then crash in 2018. Similarly, the veal industry in Colorado has not been negatively affected by this new law. In 2014, two years after its law took effect, Colorado totaled cash receipts of over $4 billion for cattle and calves sales as compared to $3 billion in 2011.[193]

2009 saw two more states, Maine and Michigan, pass legislation fading out certain animal husbandry practices. Maine's *Confinement of Calves Raised for Veal and Sows Act*,[194] effective 2011, limited the amount of time that a pregnant pig or veal calf may be confined in a day.[195] In 2010, one year before its new law

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[190] *66th Leg., Gen. Ass. SB 08-201*, STATE OF COLORADO (2008), *available at* http://www.leg.state.co.us/clics/clics2008a/csl.nsf/billcontainers/15738AC63DFF2DB1872573E600643253/$FILE/201_01.pdf.

[191] *See* COLO. REV. STAT. §§ 35-50.5-103(1)(a)–(b) (West 2016) ("This article shall apply to: (a) Calves raised for veal, on and after January 1, 2012; and (b) Gestating sows, on and after January 1, 2018."); *see also* COLO. REV. STAT. § 35-50.5-102(1)(a)–(b) (West 2016) ("No person shall confine a calf raised for veal or gestating sow in any manner other than the following: (a) [a] calf raised for veal shall be kept in a manner that allows the calf to stand up, lie down, and turn around without touching the sides of its enclosure; (b) [a] gestating sow shall be kept in a manner that allows the sow to stand up, lie down, and turn around without touching the sides of its enclosure until no earlier than twelve days prior to the expected date of farrowing. At that time, a gestating sow may be kept in a farrowing unit.").

[192] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[193] *Id.*

[194] *SP 0385, 124th Leg.*, STATE OF MAINE (May 12, 2009), *available at* http://www.mainelegislature.org/legis/bills/bills_124th/chappdfs/PUBLIC127.pdf.

[195] *See* ME. REV. STAT. ANN. Tit. 7 §§ 4020(2)(A)-(B) (West 2016) ("A person may not tether or confine a covered animal for all or the majority of a day in a manner that prevents the animal from (A) [l]ying down, standing up and fully extending the animal's limbs; and (B) [t]urning

took effect, Maine totaled cash receipts of nearly $11 million in cattle and calf sales.[196] In 2011, total cash receipts for these sales increased to an astonishing $16.2 million.[197] By 2015, cattle and calf sales in Maine again increased to $33.2 million.[198] Likewise, total cash receipts of pig sales in Maine in 2010 were $1 million, increasing to roughly $1.5 million between 2013 and 2014.[199]

When Michigan passed *Act No. 117* in 2009,[200] it became the only state to limit the use of gestation crates for pregnant pigs, crates for veal calves, and battery cages for egg-laying hens through one piece of legislation.[201] Michigan's law took effect for veal calves in 2012 while pigs and egg-laying hens must wait until 2019.[202] Similar to Maine and Arizona, Michigan has realized increased profits after passing its new law. In 2011, one year before *Act No. 117* took effect, Michigan's cash receipts for cattle and calves sales totaled nearly $434 million.[203] But in 2014, Michigan's cash receipts for cattle and calves sales reached nearly $680 million.[204]

The most recent state to pass legislation prohibiting the use of gestation crates for pregnant pigs and crates for veal calves

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around freely."). In Maine, a "covered animal" includes "a sow during gestation or calf raised for veal that is kept on a farm." *Id.* at § 4020 (1)(b).

[196] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[197] *Id*.

[198] *Id.*

[199] *Id.*

[200] *HB 5127, 95th Leg.,* STATE OF MICHIGAN (Oct. 12, 2009), *available at* http://www.legislature.mi.gov/documents/2009-2010/publicact/htm/2009-PA-0117.htm.

[201] *See* MICH. COMP. LAWS §§ 287.746(2)(a)-(b) (West 2016) ("a farm owner or operator shall not tether or confine any covered animal on a farm for all or the majority of any day, in a manner that prevents such animal from doing any of the following: (a) [l]ying down, standing up, or fully extending its limbs; (b) [t]urning around freely."). In Michigan, a "covered animal" includes "any gestating sow, calf raised for veal, or egg-laying hen that is kept on a farm." *Id.* at § 287.746(1)(b).

[202] *See* MICH. COMP. LAWS § 287.746(6) (West 2016) ("The provisions of this section do not apply to calves raised for veal until October 1, 2012."); *id.* at § 287.746(7) ("The provisions of this section do not apply to egg-laying hens and gestating sows until 10 years after the enactment date of the amendatory act that added this section.").

[203] U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., *supra* note 130.

[204] *Id.*

is Rhode Island[205] when it passed the *Animals and Animal Husbandry -- Animal Care Act* in 2012, to take effect in 2013.[206] While Rhode Island's public radio notes that no farmers in the state use gestation or veal crates anyway,[207] supporters of the law believe that it will prevent farmers from ever adopting such practices.[208] Therefore, the *Animals and Animal Husbandry -- Animal Care Act* is thought of as a symbolic gesture and an expression of the state's stance.[209] California's *Proposition 2*, Arizona's *Humane Treatment of Farm Animals Act*, and Rhode Island's *Animals and Animal Husbandry -- Animal Care Act* each have components of symbolic gestures,[210] and these laws are pertinent examples of new cultural expectations.

Finally, three states have passed legislation fading out the animal husbandry practice of tail-docking cattle, with few exceptions. California became the first state to pass legislation fading out this animal husbandry practice[211] on January 1,

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[205] *See* R.I. GEN. LAWS § 4-1.1-2 (West 2016) ("The purpose of this chapter… is to prohibit the confinement of calves raised for veal and sows during gestation.").
[206] *Id.* at § 4-1.1-1 *et seq*.
[207] *Rhode Island Bans Gestation Crates For Pigs And Calves*, HUFFINGTON POST (June 21, 2012, 4:17 PM) www.huffingtonpost.com/2012/06/21/rhode-island-bans-gestation-crates_n_1616635.html.
[208] *Id.*
[209] Cronin, *supra* note 133.
[210] *Id.*
[211] *See* CAL. PENAL CODE § 597n(a) (West 2016) ("Any person who cuts the solid part of the tail of any… cattle in the operation known as 'docking,' or in any other operation performed for the purpose of shortening the tail of… cattle, within the State of California… is guilty of a misdemeanor.").

2010.[212] Rhode Island became the second on June 2012[213] and Ohio will become the third on January 1, 2018.[214]

While tail-docking cattle appears to be a common practice among farmers, this practice is known to cause terrible chronic pain, tetanus, and gangrene.[215] The American Welfare Institute, the National Milk Producers Federation, the American Association of Bovine Practitioners, and the American Veterinary Medical Association oppose the practice of tail-docking cattle as it provides no benefit to the cattle and has no positive effects on milk quality.[216] Following the example of California, Rhode Island, and Ohio, farmers can increase DCL for their farm animals and meet new cultural expectations by fading out the animal husbandry practice of tail-docking cattle.

V. "DCL CERTIFIED" IS UNLIKE ANY THIRD-PARTY FOOD LABEL

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212 *Id.* ("Effective: January 1, 2010.").

213 *See* R.I. GEN. LAWS § 4-1-6.1(a) (West 2016) ("Any person who intentionally cuts or alters the bone, tissues, muscles or tendons of the tail of any bovine or otherwise operates upon it in any manner for the purpose or with the effect of docking, setting, or otherwise altering the natural carriage of the tail… is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars ($500), or both.").

214 *See* OHIO ADMIN. CODE 901:12-6-02(A)(3) ("Until December 31, 2017, tail docking can be performed"); *see also id*. at 901:12-6-02(4)(a)–(b) ("Effective January 1, 2018, tail docking can only be performed: (a) By a licensed veterinarian; and, (b) If the procedure is determined to be medically necessary.").

215 Sosland, *supra* note 36.

216 *Id.*; *see also NMPF Board Advances Phase-Out of Tail Docking*, NATIONAL MILK PRODUCERS FEDERATION (Oct. 26, 2015), http://www.nmpf.org/latest-news/press-releases/oct-2015/nmpf-board-advances-phase-out-tail-docking; *AABP Position Statement: Tail Docking*, AMERICAN ASSOCIATION OF BOVINE PRACTITIONERS (Mar. 13, 2010), www.aabp.org/resources/aabp_position_statements/aabp_tail_docking-3.13.10.pdf; *Literature Review on the Welfare Implications of Tail Docking of Cattle*, AMERICAN VETERINARY MEDICAL ASSOCIATION (Aug. 29, 2014), https://www.avma.org/KB/Resources/LiteratureReviews/Documents/tail_docking_cattle_bgnd.pdf.

This Note presents a new independent third-party food label that can be voluntarily placed on all farm animal products. This food label is called "DCL Certified." The still image[217] of the logo bears an integral design[218] representing transparency by having farmers open up their barns and letting consumers know about today's production methods so as to build trust between farmers and consumers and encourage a more informed conversation about food.

This Part first illustrates why accurate food labels are necessary to increase consumer confidence and how misleading food labels can make consumers feel taken advantage of. It then explains the distinctiveness of the DCL Certified food label, the importance of this new label, and why farmers should adopt the label. Finally, this Part illustrates major food companies that are implementing internal policies fading out certain animal husbandry practices, and the importance for farmers to do the same.

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[217] U.S. Trademark Application (filed Aug. 31, 2015).

[218] *See generally*, *An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, UNITED NATIONS DOCUMENTS (June 17, 1992), http://www.un-documents.net/a47-277.htm ("Our constant duty should be to maintain the integrity of each while finding a balanced design for all.").

A. Accurate Food Labels Empower And Increase Consumer Confidence, While Inaccurate Food Labels Deceive

Food labels are meant to empower and increase consumer confidence so as to make informed decisions about food purchased in the marketplace.[219] Many food labels placed on farm animal products are overseen by the USDA and independent third-party organizations.[220] A great example of a federally regulated food label, overseen by the USDA, is "USDA Organic."[221] This food label is known to increase consumer confidence in organic food by 71 percent, and further increases the likelihood that consumers will purchase food with this label by 48 percent.[222]

Independent third-party food labels, such as those from non-profit organizations, also increase consumer confidence. A fine example of this would be the Non-GMO Project's "Non-GMO Project Verified"[223] food label. This food label assures its applicants that increased consumer confidence will be realized wherever it is placed.[224] The "Non GMO Project Verified" food

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[219] *See generally* Miles McEvoy, *Organic 101: What the USDA Organic Label Means*, U.S. DEP'T OF AGRIC. (Mar. 22, 2012, 11:00 AM), blogs.usda.gov/2012/03/22/organic-101-what-the-usda-organic-label-means/.

[220] *See* Denise Shoukas, *36 Food Labels You Should Know*, SPECIALTY FOOD ASS'N (Jan. 1, 2013), https://www.specialtyfood.com/news/article/36-food-labels-you-should-know/.

[221] Under the Organic Foods Production Act of 1990, the U.S. government creates production, handling, and labeling standards for organic agricultural products. *See* 7 U.S.C. §§ 6501–22 (2016); *see also* 65 Fed. Reg. 80,548, 80,582 (Dec. 21, 2000) (this proposed rule explains that the USDA organic seal is "composed of an outer circle around two interior half circles with an overlay of the words 'USDA Organic.'" It also explains the coloring requirements).

[222] Bruce Chassy, et al., *Organic Marketing Report*, ACADEMICS REVIEW (2014), academicsreview.org/wp-content/uploads/2014/04/Academics-Review_Organic-Marketing-Report1.pdf.

[223] *About*, NON-GMO PROJECT, www.nongmoproject.org/about/ (last visited Nov 12, 2016).

[224] *Benefits of Verification*, NON-GMO PROJECT, www.nsf.org/newsroom_pdf/NSF_Non_GMO_Verification_Brochure_1213-reference.pdf (last visited Nov. 12, 2016).

label is currently one of the fastest growing food label claims, reaching over 27,000 verified products from 1,500 brands, and representing well over $11 billion in annual sales.[225] The Non-GMO Project offers North America's only independent third-party verification label for non-GMO foods and products.[226]

Food labels are also known to regain consumer confidence. A time when regaining consumer confidence was of vital importance was shortly after Upton Sinclair released his acclaimed 1906 novel, *The Jungle*.[227] Following the release of *The Jungle*, there was a drastic drop in meat sales in the United States, inspiring President Theodore Roosevelt to take steps to increase consumer confidence in farm animal products by labeling the packages with USDA approval.[228] President Theodore Roosevelt accomplished this goal by supporting the passage of the Federal Meat Inspection Act[229] and the Pure Food and Drug Act.[230] The publication of *The Jungle*, two Acts of Congress, and the positive rebound of the meat industry throughout the early 1900's demonstrate that consumers enjoy seeing food labels to increase their confidence in the food that they purchase and consume.[231]

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[225] *See* NON-GMO PROJECT, *supra* note 223.

[226] *Id*.

[227] UPTON SINCLAIR, THE JUNGLE (1906) (illustrating the intolerable labor and unsanitary working conditions in Chicago's meat packing plants).

[228] Gregory M. Schieber, *The Food Safety Modernization Act's Tester Amendment: Useful Safe Harbor For Small Farmers And Food Facilities Or Weak Attempt At Scale-Appropriate Farm And Food Regulations?* 18 DRAKE J. AGRIC. L. 239, 244 (2013).

[229] *Id*.; *see also* The Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.* (2016); *id*. at § 604 (providing for inspections, requires that meat "found to be not adulterated shall be marked, stamped, tagged, or labeled as 'Inspected and Passed'".).

[230] The Pure Food and Drug Act of 1906, banning the manufacture and shipment of adulterated or misbranded food and drugs. *See* Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938). In 1938, Congress significantly augmented the authority of the U.S. Food & Drug Administration when it passed the Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301, *et seq.* (2016)).

[231] James A. Albert, *A History Of Attempts By The Department of Agriculture To Reduce Federal Inspection Of Poultry Processing Plants - A Return to the Jungle*, 51 LA. L. REV. 1183, 1191 (1991) ("Consumer confidence is absolutely essential to the food processing industry.").

However, food labels can also be used to mislead and deceive consumers. For example, many consumers prefer to know that their food came from *true* free-range chickens and pasture-fed beef, not only for taste, but to avoid supporting abhorrent living conditions that farm animals often endure.[232] It is no wonder, then, that consumers feel taken advantage of when they intentionally purchase food because of its food label to later find out they have been deceived or misled. In the marketplace today, many food labels placed on farm animal products are misleading, including food labels overseen by the federal government.[233]

The USDA oversees 20 food labels commonly placed on farm animal products.[234] However, many of these food labels mislead consumers.[235] One pertinent example is the USDA's "free-range" food label.[236] The term "free-range" conjures up images of

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[232] Samuel R. Wiseman, *Emerging Issues In Food Law: Fraud In The Market*, 26 REGENT U.L. REV 367, 373 (2013–2014).
[233] *See* Danny Deza, *16 Most Misleading Food Labels*, HEALTH, www.health.com/health/gallery/0,,20599288,00.html (explaining that federally regulated terms like "free range" are deceptive) (last visited Nov. 12, 2016); *Free-Range and Organic Meat, Eggs, and Dairy Products: Conning Consumers?*, PETA, *available at* www.peta.org/issues/animals-used-for-food/free-range-organic-meat-eggs-dairy/ (last visited Nov. 12, 2016); *see also Ryan Gosling to Costco CEO: It's Time to Get Chickens out of Cages*, HUMANE SOC'Y OF THE U.S (June 22, 2015), www.humanesociety.org/news/news_briefs/2015/06/ryan-gosling-costco-062215.html?credit=web_id644308864 (a letter from celebrity Ryan Gosling to the CEO of Costco expresses concerns about "deceptive labeling on [egg] cartons featuring graphics of birds living out in a green pasture" when in reality the chickens are "confined in filth-laden cages with the mummified corpses of their cage-mates" and their "wings, legs, and necks [are] trapped in the corroded wires of their battery cages.").
[234] *Meat And Poultry Labeling Terms*, U.S. DEP'T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms (last updated Aug. 10, 2015).
[235] *See* Deza, *supra* note 233; PETA, *supra* note 233.
[236] Another example of a USDA food label that misleads consumers would be the "organic" label. *See* Tara Duggan, *Proposed new organic standards promise more humane animal treatment*, SAN FRANCISCO CHRONICLE, www.sfchronicle.com/food/article/Proposed-new-organic-standards-promise-more-7237779.php (last updated Apr. 8, 2016,

egg-laying hens roaming freely over grass pasture, but in reality, many "free-range" hens spend the majority of their time indoors, crammed onto large feces-covered floors.[237] The USDA's informal, non-binding policy on the use of the word "free-range" is approved where farmers can demonstrate that egg-laying hens "were allowed continuous, free access to the outside for over 51% of their lives through a normal growing cycle. Under this standard, some producers or certifying organizations may support a 'free-range' labeling claim if [egg-laying hens] were allowed access to a yard outside, regardless of whether the birds actually use the yard."[238] Putting aside the reality that egg-laying hens in modern agriculture live a mere 1-2 years,[239] as compared to their natural 10-20 year life-span,[240] the USDA's formal, binding policy on the use of the word "yard" does not specify any particular size.[241] Rather, USDA's informal, non-binding policy defines the word "yard" as "be[ing] large enough to allow all [egg-laying hens] to feed simultaneously without crowding and

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11:53 PM) ("According to a 2015 survey from Consumer Reports, 54 percent of shoppers believe that meat or poultry that is labeled organic means that the animal had access to the outdoors, and 68 percent think that is what organic certification should mean.").

[237] Kate L. Harrison, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 231 (2008).

[238] 73 Fed. Reg. 60,228, 60,229 (Oct. 10, 2008).

[239] *Egg Production in Canada*, BCSPCA (Sep. 2009), http://cfhs.ca/files/bcspca_factsheet_life_of_an_egg_laying_hen.pdf (explaining that the "average hen will begin laying eggs at between 18-20 weeks of age. Over a period of one year, a hen will lay approximately 320 eggs. This level of egg production represents a significant increase over what the ancestors of these modern [birds] produced. After laying eggs for nearly one year, a hen's egg production declines, as does the quality of the egg shell and contents, and the hen is considered 'spent.'"); PETA, *supra* note 233 (explaining that at about "2 years of age" egg-layer hens are slaughtered because they are "spent").

[240] *Chicken Help*, MY PET CHICKEN, www.mypetchicken.com/backyard-chickens/chicken-help/How-long-do-chickens-live-H106.aspx (last visited Nov. 12, 2016) (explaining that it is common "for a hen in a backyard setting to live 8-10 years" but there has also been "reports of chickens living as many as 20 years!").

[241] *See* 7 C.F.R. § 205.2 (2016) (defining "yard" as "[a]n area for feeding, exercising, and outdoor access for livestock during the non-grazing season and a high traffic area where animals may receive supplemental feeding during the grazing season.").

without competition for food."[242] There is no definition for "crowding" or "competition" under USDA's formal or informal policy, and it may very well be the case that while outside, "free-range" egg-laying hens stand within inches of each other.

B. The Distinctiveness Of The "DCL Certified" Food Label.

There are currently several non-profit organizations that provide independent third-party food labels for farm animal products. In no particular order, (1) the Humane Farm Animal Care provides "Certified Humane,"[243] (2) the American Humane Association provides "American Humane Certified,"[244] (3) the Global Animal Partnership ("GAP") provides the "5-Step Animal Welfare Rating Program,"[245] (4) the Food Alliance provides "Food Alliance Certified,"[246] (5) the Animal Welfare Approved ("AWA") provides "Animal Welfare Approved,"[247] and (6) the American Grassfed Association provides "American Grassfed Certified."[248]

Only Certified Humane,[249] AWA, and GAP accurately attempt to exceed industry standards to improve the lives of farm animals from birth to slaughter. For example, Certified Humane

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[242] 75 Fed. Reg. 7,154, 7,193 (Feb. 17, 2010).
[243] *Our Mission*, HUMANE FARM ANIMAL CARE, *available at* certifiedhumane.org (last visited Nov. 12, 2016).
[244] *About Our Program*, AMERICAN HUMANE ASSOCIATION, *available at* http://www.humaneheartland.org/about-us (last visited Nov. 12, 2016).
[245] *What Is The 5-Step ® Animal Welfare Rating Program?*, GLOBAL ANIMAL P'SHIP., *available at* http://www.globalanimalpartnership.org/5-step-animal-welfare-rating-program (last visited Nov. 12, 2016).
[246] *Food Alliance Certification*, FOOD ALLIANCE, *available at* foodalliance.org/certification (last visited Nov. 12, 2016).
[247] *About*, ANIMAL WELFARE APPROVED, *available at* http://animalwelfareapproved.org/about/ (last visited Nov. 12, 2016).
[248] *Our Standards*, AMERICAN GRASSFED, *available at* http://www.americangrassfed.org/about-us/our-standards/ (last visited Nov. 12, 2016).
[249] While this Note does not expressly take a position, there are those who believe that using the word "humane" to refer to the ultimate killing of farm animals is inherently misleading and also a paradox. *See* Ashley Capps, *A Closer Look at What So-Called Humane Farming Means*, FREE FROM HARM (Sep. 27, 2012), http://freefromharm.org/animal-products-and-ethics/a-comprehensive-analysis-of-the-humane-farming-myth/.

states their goal "is to improve the lives of farm animals by driving consumer demand for kinder and more responsible farm animal practices."[250] AWA states their "standards have been developed in collaboration with scientists, veterinarians, researchers and farmers across the globe to maximize practicable, high-welfare farm management with the environment in mind."[251] Additionally, AWA advocates for less consumption of farm animals raised in intensive confinement, and a future where the environment and farm animals are not harmed.[252] And while GAP's Steps 1 and 2 mirror industry standards,[253] Steps 3 and 4 begin to exceed industry standards,[254] with Steps 5 and 5+ exceeding all industry standards.[255]

The remaining food labels barely go beyond industry standards. For example, the American Humane Certified food label mirrors industry standards, and the certification does not require chickens, turkeys, or pigs to be let outdoors or receive fresh air.[256] Food Alliance Certified allows farms to be approved

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[250] *Overview*, HUMANE FARM ANIMAL CARE, *available at* http://certifiedhumane.org/how-we-work/overview/ (last visited Apr. 26, 2016).

[251] *Standards*, ANIMAL WELFARE APPROVED, *available at* http://animalwelfareapproved.org/standards/ (last visited Apr. 26, 2016).

[252] *The Grassfed Primer*, ANIMAL WELFARE APPROVED 13 (Oct. 2016), http://animalwelfareapproved.org/wp-content/uploads/2016/10/The-Grassfed-Primer-Oct-2016-ONLINE.pdf ("the reality is that we do need to decrease the amount of low-welfare, intensively reared feedlot meat that we eat.").

[253] *Beef Report*, CONSUMER REPORTS 22 (Aug. 2015), www.consumerreports.org/content/dam/cro/magazine-articles/2015/October/Consumer%20Reports%20Food%20%26%20Sustainability%20Center%20Beef%20Report_8-15.pdf ("GAP Step 1 and Step 2… reflect the industry baseline in many areas.").

[254] *Id*. at 20 ("GAP Step 4 [still] allows castration of calves younger than 3 months without pain medication.").

[255] *Id*. at (Under Step 5, "physical alterations including castration, dehorning or disbudding, and branding are prohibited. There are protections during transport to the slaughterhouse, and Step 5+ requires on-farm slaughter.").

[256] Dena Jones, *American Humane Certified Is Out of Step on the Meaning of "Humane,"* HUFFINGTON POST (July 28, 2015, 2:08 PM), http://www.huffingtonpost.com/dena-jones/american-humane-certified-is-out-of-step-on-the-meaning-of-humane_b_7859634.html.

based on an average score, instead of requiring that every standard be adhered to.[257] Additionally, it does not require all farm animals to access the outdoors, and it allows beak cutting, horn cutting, and tail docking without pain relief.[258] Finally, American Grassfed Certified, a label that apparently prides itself on supporting humane treatment and welfare of farm animals,[259] has no set standards for how farm animals are to be treated.[260]

Separate and distinct from these food labels is "DCL Certified." This new food label communicates to consumers that farmers with this certification (1) are transparent in their operations and say "no" to Ag-Gag laws, and (2) do not use battery cages for egg-laying hens, gestation crates for pregnant pigs, veal crates for male calves, or tail-dock cattle.[261] The first prong communicates that the particular farmer does not enjoy Ag-Gag laws that bring the farming profession into disrepute, bad taste, and reflect unfavorably on other farmers. The second prong communicates to consumers that the particular farmer is always aware of, and implementing, new cultural expectations for how farm animals are born, raised, and/or slaughtered at the farm.

Compliance with DCL Certified will be verified through independent third-party certification,[262] using financially accessible food quality verification services, similar to Where

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[257] *A Consumer's Guide to Food Labels and Animal Welfare*, ANIMAL WELFARE INSTITUTE (Mar. 2015), awionline.org/content/consumers-guide-food-labels-and-animal-welfare; *see also* CONSUMER REPORTS, *supra* note 253, at 20 (explaining that the Food Alliance Certified label is "somewhat meaningful for… animal welfare.").

[258] *Id.*

[259] AMERICAN GRASSFED, *supra* note 257 (American Grassfed Certified claims that it uses "the highest standards of animal husbandry in their grazing programs to support humane treatment and welfare of their animals.").

[260] ANIMAL WELFARE INSTITUTE, *supra* note 257; *see also* CONSUMER REPORTS, *supra* note 253 ("Other than requiring continuous access to pasture… there are no standards for how the animals are treated" under the American Grassfed Certified label).

[261] *See supra* notes 37–44 and accompanying text for an illustration of possible future animal husbandry practices that can be faded out to increase DCL for farm animals.

[262] Third-party certification occurs when an outside certification organization certifies that a product meets the requirements of a standard.

Food Comes From, Inc.,[263] NSF International,[264] and SCS Global Services.[265] There will also be an online website for DCL Certified that consumers can readily access to understand all that the food label means. As explained below in Part V.C, farmers will always want to be aware of new laws passed by voters and state legislatures fading out certain animal husbandry practices because major food companies are beginning to adopt these new cultural expectations as internal policy.

Additionally, DCL Certified proudly amplifies the conversation for one of the most important rights of American citizens; the right to vote.[266] Lawmakers at the federal, state, and local levels are elected by and work for the American public. Letting legislators know how their constituents view specific issues shows the legislator that the community they represent is keeping track of their votes, and that constituents are encouraging legislators to vote in favor of their view. However, if voter participation declines, not only will the primary link between the citizen and the system be diminished, but government actions may be less likely to correspond with the

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[263] *About Us*, WHERE FOOD COMES FROM, INC., http://wherefoodcomesfrom.com/about-us/ (last visited Nov. 12, 2016); *see e.g.*, *Non-GMO Project Verification Pricing*, WHERE FOOD COMES FROM, INC. (Apr. 13, 2016), http://www.nongmoproject.org/wp-content/uploads/2016/08/WFCF-Price-Sheet-2016-04-21.pdf (Where Food Comes From Inc.'s assessment fees related to the Non-GMO Verified food label).

[264] *About NSF*, NSF INT'L, http://www.nsf.org/about-nsf/ (last visited Nov. 12, 2016); *see e.g.*, *Non-GMO Project Brand Owner, Handler and Producer Fees*, NSF INT'L (Mar. 1, 2016), http://www.nongmoproject.org/wp-content/uploads/2016/08/NSF_Fees_March2016.pdf (NSF's assessment fees related to the Non-GMO Verified food label).

[265] *About*, SCS GLOBAL SERVICES, https://www.scsglobalservices.com/company (last visited Nov. 12, 2016); *see e.g.*, *Fee Schedule for Non-GMO Project Verification*, SCS GLOBAL SERVICES (Feb. 2016), http://www.nongmoproject.org/wp-content/uploads/2016/08/SCS-Cost-Sheet-05-03-2016.pdf (SCS Global Services' assessment fees related to the Non-GMO Verified food label).

[266] *Elections & Voting*, THE WHITE HOUSE, https://www.whitehouse.gov/1600/elections-and-voting (last visited Nov. 12, 2016).

desires of the citizens.[267] As such, the legitimacy of the democratic system may be undermined.[268]

In order to encourage higher voter turnout, and reestablish the important link between citizens and government, the DCL Certified food label comes to the marketplace with a purpose of reconnecting voters and their legislators. DCL Certified makes it a priority to motivate voters and stimulate a more informed debate about DCL for farm animals by promoting new ideas for the design of future laws that affect farm animals. Voters are more likely to vote when they are motivated to get to the voting booths, knowing that voter turnout will be high, and having discussed plans for getting there.[269]

C. Major Food Companies Are Implementing Internal Policies That Increase DCL For Farm Animals, And It Is Important That Farmers Do The Same.

Major American and international food companies are implementing internal policies of their own that increase DCL for farm animals. This trend began with Bon Appétit in 2005 as the first United States food service company to purchase only cage-free eggs[270] Smithfield Foods, the world's largest pork producer, committed in 2007 to stop housing pregnant pigs in gestation crates in the United States by 2017,[271] and ultimately worldwide by 2022.[272] Since 2005, more than 60 major food companies,

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[267] *Engaging the Electorate: Initiatives to Promote Voter Turnout from Around the World*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (2006), http://aceproject.org/ero-en/topics/electoral-participation/turnout/Idea_voter_low.pdf.

[268] *Id.*

[269] Marguerite Rigoglioso, *Research-Backed Ways to Get Out the Vote*, STANFORD BUSINESS (Apr. 17, 2012), www.gsb.stanford.edu/insights/research-backed-ways-get-out-vote.

[270] *Animal Welfare*, BON APPÉTIT MANAGEMENT COMPANY, www.bamco.com/sourcing/animal-welfare/ (last visited Nov. 12, 2016).

[271] *See Housing of Pregnant Sows*, SMITHFIELD FOODS, http://www.smithfieldfoods.com/integrated-report/animal-care/housing-of-pregnant-sows (last visited Nov. 12, 2016).

[272] Christopher Doering, *Smithfield urges farmers to end use of gestation crates*, USA TODAY (Jan 7, 2014, 7:13 PM), www.usatoday.com/story/news/nation/2014/01/07/hog-crates-ban/4362353/.

including McDonald's, Sodexo, and Aramark, announced internal policies to fade out certain animal husbandry practices by no longer using suppliers that house pregnant pigs in gestation crates.[273] Whole Foods Market is so far the only major food company that has stopped using suppliers that house pregnant pigs in farrowing crates.[274] There have also been announcements by Denny's Restaurants, Dunkin' Brands, and General Mills to no longer contract with farmers that dehorn cattle.[275] Even Swiss international company Nestlé, one of the world's largest food companies, announced in 2014 that it will no longer contract with farmers that house pigs in gestation crates, house egg-laying hens in battery cages, dehorn cattle, tail dock cattle without anesthesia, and use drugs for animal growth.[276]

Additionally, major companies not commonly known for food, or those that do not sell food at all, have joined the fray to meet new cultural expectations. For example, Hilton Worldwide announced that it will no longer contract with farmers that house egg-laying hens in battery cages by 2017 and house pigs in gestation crates by 2019.[277] Even Geico Auto Insurance, the second largest United States auto insurance company,[278] released a 2015 commercial where a chicken is seen roaming freely

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[273] *See Food Company Policies on Gestation Crates*, CRATEFREEFUTURE.COM, cratefreefuture.com/pdf/Gestation%20Crate%20Elimination%20Policies.pdf (last visited Nov. 12, 2016).

[274] Frances Flower, *No Gestation Crates for Our Pigs*, WHOLE FOODS (Mar. 22, 2012), https://www.wholefoodsmarket.com/blog/whole-story/no-gestation-crates-our-pigs; *see also* U.S. ENVTL. PROT. AGENCY, *supra* note 37.

[275] David Pitt, *Dairy Farms Asked to Consider Breeding No-Horn Cows*, FOODMANUFACTURING.COM (Mar. 30, 2015, 9:40 AM), www.foodmanufacturing.com/news/2015/03/dairy-farms-asked-consider-breeding-no-horn-cows.

[276] Stephanie Strom, *Nestlé Moves Toward Humane Treatment of Animals at Its Suppliers*, N.Y. TIMES, Aug. 21, 2014, at B2, *available at* http://www.nytimes.com/2014/08/21/business/nestle-moves-toward-humane-treatment-of-animals-at-its-suppliers.html.

[277] *Hilton Worldwide Commits to Improving Animal Welfare in Supply Chain*, HILTON WORLDWIDE (Apr. 6, 2015), news.hiltonworldwide.com/index.cfm/news/hilton-worldwide-commits-to-improving-animal-welfare-in-supply-chain.

[278] *GEICO Passes Allstate to Become 2d Largest U.S. Auto Insurer: SNL*, INSURANCE JOURNAL (Dec. 16, 2013), www.insurancejournal.com/news/national/2013/12/16/314530.htm.

around the country, sending selfie pictures back to the farmers.[279] The Geico commercial shows the chicken's farm home with many chickens roaming freely around the front yard, and the Geico narrator says, "[i]f you're a free range chicken, you roam free. It's what you do. If you want to save 15% or more on car insurance, you switch to Geico. It's what you do."[280]

Most importantly, when farmers fade out certain animal husbandry practices, they can guarantee that they will continue to do business with major food companies. For example, Nestlé announced that it has hired independent auditors to make sure that their new standards are being adhered to at the farms it works with, and that farmers whom refuse to meet Nestlé's new standards will no longer supply Nestlé.[281] Major American and international companies, both food companies and not, are recognizing new cultural expectations. Per this integral point, it is important for farmers to increase the DCL for farm animals born, raised, and/or slaughtered at the farm.

VI. CONCLUSION

There are new cultural expectations in the United States to know how farm animals are born, raised, and/or slaughtered at the farm. By using a new term and phrase known as Daily Comfort Level, and a new food label called DCL Certified, farmers can communicate to consumers that they (1) say "no" to Ag-Gag laws that bring the farming profession into disrepute, bad taste, and reflects unfavorably on other farmers, and (2) do not use certain animal husbandry practices, such as battery cages for egg-laying hens, gestation crates for pregnant pigs, veal crates for male calves, and tail-docking cattle. It is important for farmers to always be aware of and implement new cultural expectations for how farm animals are born, raised, and/or slaughtered at the farm. Doing so can help farmers avoid contractual cancellations with major food companies that are beginning to implement

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[279] Yvette Schwartz, *GEICO Chicken Commercial 2015 Free Range Song by Roy Orbison*, YOUTUBE, https://www.youtube.com/watch?v=z38evlC-EiY (uploaded Apr. 28, 2015) ("If you're a free-range chicken, you roam free, it's what you do.").

[280] *Id.*

[281] *Nestlé announces farm animal welfare commitment*, NESTLÉ (Aug. 21, 2014), *available at* www.nestleusa.com/media/pressreleases/nestlé-announces-farm-animal-welfare-commitment.

internal policies fading out certain animal husbandry practices. And while change is never easy, farmers can view new cultural expectations as an opportunity to reconnect with the consumer.[282] At the end of the day, it is consumers whom are the driving force behind increasing DCL for farm animals, and the farming profession that must meet new cultural expectations.

[282] Erica Shaffer, *Reconnecting with consumers*, MEAT+POULTRY (June 1, 2015), *available at* http://www.meatpoultry.com/articles/news_home/Trends/2015/06/Reconnecting_with_consumers.aspx?ID=%7B202C96A5-E672-44CE-A85B-FE1FF5ECCC0D%7D&cck=1\.

THE ARABBERS AND THEIR HORSES: RECONCILING ANIMAL WELFARE CONCERNS AND AFRICAN AMERICAN TRADITION TO BENEFIT BALTIMORE CITY

BY: GABRIEL H. RUBINSTEIN

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INTRODUCTION

On the morning of January 13, 2015, officers from the Baltimore City Health Department's ("Health Department") Office of Animal Control ("Animal Control") inspected a horse stable located in the Hollins Market neighborhood of Baltimore City. The stable, which is the oldest continually functioning livery stable in the United States,[1] housed horses belonging to Baltimore produce vendors, known as arabbers,[2] who rely on their horses to pull their brightly colored wagons throughout Baltimore City.[3] Arabbing is low-income profession traditionally held by black men that emerged in Baltimore following the end of the Civil War and is unique to Baltimore today.[4]

Animal Control's inspections that morning led it to seize fourteen horses belonging to five arabbers,[5] and ultimately developed into serious animal cruelty charges. The charges included (1) depriving an animal of necessary sustenance, (2) inflicting unnecessary suffering or pain on an animal, (3) causing, procuring, or authorizing the deprivation of an animal of necessary sustenance or inflicting unnecessary suffering or pain on an animal, and (4) failure to provide an animal with nutritious food in sufficient quantity, necessary veterinary care, proper drink, air, space, shelter, or protection from the weather.[6] If found guilty, the five arabbers faced imprisonment of up to 90 days.[7] In

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[1] Baynard Woods, *Arabber Stable Near Hollins Market Raided, Horses and Other Animals Taken*, CITY PAPER (Jan. 14, 2015 4:00 PM), http://www.citypaper.com/blogs/the-news-hole/bcp-arabber-stable-near-hollins-market-raided-horses-and-other-animals-taken-20150114,0,4843594.story.

[2] David Frey, *The Last of the Arabbers*, EATER (Oct. 8, 2014 10:00 PM), http://www.eater.com/2014/10/8/6915565/baltimore-arabbers-fruit-vendors. The proper pronunciation of arabber is AY-rabbers. *Id.*

[3] Charles Cohen, *Another arabber exodus?*, CITY PAPER (Feb. 3, 2015 12:13 PM), http://www.citypaper.com/news/mobtownbeat/bcp-another-arabber-exodus-after-one-of-the-last-stables-is-raided-the-future-of-baltimores-produce-pedd-20150203,0,5835072.story.

[4] Frey, *supra* note 2.

[5] Justin Fenton, *Animal Cruelty Trial Opens for West Baltimore Arabbers*, BALTIMORE SUN (Feb. 24, 2016, 9:07 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-arabbers-trial-20160224-story.html.

[6] MD. CODE ANN., CRIM. LAW § 10-604(a)(2)-(5) (West 2008).

[7] MD. CODE ANN., CRIM. LAW § 10-604(b)(1) (West 2008).

addition, the arabbers, who are a low income group and rely on their horses for their livelihood, also faced fines of up to $1000, prohibition from owning, possessing, or residing with any animal, and mandatory psychological counseling, for which they would have to pay.[8]

The section of the Maryland Criminal Code, under which the arabbers were charged, serves a critical purpose in protecting the health and well-being of animals in Maryland. Indeed, the intent of the Maryland General Assembly, as professed in the statute, is to ensure that every animal in the state is protected from "intentional cruelty.[9]" The statute itself is quite encompassing, casting a wide net in terms of the vast array of animals it protects. For example, it defines "animal," as "a living creature except for a human being."[10] As such, the law as written is critical in protecting animals in Maryland.

Despite this vital statute, many view its enforcement by the Office of the State's Attorney for Baltimore City to stem not so much from a desire to protect the well-being of the arabbers horses from cruelty, but from a larger goal of ensuring that the arabbers cannot use horses to support their traditional livelihood.[11] Supporters of the arabbers feel that the Health Department views arabbing as a nuisance and seeks to end the practice for good.[12] Many view the January 2015 raid as the latest installment of a series of events marking a tumultuous relationship between the arabbers and the Baltimore City government, though the January 2015 incident marked the first time prosecutors actually brought criminal charges against the arabbers.[13] Notably, the arabbers were acquitted of the serious animal cruelty charges brought against them following the January 2015 incident.[14]

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[8] MD. CODE ANN., CRIM. LAW § 10-604(b)(2)-(3) (West 2008).

[9] MD. CODE ANN., CRIM. LAW § 10-602 (West 2008). "Cruelty" as defined by the act "means the unnecessary or unjustifiable physical pain or suffering caused or allowed by an act, omission, or neglect" and includes torture and torment. *Id.* at § 10-601(c)(1)–(2).

[10] MD. CODE ANN., CRIM. LAW § 10-601(b) (West 2008).

[11] Fenton, *supra* note 6.

[12] *Id.*

[13] *Id.*

[14] Jessica Anderson, *Arabbers Acquitted of Most Serious Charges*, BALTIMORE SUN (Feb. 26, 2016, 8:40 PM),

In an environment where finding employment is challenging for many Baltimore residents, particularly low-income black men,[15] arabbing has historically provided an opportunity for income.[16] Today, there is an extremely high unemployment rate stemming from the deindustrialization of and disinvestment in Baltimore City over the latter half of the 20th century.[17] Arabbing is not a lucrative profession, but the arabbers, who have learned the trade from earlier generations, rely on their horses to transport their carts and earn income.[18] Following Animal Control's recent inspection and confiscation, Dion Dorsey, a third-generation arabber who raised three children on his arabbing income, stated, "'[a]ll we know is some people out of work . . . and a whole lot of people are hurting.'"[19]

Concerns over the well-being of the arabbers' horses are certainly valid. As Baltimore Health Commissioner Dr. Leana S. Wen recently stated, "our mission is to protect the health and safety of our animal residents, just like our human residents."[20] Here, there is the potential for a symbiotic relationship between the Baltimore City Government (hereinafter, "the "City Government") and the arabbers. Despite their dwindling numbers, the arabbers already bring significant value to Baltimore City.[21] The presence of the arabbers helps to assuage the deleterious effects of food deserts,[22] and contributes to the City's historical milieu, which the City Government could utilize to encourage tourism and development in the City.[23] Furthermore, the arabbing tradition allows low-income children living in the City to interact with horses, an opportunity which they may not get without the arabbers' presence. Research has shown that the

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http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-arabber-trial-20160226-story.html.

[15] Jordan Malter, *Baltimore's Economy In Black and White*, CNN (Apr. 29, 2015, 8:59 PM), http://money.cnn.com/2015/04/29/news/economy/baltimore-economy/.

[16] Frey, *supra* note 3.

[17] KARL ALEXANDER *ET AL.*, THE LONG SHADOW 28 (2014).

[18] Woods, *supra* note 2.

[19] *Id.*

[20] Anderson, *supra* note 15.

[21] Frey, *supra* note 3.

[22] *See infra* Part I.B.1.

[23] *See infra* Part I.B.2.

effects of children interacting with horses can be therapeutic and teach empathy, which could be especially important for children living in neighborhoods riddled with crime and violence.[24]

Accordingly, this paper argues that Animal Control, and more generally, the Health Department and the City Government should work with the arabbers to develop a more cooperative relationship. By doing so, not only would the City Government ensure that the arabbers' horses have a high quality of life, but it could harness and increase the positives that the arabbers bring to the City community. Through this cooperation, the City Government would be able to monitor the welfare of the arabbers' horses while working with the arabbers to improve the City's communities.[25]

Part I of this paper examines the arabbers' unique history in the City,[26] their sharp decline beginning in the second half of the 20th Century,[27] and the considerable benefits that arabbers offer to many communities in Baltimore City, which the City Government should capitalize on to benefit the City.[28] Part II of this paper assesses the often-troubled relationship between the arabbers and the City Government,[29] including the most recent criminal charges brought against the arabbers.[30] Part III of this paper proposes policy changes that the City Government should implement to establish a mutually beneficial relationship between the arabbers and the City Government, which would ultimately promote the animal welfare laws protecting horses, while also strengthening Baltimore's communities.[31]

I. THE BALTIMORE ARABBERS: AN AFRICAN AMERICAN FOLK TRADITION

The Baltimore arabbers have been active since the end of the Civil War, and are an iconic and unique aspect of Baltimore's history. Though the number of arabbers has declined following the profession's peak in the 1950s, the Baltimore arabbers still

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[24] *See infra* Part I.B.3.
[25] *See infra* Part III.
[26] *See infra* Part I.A.
[27] *See infra* Part I.A.
[28] *See infra* Part I.B.
[29] *See infra* Part II.A.
[30] *See infra* Part II.B.
[31] *See infra* Part III.

bring noteworthy benefits to Baltimore. Perhaps the most obvious benefit they provide is in assuaging the impact of food deserts by bringing nutritious foods into communities where residents lack options to purchase healthy foods. In addition, the image of the Baltimore arabber, leading a horse with a brightly colored cart full of fruits and vegetables down Baltimore's streets, hearkens back to an earlier era in Baltimore's history, and presents an opportunity for the city government and Baltimore businesses to increase revenue through tourism and development.

A. A Brief History

The emergence of the arabbing industry can be viewed historically as a push for economic opportunity by black people in the midst of extreme racial discrimination following the abolition of slavery. Following the end of the Civil War, African Americans throughout the United States often were unable to find employment that led to economic independence.[32] From the end of the Civil War until the 1970s, Baltimore had a plethora of downtown markets where fresh produce was sold.[33] Because many Baltimore citizens sought convenient produce, there was a market for produce delivery. Many African Americans seeking work jumped at the opportunity for self-employment and began hauling fresh produce from downtown Baltimore to other areas of the city using a horse and cart.[34]

The success and subsequent demise of the arabbing industry parallels the economic history of Baltimore City in the 20th Century.[35] Like Baltimore, the arabbers' economic zenith was directly tied to the demand for production associated with World War II. Prior to World War II, produce vending was not considered distinctly African American.[36] However, many whites who had previously engaged in the trade of produce began working in manufacturing positions because these positions were

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[32] Catherine Finn, *Baltimore's Arabbers Are Fading Away*, PRESERVATION NATION (Nov. 2, 2007), http://blog.preservationnation.org/2007/11/02/baltimores-arabbers-are-fading-away/#.VQyqyZPF8mU.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Frey, *supra* note 3.

easier for white Americans to obtain and also paid better.[37] Though many African Americans did work in manufacturing jobs, African Americans filled the void left by white Americans in the lower-wage arabbing industry.[38] With the overall upsurge in the wealth and population of the City,[39] the demand for produce, specifically produce that was conveniently transported to the buyer instead of requiring the buyer to make a trip to the downtown markets, also increased.[40] Consequently, the 1950s saw the apex of arabber activity; though the official number was never recorded, estimates range from several dozen to as high as several hundred arabbers being active at one time during these years.[41]

Though Baltimore dominated Maryland and much of the mid-Atlantic region economically during World War II, business and industrial leaders were aware that the elevated levels of industry achieved because of World War II would be difficult to maintain after the war's end.[42] As early as 1944, Maryland was diagnosed as a "problem state" by a government report where "federal war outlays had led to abnormal population growth and a heavy dependence on military production."[43] The actual post-war economy did not see Maryland as a whole suffer; Baltimore bore the brunt of Maryland's post-war industrial decline. Between 1950 and 1995, Baltimore lost over 100,000 manufacturing jobs, which made up approximately seventy-five percent of its industrial employment,[44] and most jobs moved to Baltimore's

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[37] Finn, *supra* note 33.
[38] *Id.*
[39] By 1950, Baltimore City had become the sixth-largest city in the U.S. Service Employees International (SEIU), *Putting Baltimore's People First: Keys to Responsible Economic Development of Our City* (2004), *available at* http://www.nathanielturner.com/robertmooreand1199union3.htm.
[40] Frey, *supra* note 3.
[41] Frey, *supra* note 3. Adding to the difficulty of knowing how the actual number of arabbers active in Baltimore is the fact that the number of arabbers ebbed and flowed with periods of economic prosperity. Because an individual only needed a horse and cart to find employment as an arabber, the total number of arabbers went up during periods of unemployment. *Id*.
[42] ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT1634-1980, 554 (1988).
[43] *Id*. at 587.
[44] *Id*.

suburban areas.[45] Between 1955 and 1965, Baltimore lost eighty-two industries, sixty-five of which went to suburban Baltimore County.[46] Today, manufacturing jobs comprise only six percent of jobs in Baltimore.[47]

As industry and wealth moved from the City to the suburbs, the arabbers were faced with escalating obstacles in maintaining their way of life. Baltimore markets, such as the historical Lexington Market and smaller produce markets, lost significant business,[48] and many of the downtown markets closed permanently.[49] The biggest loss for the arabbers came in 1976, when the City closed three of its major markets in favor of the Greater Baltimore Consolidated Wholesale Food Market Authority's modern distribution center in Jessup, Maryland, located seventeen miles away.[50] Consequently, the arabbers could no longer use their horses and carts to reach their supply of produce in the City.[51] Though many arabbers came together to rent trucks that could be driven each day to Jessup to bring back fresh produce, this increased cost was unsustainable and many arabbers were forced to quit the practice for good.[52]

As of 2015, approximately nine arabbers still practice in Baltimore.[53] Arabbing has survived largely through the assistance of the Arabber Preservation Society, neighborhood associations, and other community groups.[54] Despite the emergence and eventual widespread use of the automobile and highways, the arabbers continue to use horses today.[55] They still use traditional methods because the trade is inherited from their fathers (though, notably, there have been the some female arabbers).[56]

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[45] ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 217 (2010).
[46] *Id.*
[47] SEIU, *supra* note 40.
[48] PIETILA, *supra* note 46, at 221.
[49] *Id.*
[50] Frey, *supra* note 3. This suburban location was chosen because Jessup was seen as roughly equidistant from Baltimore and Washington, D.C.—two cities with rapidly growing suburban areas. *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

Because the arabbers learn the practice of arabbing, including the stabling and caring for the horses, as children, the arabbers view working with their horses as a major component of their identity and culture.[57]

B. Benefits to the City

1. "Strawberries by the Quart!"[58]: Alleviating the Impacts of Food Deserts

Generally known as an area where healthy food is unavailable, a food desert is defined by the City of Baltimore's Department of Planning as an area "where the distance to a supermarket is more than one quarter of a mile; the median household income is at or below 185 percent of the Federal Poverty Level; over forty percent of households have no vehicle available; and the average Healthy Food Availability Index score for supermarkets, convenience and corner stores is low."[59] The Healthy Food Availability score is determined using the Nutrition Environment Measurement Survey,[60] a formula developed at the University of Pennsylvania to rate the healthiness of food in an area based on type and accessibility.[61]

Today, Baltimore City has 45 supermarkets, mostly concentrated in middle and upper-class neighborhoods of the city, compared to approximately 450 corner stores and 625 carryout locations (i.e., fast food restaurants, like McDonald's).[62]

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[57] *Id*.

[58] Arabbers are known to each have unique calls that they call out when moving about the City to let people know they are present. One Baltimorean who grew up in the City during the period in which arabber commerce dominated the streets of Baltimore recalls one particular arabber known for shouting "strawberries by the quart!" Finn, *supra* note 33.

[59] *Planning/Baltimore Food Policy Initiative/Food Deserts*, BALTIMORECITY.GOV (2010) [hereinafter *Planning*], *available at* http://archive.baltimorecity.gov/Government/AgenciesDepartments/Planning/BaltimoreFoodPolicyInitiative/FoodDeserts.aspx.

[60] *Id*.

[61] *Developing NEMS,* PERELMAN SCHOOL OF MEDICINE AT THE UNIVERSITY OF PENNSYLVANIA, http://www.med.upenn.edu/nems/index.shtml (last visited Mar. 21, 2014).

[62] *Planning*, *supra* note 60.

However, supermarkets are especially scant in low-income areas. This means that low-income residents who want produce from supermarkets have to travel long distances, oftentimes without access to a car, making it difficult to bring home an adequate amount of healthy food.[63] The resulting lack of healthy food combined with widely available fast and snack food contributes to a high incidence of malnutrition and obesity.[64] In Baltimore City, food deserts have become such an extensive and detrimental problem that a Health Department program exists in which physicians can provide care to low-income patients by writing "prescriptions" for patients to obtain fresh fruits and vegetables at designated sites.[65]

However, aside from the arabbers, only a handful of groups actually travel throughout the city to bring healthy food to residents. Real Food Farm, for example, a non-profit group with an urban farm in Clifton Park, has a mobile market that sells produce in certain city locations.[66] Real Foods Farms' service is mostly in northeast Baltimore and does not sell produce year-round.[67]

Farmers' markets are another option for healthy food, but many of the city's farmers' markets are not open during the entire year and are not located in food deserts, meaning that travel to, and carrying produce from, farmers' markets can be difficult.[68]

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[63] MARK WINNE, CLOSING THE FOOD GAP: RESETTING THE TABLE IN THE LAND OF PLENTY 111 (2008).
[64] *Id.*
[65] Interview with Dr. Susan Hersker Rubinstein, Medical Director, Family Health Centers of Baltimore–Brooklyn Site (Dec. 1, 2014). The Baltimore City Health Department implemented a program called the Virtual Supermarket that included the Cherry Hill and Brooklyn areas of Baltimore City. *Id.*
[66] *Mobile Farmers Market*, REAL FOOD FARM, http://www.realfoodfarm.org/get-food/mobilemarket/ (last visited Mar. 22, 2015).
[67] *Id.*
[68] Gabriel H. Rubinstein, *Hungry in the "Land of Pleasant Living": Combating the Effects of Baltimore's Food Deserts on Childhood Education Through Eminent Domain*, 15 U. Md. L.J. Race, Religion, Gender & Class 386, 395-96 (2015). The Cherry Hill neighborhood of Baltimore shows how difficult accessing healthy food can be for those in food deserts, who are often without an automobile. Travel by bus to the nearest supermarket takes the average Cherry Hill resident 32 minutes one way, versus 12 minutes for the average Baltimore City resident. *Cherry Hill,*

Historical markets, such as Lexington Market and Hollins Market, provide consistent options for low-income residents to purchase food, but such markets do not exist in the majority of Baltimore's neighborhoods.[69] Here, because of their continued presence in low-income communities in the city, as well as the fact that they are available year-round, arabbers are a vital means for low-income and elderly Baltimore citizens to purchase produce.[70] Arabbers even make stops at individual residences on their daily routes to drop off produce, which is helpful for elderly city residents who have mobility issues.[71]

Additionally, because the arabbers have been a longstanding community resource with roots in many of the city's neighborhoods, they are well suited to provide healthy food to communities that are historically marginalized and disproportionately impacted by food deserts. Though other mobile food services are valuable to the city's residents, they may not have the same degree of familiarity and historical connection to marginalized communities that the arabbers possess. This unique connection that the arabbers have with many of the city's communities may increase the likelihood that the low-income communities affected by a paucity of healthy food will utilize their services.

Researchers at Johns Hopkins University have also highlighted the importance of the arabbers' role in Baltimore. In 2010, Johns Hopkins University's Center for a Livable Future issued a report designating the arabbers as a Baltimore group that "contribute[s] significantly to the Baltimore City food environment."[72] The Report went on to state that the arabbers "should not be viewed merely as Baltimore historical and cultural icons, but as resilient, sustainable sources of distribution of fresh

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Baltimore City 2011 Neighborhood Health Profile, BALTIMORE CITY HEALTH DEP'T 5 (Dec. 2011), *available at* http://health.baltimorecity.gov/sites/default/files/7%20Cherry%20Hill.pdf.

[69] *Planning*, *supra* note 60.

[70] Frey, *supra* note 3.

[71] *Id*.

[72] *The Baltimore City Food Environment*, CENTER FOR A LIVABLE FUTURE AT JOHNS HOPKINS UNIVERSITY, 3 (STEPHEN A. HAERING & MANUEL FRANCO, EDS., FALL 2010), *available at* http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/research/clf_reports/BaltimoreCityFoodEnvironment.pdf.

produce directly to points of consumption."[73] Notably, the Report recommended that the city government support arabbers in their work to ameliorate the detrimental effects of food deserts.[74] Despite this recommendation, no progress has been made towards building a reciprocal relationship between the city government and the arabbers.

2. Tourism and Economic Development

Baltimore is the only United States city in which the arabbing tradition exists today.[75] The nostalgic image of the Baltimore arabber is consistent with the way in which Baltimore is often marketed: as a quaint,[76] small-town and prosperous city.[77] Although an individual may be unlikely to travel to Baltimore solely to see an arabber, the experience of seeing an arabber walking alongside a horse arrayed in a flashy garb, decorated with bells, pulling a brightly-painted wagon of produce conjures a different time. Imagine, for example, a line of arabber horses visible on television between a Baltimore Ravens football game and commercials,[78] or between innings of a Baltimore Orioles game. Attendees could even purchase food from the arabbers during the games.[79] Here, the promoting the arabbers would likely be marketable and contribute to tourism and revenue.

Likewise, the arabber image could also be utilized to attract new people to live in Baltimore. A current trend among millennials is to move to cities that are perceived as having an "authentic feel."[80] Between 2000 and 2010, the number of college

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[73] *Id.*
[74] *Id.*
[75] Frey, *supra* note 3.
[76] *Baltimore Than You Expect*, JOHNS HOPKINS UNIVERSITY, http://ois.jhu.edu/Life_in_Baltimore/Baltimore.pdf (last visited May 1, 2015).
[77] *Id.*
[78] Dan Rodricks, *Preservationists Try Again to Save Arabber Tradition*, BALTIMORE SUN (Feb. 23, 2016, 7:24 PM), http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0224-20160223-column.html.
[79] *Id.*
[80] Stephanie Hanes, *The New 'Cool' Cities for Millennials*, THE CHRISTIAN SCIENCE MONITOR (Feb. 1, 2015),

degree-holding young people living in Baltimore City increased by ninety-two percent.[81] Baltimore City has numerous issues related to tax revenue and vacancy,[82] so a continued increase of educated young people would certainly be beneficial to the city's economy, as well as the current administration goal's to increase Baltimore's population.[83]

Studies have also shown that the majority of millennials seeking out cities like Baltimore are eager to make a positive differences in their communities and actively participate in the political process.[84] Here, the city government has the opportunity not only to continue to attract people who have expendable income to reside in the city, but individuals who are likely to engage with existing communities to ultimately improve the city as a whole, which could decrease the amount of money the city government spends on community need issues.[85] Therefore, the city government would be well served in bolstering Baltimore's image as an authentic city by marketing the image of the arabber.

In promoting the arabbers, however, the city government may worry that it will alienate animal welfare and rights groups. To satisfy such fears, compromise between the city government is key; in exchange for the city government's commitment to support the arabbers, the arabbers must guarantee that the city government can ensure the condition and health of the horses.

3. Value to the City Community

To follow arabbers on their routes is to witness how a single person with a horse and cart can serve as a needle and thread, pulling the frayed fabric of a community together. As they roll down the street, people stop what they're doing. Kids slam on

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http://www.csmonitor.com/USA/Society/2015/0201/The-new-cool-cities-for-Millennials.

[81] *Id*.

[82] *Id*.

[83] *Stephanie Rawlings-Blake, Mayor*, BALTCITY.GOV, http://mayor.baltimorecity.gov/node/2003 (last visited Apr. 5, 2016, 5:33 PM).

[84] *Id*.

[85] Jeffery Fraser, *The Cost of Blight: Vacant and Abandoned Properties*, PITTSBURGH QUARTERLY (Fall 2011), http://www.pittsburghquarterly.com/index.php/Region/the-cost-of-blight/All-Pages.html.

their coaster brakes, a beautician will step from her shop, and elderly women will anticipate their knock on the door. [86]

When arabbers and their horses walk through the streets of Baltimore, they often attract crowds. In these moments, Baltimore residents have the chance to interact with the horses and arabbers. In an urban environment like Baltimore in which many citizens are low-income and do not have the means to travel outside of the city, there are very few opportunities for people to see and interact with horses. For children, these interactions can be particularly critical; research has shown that children who are exposed to and interact with horses show decreased levels of stress hormones,[87] and are more likely to develop a stronger sense of empathy for animals and other humans.[88]

Baltimore City can be a difficult and violent place to grow up, especially for those in poverty. Among cities in the United States, Baltimore ranks in the top five for murder rate each year.[89] Baltimore also typically ranks as one of the most impoverished major cities in the United States.[90] One-third of Baltimore residents have an annual income below $25,000.[91] A recent study of 790 Baltimore children found that of those who grew up in low-income families, only 10.5 percent moved beyond the low-income bracket by age twenty-eight.[92] Because of the low quality

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[86] Cohen, *supra* note 4.

[87] Rachel Webster, *'Horsing Around' Reduces Stress Hormones in Youth*, WASH. ST. U.(Apr. 24, 2014), https://news.wsu.edu/2014/04/24/horsing-around-reduces-stress-hormones-in-youth/#.VRBxq5PF8mU.

[88] *Teaching Kids Compassion Toward Animals*, PETA KIDS, http://www.petakids.com/parents/teaching-compassion/ (last visited Mar. 23, 2015).

[89] Kate Abbey-Lambertz, *These Are the Major U.S. Cities with the Highest Murder Rates, According to the FBI*, HUFF. POST (Nov. 11, 2014, 5:33 PM), http://www.huffingtonpost.com/2014/11/12/highest-murder-rate-us-cities-2013_n_6145404.html.

[90] Bruce Kennedy, *America's 11 Poorest Cities*, CBS NEWS (Feb. 18, 2015 5:30 AM), http://www.cbsnews.com/media/americas-11-poorest-cities/.

[91] *Id*.

[92] Emily Badger, *What your First-Grade Life Says About the Rest of it*, WASH. POST (Dec. 27, 2014, 8:50 AM),

of life associated with poverty and high incidences of crime, many Baltimorean children have dealt with various traumas in their lives. As writer and social commentator Ta-Nehisi Coates, who grew up in Baltimore, explains, Baltimore youth who grow up in impoverished communities "lead lives of incomprehensible violence" in terms of the physical and emotional pain they are forced to endure[93]

Research has indicated that children who are exposed to and interact with horses show decreased levels of stress hormones.[94] Studies have also shown that children who have the opportunity to interact with animals and see humans care for animals are likely to develop a stronger sense of empathy for animals and humans.[95] The propensity for children to learn empathy is critical in cities like Baltimore, where children are more likely to be considered high risk for becoming involved in criminal behavior. As Clifford Murphy, director of the Maryland Traditions at the Maryland State Arts Council puts it, '"[the arabbers add] a kind of humanity [to the City] . . . [t]he recurring theme in terms of the philosophy repeated by arabbers, teaching young kids to work and care for animals is a humanizing thing. And there is a lot of things dehumanizing by living in a difficult urban environment.'"[96]

The arabbers allow members of the community, including children, to come to the stables to interact with and learn about horses.[97] In addition, the arabbers have sought funding to develop educational centers at their stables to implement formal programs for the youth in their communities to attend.[98] Furthermore, the arabbers have also attempted to turn their historical stables into museums, similar to the Baltimore Museum of Industry, to make the stables centers for educating the community.[99] The city government has acknowledged the

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http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/27/what-your-first-grade-life-says-about-the-rest-of.

[93] Ta-Nehisi Coates, Address at the Johns Hopkins University Forum on Race Relations (Apr. 30, 2015).

[94] Webster, *supra* note 88.

[95] *Teaching Kids Compassion Toward Animals*, *supra* note 89.

[96] Cohen, *supra* note 4.

[97] *Id*.

[98] *Id*.

[99] Fern Shen, *Arabbers Throwing a Party to Showcase Murals, Horses and High Hopes*, BALTIMORE BREW (Jul. 8, 2013, 2:45 PM),

importance of urban children having the opportunity to interact with living horses. At one point, a plan was in place where the city government allocated $500,000 to build an educational facility adjacent to an arabber stable, but, according to *City Paper*, the idea fell through due to "in-fighting and mixed signals coming from the [C]ity."[100]

An organization in Philadelphia, called the Fletcher Street Urban Riding Club ("Fletcher Street"), serves as precedent for the idea that children living in urban areas who are at-risk for lives of violence and crime can greatly benefit from interaction with horses. Fletcher Street describes itself as a, "ground-level, grassroots riding club in the Strawberry Mansion neighborhood of North Philadelphia that gives local youth an alternative to the streets by teaching them to ride and take care of rescued horses."[101] Fletcher Street provides a close-knit circle of adults who mentor youth to keep them from falling victim to the risks present in their community.

Studies have shown that horses can help people develop and enhance social and leadership skills.[102] Current arabbers credit the trade to instilling work ethic within them and providing them with a path in life on which they are not engaging in high-risk activities.[103] One arabber named B.J., who is twenty-six years old, began arabbing after being incarcerated numerous times for selling crack cocaine, assault, burglary, and possession of illegal firearms. B.J.'s father, a successful arabber, died when B.J. was only eight years old.[104] B.J. felt that growing up in a crime-ridden,

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https://www.baltimorebrew.com/2013/07/08/arabbers-throwing-a-party-to-showcase-murals-horses-and-high-hopes/.

[100] *Id.*

[101] *Fletcher Street Urban Riding Club Facebook Page*, FACEBOOK, https://www.facebook.com/pages/Fletcher-Street-Urban-Riding-Club/233218050149406?sk=info&tab=page_info (last visited Mar. 25, 2015).

[102] Patricia Dyk et al., *The Effectiveness of Equine Guided Leadership Education to Develop Emotional Intelligence in Expert Nurses: A Pilot Research Study*, U. KY. (2013), *available at* http://www2.ca.uky.edu/cfld/content/EGLEResearchPilotReportFinal5-20-13.pdf.

[103] Frey, *supra* note 3.

[104] *Id.*

low-income neighborhood negatively influenced him.[105] After his most recent incarceration, B.J. decided he wanted to change his life and he ultimately followed his father's example and began arabbing.[106] B.J. attributes his responsibilities related to arabbing as keeping him free from illicit activity. [107]

II. RELATIONSHIP BETWEEN THE ARABBERS AND THE CITY GOVERNMENT

Concerns over the health and safety of the arabbers' horses are legitimate and top priority. This Section discusses past events and the valid concerns of animal welfare advocates. It also discusses how the arabbers' lack of resources and capital makes it difficult for them to conform to the Baltimore City Code.

A. Past Confrontations Between the City Government and the Arabbers

Throughout the years, the arabbers have frequently been in conflict with the City Government and animal welfare groups. Some of the strife has stemmed from instances in which horse abuse did occur. In January 1994, two arabber horses froze to death.[108] In another instance, in 1995, the Maryland Horse Coalition claimed that a horse belonging to an arabber died on the street after the horse escaped from his or her owner. The report also stated that a witness had seen the owner riding and whipping the horse, though the owner denied the allegation.[109] These instances are egregious, and the city government should prosecute to the fullest extent in such cases, though events this horrifying have been few and far between.

More often, the concern for the horses' safety and well-being stems from the arabbers' lack of resources, not disregard for the horses' welfare. In 2007, the Health Department moved arabber horses from a stable on Retreat Street, several of which

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[105] *Id*. ("'[Crime is] all you grow up around . . . . You see people wearing finer things and diamond rings. If that's what you want, eventually that's what you end up doing. Then it leads you to a place you don't want to be.'").
[106] *Id*.
[107] *Id.*
[108] *Id*.
[109] *Id*.

belonged to two historic arabber families, to Pimlico racetrack.[110] Though the Retreat Street stable was not strictly an arabber stable and many of the horses stabled there were owned by non-arabbers, the Health Department cited the arabbers for keeping their horses in a stable with structural issues, rodent infestation, and trash blocking the exits.[111] Despite the reported conditions of the stables, the horses were found to be in good health.[112] Following this event, the city government sought to assist the arabbers in finding a permanent stable[113]

In 2009, Animal Control seized a number of horses, most of which belonged to the Savoy family of arabbers, after officers found standing water, mud, and rats in the city-owned tent stables in Southwest Baltimore.[114] Soon after the seizure, the Savoy arabbing family signed an agreement with the city government to regain possession of their horses.[115] The Savoys currently house their horses in a stable on Fremont Avenue, which the Health Department purportedly agreed to help build, but later reneged on because it found that the horses were not being kept properly.[116]

Health Department inspectors closed another arabber stable on Bruce Street in 2012. The Health Department determined that the stable was dangerous due to "exposed electrical outlets, stalls on the verge of collapse and trash strewn about the premises."[117] In 2013, the owner of the Bruce Street stable, Dorothy Johns, attempted to reopen the stables.[118] To do so, Animal Control required Ms. Johns to have all of her horses

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[110] Kelly Brewington, *Arabbers, their Horses Reunited*, BALT. SUN (Aug. 15, 2007), http://articles.baltimoresun.com/2007-08-15/news/0708150145_1_horses-pimlico-stable.
[111] *Id.*
[112] Fenton, *supra* note 6.
[113] Interview with Dan Van Allen, President, Arabbers Preservation Society, Mar. 22, 2015.
[114] Woods, *supra* note 2.
[115] *Id.*
[116] *Baltimore Arabbers Final Project*, BALTIMORE ARABBERS (Dec. 1, 2009), http://baltimorearabbers.blogspot.com/.
[117] Jonathan Pitts, *Arabbers Get New Stable, Submit to Microchip Tracking Rule*, BALT. SUN (Oct. 24, 2013), http://articles.baltimoresun.com/2013-10-24/news/bs-md-arabber-stable-reopening-20131022_1_arabbers-dorothy-johns-southwest-baltimore.
[118] *Id*.

microchipped before she could obtain a license to operate.[119] The microchipping rule requires that, for an owner to reclaim an animal, he or she must allow Animal Control to microchip the animal at the owner's expense.[120] Though this microchipping rule was originally issued in 2003, this was the first time that Animal Control enforced the policy.[121]

After paying for all the renovations and upgrades at the stable with her own money, Ms. Johns was required to pay $100 for each of her four horses to be microchipped.[122] Though paying $400 to keep a business going may not seem like a significant amount, the arabbers' business is not highly profitable, and unplanned costs can make quite a difference. Nonetheless, microchipping is a sensible practice aimed at making sure that governments can keep track of animals and that lost animals can be returned to their owners.[123]

On numerous occasions, Animal Control has even publicly stated support for the arabbers. The director of Animal Control, Sharon Miller, recently stated that she is "'sensitive to the importance of [the arabbing] tradition in Baltimore. [The City Government] want[s] people to see the arabbers' horses and enjoy them. But we want to be able to make sure the horses are healthy and fit to work. That way we can back [the arabbers] 100 percent if and when any questions arise.'"[124]

Because the conflict between the arabbers and the city government is not well documented outside of limited contemporaneous news sources, it is difficult to know the particular facts of each conflict. What is clear, however, is that the arabbers want to continue to practice their trade, but often do not have the resources to meet the standards that Animal Control and the Health Department impose. Here, the opportunity for City Government and the arabbers to form a symbiotic, respectful relationship exists, in which each group can gain significantly from working together.

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[119] *Id.*

[120] BALT. CITY CODE § 10-805(b)(4).

[121] Pitts, *supra* note 118.

[122] *Id.*

[123] *Why is it Important to Ensure My Pet is Microchipped?*, RSPCA, http://kb.rspca.org.au/Why-is-it-important-to-ensure-my-pet-is-microchipped_500.html (last visited May 1, 2015).

[124] Pitts, *supra* note 118.

B. The January 2015 Confrontation Between the City Government and the Arabbers

In January 2015, Animal Control raided the Carlton Street stable, one of Baltimore's last arabber stables, accused five arabbers and an arabber stable hand of animal cruelty, and confiscated 14 horses, sending them to a rescue farm 30 miles outside of Baltimore.[125] Fourteen months after the arabbers' horses were seized, Judge Nicole Pastore-Klein of the District Court of Maryland for Baltimore City acquitted the five individuals on all counts of criminal animal cruelty.[126]

Many groups were skeptical about the charges brought against the arabbers. *The Equiery*, a publication that describes itself as an "independently owned and operated information . . . publication for the Maryland equestrian community,"[127] whose audience includes everyone from the "international professional to the amateur rider, from trainers to barn managers, from veterinarians to pleasure riders, competitors, lesson students, and even kids," was uncomfortable with the charges. *The Equiery* stated that it had been unable to obtain adequate information from the State's Attorney's Officer for Baltimore City: "unlike the animal control and State's Attorney's offices in various Maryland counties, most of which have been very cooperative, providing *The Equiery* with documentation regarding seizures in equine cases… the Baltimore City Health Department and State Attorney's officer either ignored our requests or provided meaningless "official statements."[128] *The Equiery* also noted that it found the photographs of the seized horses, which the rescue center posted, to be "troubling" as they showed no indication that the animals were malnourished or underweight.[129]

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[125] Dan Rodricks, *Arabbers Cleared of Charges, but their Horses are Gone*, BALT. SUN (Mar. 12, 2016, 1:03 PM), http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0313-20160312-column.html.

[126] "*Not Guilty*," THE EQUIERY, Mar. 24, 2016, http://equiery.com/not-guilty/ (last visited May 1, 2016).

[127] About the Equiery, THE EQUIERY, http://equiery.com/about/ (last visited May 1, 2016).

[128] "Not Guilty," *supra* note 127.

[129] *Id.*

Like *The Equiery*, reporter Dan Rodricks, who has his own blog for the *Baltimore Sun*, reported that city government's case against the arabbers was "laughably weak." Corroborating *The Equiery's* observations that the horses did not appear to be unhealthy, Rodricks noted that on the first day of trial, the state's expert witness, Veterinarian Richard J. Forfa, testified during cross-examination that the arabbers' horses seized from the stable were not in poor health and displayed no signs requiring the owners to be reported for abuse or neglect.[130] Further, *The Equiery* noted that it spoke with Dr. Forfa, who explained that when he conducted the intake exams on the horses at the rescue shelter, he did not believe that the city government had cause to seize the horses, which he told the State's Attorney's office at the time.[131] Nonetheless, the State's Attorney's office chose to proceed, despite their expert witness's analysis and clear input.[132]

The State's Attorney's case ultimately proved to be insufficient and all the abuse charges were dropped, but the arabbers' horses have not been returned to them.[133] All of the horses had been adopted out from the rescue shelter, despite the arabbers' wishes to get their horses back.[134] Reportedly, a Health Department spokesman claimed that one of the arabbers signed over his horse to the city government following the raid.[135] The other arabbers were apparently unable to prepare and file the required paperwork within the required period.[136] However, as Dan Rodricks posits, "how could men accused of animal cruelty expect to get their horses back while the criminal charges against them were pending?"[137] The arabbers currently do not know where their horses are.[138]

The specific events surrounding the January 2015 raid are vague, but the arabbers have been cleared of any wrongdoing. Though it is admirable that the city government sought to look

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[130] Rodricks, *supra* note 126.
[131] "*Not Guilty*," *supra* note 127.
[132] *Id.*
[133] Rodricks, *supra* note 126. The only charge that held up was William Murray Jr.'s minor charge of failing to post proper identification at the stable. *Id.*
[134] *Id.*
[135] "*Not Guilty*," *supra* note 127.
[136] *Id.*
[137] Rodricks, *supra* note 126.
[138] "*Not Guilty*," *supra* note 127.

out for the horses' health, which is an important policy within the city, its fears were unfounded in this case. Moreover, the charges were devastating for the five arabbers who had their property and means of income confiscated indefinitely.[139] Animal Control and the Health Department claim that they understand the importance of the arabbers to the Baltimore community and want to see the arabbers thrive,[140] but they do not appear to truly want to work with the arabbers based on this instance of pursuing animal cruelty on shaky grounds and not assisting the arabbers in getting their horses back.

III. PROPOSED POLICY IMPLEMENTATIONS

To date, the city government has failed to develop a relationship with the arabbers that is mutually beneficial to both groups, despite the city government frequently stating that it realizes the value of the arabbers to the city's communities.[141] Nevertheless, a symbiotic relationship between the city government and the arabbers following the January 2015 seizure is not out of the question. The city government could greatly benefit from a successful plan promoting the arabbers' presence in Baltimore. It could develop a safe way to celebrate the arabbers' existence by helping the arabbers permeate areas in need of healthy food in the city, developing safe stables where community members could interact with the arabbers and learn about Baltimore culture and history, while boosting tourism and development in the city. Accordingly, the following changes and adjustments should be made.

First, the city government should reduce the financial burdens on arabbers. The arabbers do not earn significant revenue through their trade,[142] so meeting the cost requirements set forth by the city code, such as microchipping, can be challenging for the arabbers. The arabbers should pledge to make sure that their horses will be documented as required by the city code, but the city government should waive the fees associated with the requirements of the city code for the arabbers.

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[139] Rodricks, *supra* note 126.
[140] Pitts, *supra* note 118.
[141] Fenton, *supra* note 6.
[142] Frey, *supra* note 3.

Additionally, Animal Control and the arabbers should adopt practices that maintain open and productive communication between each other to achieve the common goal of protecting the horses' health and well-being. The arabbers not only care about their horses, but they need their horses in order to earn income. If Animal Control feels that the arabbers' stables are truly inappropriate for the horses, the city government and the arabbers should work to develop new stables in the city that guarantee the horses will have the facilities and services they need. Access to land on which the city could build such facilities is not an issue—the city government estimates that there are 16,000 vacant properties in Baltimore City, and the city government currently owns twenty-five percent of those properties.[143] Thus, there would be room not only for stables, but for pastures. Though tearing down vacant and abandoned buildings and clearing properties is costly, removing vacancies is financially advantageous in the long-term.[144] Similarly, such decrepit properties contribute to crime and land devaluation throughout the city, so removal vacancies would decrease the municipal resources the city government needs to address many of the risks associated with vacancy.[145]

Similarly, under a more cooperative arrangement, Animal Control could check on the arabbers' horses to ensure their safety and welfare. Instead of immediately confiscating the arabbers' horses, Animal Control could work with the arabbers in fixing any issues that may be problematic for the horses and the two groups could come up with a plan to prevent the issue from recurring.

Furthermore, the city government should work with the arabbers to expand the number of stables, horses, and arabbers to help deal with the ongoing food desert crisis in the city. The city government and the arabbers should develop comprehensive arabber routes that penetrate into food desert neighborhoods. The increased number of horses and stables in the city would provide more opportunity for communities to spend time at the stables and interact with the horses. The arabbers and the city

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[143] Stephanie Rawlings-Blake, Mayor, Balt. City, Mayor Announces "Vacant to Value" Plan to Reduce Blight (Nov. 3, 2010), http://archive.baltimorecity.gov/OfficeoftheMayor/NewsMedia/tabid/66/ID/691/Mayor_Announces_Vacants_to_Value_Plan_to_Reduce_Blight.aspx.

[144] Fraser, *supra* note 86.

[145] *Id.*

government should also develop educational centers alongside the stables where children and other community members could come to learn about horses, as well as the culture of Baltimore City and the arabbers. Many arabbers have expressed a desire to develop such programs.[146] The city government should jump at the opportunity to instate these educational centers because it would be investing in the psychological well-being of Baltimore's children. Furthermore, these educational centers could partner with an anti-cruelty task force or group, such as the ASPCA, located at the center to raise awareness about animal cruelty.

Finally, the city government and the arabbers should agree to address any future disputes through mediation proceedings prior to more formal legal proceedings. An informal mediation process encourages communication between parties and "identifies each person's needs and, if possible, help[s] the participants reach an agreement that satisfies everyone's needs."[147] With each party agreeing to attend mediation prior to more formal legal proceedings, the adversarial relationship between the parties will deflate, and a more trusting partnership will be cultivated. When a case goes to mediation, the parties and courts save time and money, which is beneficial to all parties, but especially for the arabbers who are economically limited.[148] Further, such mediation communication would mean that the arabbers would be better informed of any property seizures and better understand how they can get their horses back.

IV. CONCLUSION

Because the arabbers are a low-income group, they often have a difficult time reaching the animal welfare standards required by law in Baltimore City. Nevertheless, the arabbers benefit Baltimore City. The arabbers help to alleviate the damaging effects food deserts have on the health of Baltimore's low-income citizens.[149] The image of the arabber is likely marketable as a tool to increase tourism and movement into the

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[146] Cohen, *supra* note 4.

[147] *Civil Docket – Alternate Dispute Resolution*, CIRCUIT COURT FOR BALT. CITY, http://www.baltocts.state.md.us/civil/adr.htm (last visited May 1, 2015).

[148] *Id*.

[149] *See supra* Part I.B.1.

city.[150] In addition, the arabbers provide Baltimore citizens with the opportunity to interact with horses. Such interaction can help children develop empathy skills and ultimately improve the quality of life as these children grow up.[151]

The city government should look to optimize the numerous benefits the arabbers bring to Baltimore City. With additional resources, such as equipment that is more efficient, and additional funding to increase the number of workers to handle the demands of the horses, the arabbers would not run the risk of violating animal welfare standards. In exchange for a commitment from the arabbers to undergo any necessary training and be transparent in the treatment of their horses, the city government should provide the arabbers with the vital resources to ensure the horses' needs are consistently met. Ultimately, with a foundation of communication and trust, the city government and the arabbers can work together to maximize the potential of those living in Baltimore City.

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[150] *See supra* Part I.B.2.
[151] *See supra* Part I.B.3.

STANDING ON FOUR LEGS OR TWO?

By: Brieanah Schwartz

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I. INTRODUCTION

Having a heartbeat, pain sensation, cognition, or interest—how do we measure consciousness? How should the courts in the United States define personhood? Arguably, animals are capable of seeking to preserve their interests for their own protection and benefit. Yet, currently, United States courts seldom recognize an animal's right to sue on its own behalf to protect these interests, or to establish standing.[1] Animals, and further any being, should not be considered merely a thing in the eyes of the law because when a conscious being "has morally significant interests…the principle of equal consideration applies to that being,"[2] Animals should be able to enjoy rights beyond those of property and similar to those of any other holder of legal rights.

When United States courts do allow an animal to be a plaintiff, it is usually because Congressional intent from a statute has endowed the animal with the right to sue to protect its individual interest.[3] More often, groups or private individuals that can demonstrate some individual harm are able to establish standing.[4] Human beings can establish standing to protect animals in federal court in three ways: "when they seek information about animal welfare,[5] when the government's failure to protect animals inflicts a competitive injury[6] on the human plaintiff, and when a human being visits or works with animals that are threatened with…harm."[7] Therefore, what the

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[1] *Cf. Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004) (holding that several animals lacked standing to sue). *Cf. Palila v. Hawaii Department of Lawn and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (holding that a species of animal had standing to sue).

[2] Cass R. Sunstein *supra* note 2 at 131.

[3] *See generally Palila*, 852 F.2d 1106.

[4] *See generally Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

[5] The information is provided if it must be disclosed to the public by law. Cass R. Sunstein *supra* note 2 at 259.

[6] "Competitive Injury" is an anti-trust law claim where a price difference is designed to harm competition. *See Competitive* Injury, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/C/CompetitiveInjury.aspx (April 27, 2016). Here, the application of the term means that in failing to adequately protect animals, human interests are also harmed.

[7] Cass R. Sunstein supra note 2 at 259.

United States is lacking is regulation that provides the ability for something that is an inanimate object in the eyes of the law, like an animal, the right to sue on its own behalf.[8]

The goal of this paper is to explore the current status of animals in the law and assert whether further protections, such as standing, could be available in the future. This paper will begin with an overview of the current legislation and case law in the United States that dictates tests for standing. The paper will also discuss legislation and cases that influence the enforcement of animal rights and protections currently extended to animals. Then the paper will compare and contrast Australia's and Canada's unique recognition or disregard of animals' rights in court to those principles of the United States. Finally, the paper will conclude with the assertion that, based on the current case law and new state legislation, the U.S. has the potential to allow consistent instances of standing for animals to sue on their own behalf in the future.

II. BACKGROUND ON STANDING IN THE UNITED STATES

Constitutional standing is important to procedure in the United States because if a party cannot establish constitutional standing, then a federal court cannot decide the case.[9] Specifically, Article III, clause 2 of the Constitution gives federal courts the power to resolve cases and controversies.[10] The most important element to establishing what is a case or controversy depends on

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[8] *See Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J. dissenting) (in his dissent, this is what Justice Douglas proposed).

[9] Article III of the Constitution elaborates the responsibilities of the Judicial Branch. Timothy Belevetz, *The Impact on Standing Doctrine in Environmental Litigation of the Injury in Fact Requirement in Lujan v. National Wildlife Federation*, 17 WM. & MARY ENVTL. L. & POL'Y REV. 103, 110 (1992).

[10] *Id. See also* Cass R. Sunstein *supra* note 2 at 260. ("The only serious question is constitutional: whether the grant of standing would violate Article III's requirement of a 'case or controversy.' Nothing in the text of the Constitution limits 'cases' to actions brought by persons, but perhaps it could be argued that Congress could not constitutionally confer standing on animals. To say the least, the founding generation believed that actions could be brought by human beings, and did not anticipate that dogs or chimpanzees could bring suit in their own names.")

whether the parties have a concrete interest in the matter so that the Court does not waste its resources in the abstract.[11] In order to demonstrate this interest, the plaintiff must meet the requirements of standing. *Valley Forge Christian College v. Americans United for Separation for Church and State, Inc.*[12] established the three-part test for standing.[13] To satisfy standing, the plaintiff must achieve the following requirements:

> show that [1] he. . . has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and [2] that the injury 'can be [fairly] traced to the challenged action' and [3] 'is likely to be redressed by a favorable decision.[14]

Yet, this test's focus on the individual, "he," causes environmentalists and animal rights activists to "couch their claims in terms of human self-interest;" creating another barrier that animal plaintiffs must overcome in order to satisfy standing.[15]

One of the most influential cases involving organizational standing on an environmental harm claim is *Sierra Club v.*

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[11] Timothy Belevetz, *supra* note 9.

[12] *See generally* 102 S. Ct. 752 (1982). (a property was conveyed to a college and respondents sued in Federal District Court, stating that the conveyance violated the Establishment Clause of the First Amendment. The District Court found the respondents lacked standing to sue as taxpayers and failed to allege an actual injury. Court of Appeals reversed, stating that the respondents had standing to sue as citizens and satisfied the "case or controversy" requirement of Article III. The Supreme Court ultimately held that there was no Article III standing to challenge the conveyance because there was no injury in fact, the source of the complaint was not a Congressional action, the respondents make no other claim on which to sue, and enforcement of the Establishment Clause does not justify an exception to the Article III standing requirements. The test established in this case is used to elaborate on Article III standing and what requirements actually satisfies the test.)

[13] Timothy Belevetz, *supra* note 9 at 110-11.

[14] Timothy Belevetz, *supra* note 9 at 110-11 (quoting *Valley Forge Christian College v. Americans United for Separation for Church and State, Inc.*, 102 S. Ct. 752, 758 (1982)).

[15] Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL. L. & POL'Y F. 347, 350 (2008).

Morton.[16] In this case, Disney planned to build a $35 million complex in Mineral King Valley, California.[17] The Sierra Club brought a claim seeking review under the Administrative Procedure Act by demonstrating special interest in "the conservation and sound maintenance of the national parks, game refuges and forests of the country."[18] The Supreme Court held that the Sierra Club and its members lacked standing because the organization failed to demonstrate a special interest in the project.[19] Ultimately, the Court did not deny that the action could amount to an injury in fact, but determined that the Sierra Club and its members were not parties that would be directly injured by the proposed project.[20] The Court affirmed the Court of Appeals holding that the Sierra Club lacked standing to maintain this action, and then did not reach any other questions presented in the petition.[21]

For environmentalists and animal rights activists, the most important part of *Sierra Club* is Justice Douglas' dissent. In his dissenting opinion from the majority, Justice Douglas called for "a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled… where injury is the subject of public outrage."[22] Douglas then discussed that there are other inanimate objects that are sometimes recognized as parties in litigation[23] and reasons that therefore a river, which gives life, should be awarded similar protections.[24] Douglas noted that the growing public concern for protecting environment can and

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[16] 405 U.S. 727 (1972).
[17] *Id*. at 729.
[18] *Id.* at 730.
[19] *Id.* at 731. (Plaintiff's claim was under Section 10 of the APA, which states that "[a] person suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.")
[20] *Id*. at 734 (therefore Plaintiff could not utilize Section 10).
[21] *Sierra Club*, 405 U.S. at 741.
[22] *Id.* at 741-742. (Douglas, J., dissenting), (Douglas states that under such a rule the case would have been "more properly labeled as Mineral King v. Morton.")
[23] "But plaintiffs need not be expressly labeled 'persons,' jurisdictional or otherwise, and legal rights are also given to trusts, municipalities, partnerships, and even ships." Cass R. Sunstein *supra* note 2 at 260.
[24] *Sierra Club*, 405 U.S. at 743.

should lead to the "conferral of standing upon environmental objects to sue for their own preservation."[25] Additionally, he argued that because many of the administrative procedures favor industry, that there is a need for inanimate voices to be heard in such proceedings.[26] Even today, his dissent serves as hope that the American court system could one day recognize how animals are deserving of a type of personhood instead of being categorized as property. This recognition could lead to more consistent instances of standing and recognition of an animal's individual interest claim being recognized in court.

The decision in *Lujan v. National Wildlife Federation*[27] is influential on the future of animal rights claims because the holding broadened the Supreme Court's test for standing. Here, the Court held that affidavits indicating members' recreational use and aesthetic enjoyment of land "in the vicinity" of land covered by agency actions are insufficient to show that the affiants' interests were actually affected.[28] The first requirement of standing is that "the plaintiff must have suffered an 'injury-in-fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[29] Further, the injury has to be particularized and personally affect the plaintiff.[30] Before the *Lujan* decision, the Court usually deferred to the Congressional intent in order to grant standing.[31] While the Court here did not award standing to the environmental groups, it did establish the requirements that need to be met in order to achieve constitutional standing.[32]

Lujan involved a claim under the Endangered Species Act (ESA), a federal statute.[33] While protection of ecosystems under the ESA was upheld in *Lujan*, the Court only considered the claim through a human-centric lens.[34] The Court's interpretation of the

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[25] *Id.* at 742.
[26] *Id.* at 748-751.
[27] 110 S.Ct. 3177 (1990).
[28] *Lujan*, 110 S.Ct. 3177, 3179 (1990).
[29] Francisco Benzoni, *supra* note 15 at 357.
[30] *Id.* at 357.
[31] This decision works towards a different understanding of establishing standing; one past deferring to Congressional intent. *Id*. at 360.
[32] *Id.* at 358.
[33] *Id.* at 357.
[34] Francisco Benzoni, *supra* note 15 at 358.

statute found that Congress can provide a right of action that can lead to the establishment of standing under a statute only when there is an injury-in-fact.[35] Beyond that, the Court concluded that the fact the Act was meant to protect ecosystems did not matter because the mere expression of protection does not extend to persons who have not been injured by an injury-in-fact.[36]

Both of these Supreme Court decisions created a defining moment on most non-human harm claims, as to whether or not a group could prove an individualized harm in court. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[37] Friends of the Earth filed a citizen suit against Laidlaw Environmental Services (TOC), Inc. for noncompliance with the National Pollutant Discharge Elimination System permit.[38] The Court recognized that Friends of Earth had Article III standing to sue because the members of the group were able to prove that their concerns over Laidlaw's discharges directly affected their "recreational, aesthetic, and economic interests."[39] However, the reasoning of the Court does not support bringing a case on behalf the environment because the Court found that the plaintiff had satisfied Article III standing but that the injury to the environment that gave the plaintiff standing was not relevant.[40] Moving forward, this now meant that a group would not have standing should it choose to sue on behalf of the environment; instead groups had to prove a personal, individualized harm.[41] *Laidlaw* interpreted standing such that "there need be no harm to the environment or threat to human health for the plaintiff to have suffered injury-in-fact due to technical violation of discharge

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[35] *Id.*

[36] Further, the Court expressly rejected citizen suit provisions as a way to gain standing in environmental claims cases. *Id.*

[37] 120 S.Ct. 693 (2000).

[38] *Id*. at 696.

[39] *Id.* at 698.

[40] *See Id.* 704. ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.")

[41] *See id.* at 704. ("To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post,* at 713–714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.")

permits. Subjective fear is enough."[42] This decision provided an opening for environmental groups to bring cases without having to prove a specific harm from the environmental issue, and broadened the basis on which injury for organizational standing could be established.[43] Ultimately, this holding called for a further loosening of the strict requirements courts use to establish that an individualized harm exists, and consequently gave more opportunity for representational animal rights cases to be brought on the animal's behalf in the future.

III. BACKGROUND ON STANDING FOR ANIMALS IN THE UNITED STATES

Traditional awards of standing under Article III are often unachievable for animal rights cases. "Generally, of course, Congress grants standing to 'persons,' as it does under the Marine Mammal Protection Act and the Endangered Species Act."[44] The Endangered Species Act is a well-known example of an instance where Congress provided citizen suit provisions for the protection of animal rights.[45] The Act is meant to protect

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[42] Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL. L. & POL'Y F. 347, 365 (2008).

[43] Here, the Court recognized "subjective apprehensions" instead of concrete, individual injury. *See Laidlaw,* 120 S.Ct. 693, 714 (2000). *See also Laidlaw,* 120 S.Ct. 693 at 714 (*quoting Los Angeles v. Lyons,* 103 S.Ct. 1660 (1983)) ("Ongoing "concerns" about the environment are not enough, for "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.").

[44] Cass R. Sunstein *supra* note 2 at 260; *see also People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dep't 2014). (The organization petitioned for a writ of habeas corpus on behalf of nonhuman primates. The Supreme Court, Appellate Division, in New York, held that a nonhuman primate was not a person entitled to rights afforded by the writ of habeas corpus. "The common law writ of habeas corpus, as codified by CPLR article 70, provides a summary procedure by which a 'person' who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention (CPLR 7002[a]). The statute does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion.'").

[45] Endangered Species Act, 16 U.S.C. § 1540 (g)(1)(B) (2006).

threatened or endangered species from extinction[46] and Section 1540 (g)(1) states that a person may bring a civil suit on his own behalf to enjoin any person in violation of any provision of the chapter, to compel the Secretary to apply the prohibitions set forth in this title with respect to the taking of an endangered or threatened species, and against the secretary for an alleged failure to perform a duty.[47] Section 1540(g)(1)(B) explicitly provides for the possibility that a citizen could bring a suit to compel action where an endangered or threatened species protected by the Act is harmed[48] and also provides for the protection of listed species without having to prove human-centric interest to have the claim heard.[49]

Additionally, the Animal Welfare Act (AWA) imposes standards to cover the handling, care, treatment, and transportation of anyone who deals in or with animals.[50] Standing to sue under the Act is a continually contested issue because the Courts fluctuate in their interpretation of when standing should be awarded to animals, private individuals, or third-parties to sue

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[46] Cass R. Sunstein *supra* note 2 at 253.
[47] *See* Endangered Species Act, 16 U.S.C.S. § 1540 (g)(1) (2006). ("(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or (B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.")
[48] Endangered Species Act, 16 U.S.C.S. § 1540 (g)(1)(B) (2006).
[49] *Id.*
[50] Cass R. Sunstein *supra* note 2 at 254.

on an animal's behalf under the AWA.[51] *International Primate Protection League v. Institute for Behavioral Research*[52] held that an animal protection organization lacked standing to challenge a medical researcher's compliance with the AWA.[53] The Court went so far as to say that the federal statute does not authorize a right to seek relief in this matter, and reinforced that the AWA was meant to ensure proper treatment of animals while preserving the animal testing regime.[54] This issue was reinforced in *Animal Legal Defense Fund, Inc., et al. v. Epsy*,[55] which held that the plaintiff's informational injury to widen the definition of animals under the act did not fall within the Act's zone of interests.[56] The holding reinforced the idea that that the act was meant to ensure proper treatment of the animals covered and that Congress could afford standing to anyone who wanted to inquire about information on animal welfare if it wanted.[57]

Many states have adopted statutes that provide an organization the right to participate in enforcement actions of animal-cruelty statutes. [58] Massachusetts Senate Bill 767

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[51] Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 806 (1997): *cf. Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 428 (1998) *Cf. Palila v. Hawaii Department of Lawn and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (Both cases discuss this tension.)
[52] 799 F.2d 934 (4th Cir. 1986).
[53] A.C. Holton, *International Primate Protection League v. Institute for Behavorial Research: The Standing of Animal Protection Organizations under the Animal Welfare Act*, 4 J. CONTEMP. HEALTH L. & POL'Y 469, 470 (1988).
[54]*See Id.* (the court "refused to allow this judicial expansion of standing to interfere with the use of animals in medical research under the AWA.").
[55] 23 F.3d 496 (D.C. Cir. 1994).
[56] Cass R. Sunstein *supra* note 2 at 256.
[57] *Id.* at 256-57.
[58] Some of those state provisions include the following: D.C. Code Ann. § 22-1006 (2001) (conveyed the duty of prosecution to deputy marshals, police officers, or any humane officer of the Washington Humane Society); Fla. Stat. Ann. § 828.03 (2016) (provides any county or any society with the ability to appoint agents, for investigative purposes, to prevent an act of cruelty to a child or animal); 17 M.R.S.A. § 1023 (2013) (provides law enforcement officers, animal control officers and humane agents with the ability to investigate violations and pursue a civil or criminal action based on the investigation); Minn. Stat. Ann. § 343.01

attempted to provide the right for private individuals to file a lawsuit for the "protection and humane treatment of animals."[59] The bill would have given anyone the right to sue on behalf of an animal that they believe is being treated inhumanely.[60] However, the language was lost in the legislative process.[61] In North Carolina there is a state statute that grants a right of action by which an organization could establish standing to "any person or organization to enforce via injunction a civil anti-cruelty statute."[62] The 1969 legislation, "An Act to Provide a Civil Remedy for the Protection and Human Treatment of Animals to

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(2016) (provides the federation and all county and district societies the ability to appoint agents to investigate or otherwise assist lawfully empowered officials in the prosecution of those charged with animal cruelty); N.H. Rev. Stat. Ann. § 105:18 (2016) (expressed that "[a]ny officer or agent of any incorporated society for the prevention of cruelty to animals" can "make arrests and bring before any court or magistrate having jurisdiction offenders found violating the provisions of this subdivision); T.C.A. § 39-14-210(a) (2014) (provides agents of any society incorporated to prevent cruelty to animals, the ability to bring offenders found violating this part with respect to non-livestock animals before any court); Vt. Stat. Ann. 13, § 354(d) (2016) (provides that the State may institute a civil proceeding if an animal is seized under this section for forfeiture of the animal) *cited in* William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 40 (2004).

[59] Massachusetts Bill Allows Animal Rights Activists to Sue Sportsmen, *Sportsmen's Alliance* (March 1, 2013), http://www.sportsmensalliance.org/news/massachusetts-bill-allows-animal-rights-activists-to-sue-sportsmen/

[60] According to the Massachusetts Legislature website, the bill accompanied several new drafts ending with S.2345 that was enacted and signed by the Governor as Chapter 293 of the Acts of 2014 on August 20, 2014. THE 189TH GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, BILL S.767, *available at* https://malegislature.gov/Bills/188/Senate/S767 (last visited April 27, 2016).

[61] THE 189TH GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, CHAPTER 293 AN ACT PROTECTING ANIMAL WELFARE AND SAFETY, *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2014/Chapter293 (last visited April 27, 2016), (The legislation no longer includes the provision for citizens to bring suits to protect the humane treatment of animals.)

[62] N.C. Gen. Stat. §§ 19A-1 to 19A-4 (2003). *See also* William A. Reppy, Jr., *supra* note 58 at 41.

Supplement Existing Criminal Remedies" in G.S. 14-360,[63] authorized "a 'person'[64] to bring the civil suit to enjoin cruelty."[65] In 2003, amendments to the law noted that counties are permissible plaintiffs and that a plaintiff need not have claim to the animals to seek a benefit.[66] In contrast, Illinois has a provision in its Humane Care for Animals Act that simply provides for civil actions of the owner of an animal that has suffered some harm.[67] Here, the human-centric approach to recognizing animal harms in law is utilized because the owner can recover damages for anything from veterinary expenses to emotional distress suffered.[68] In contrast to the North Carolina and Massachusetts laws, the Illinois law states that humans must have a claim to the harmed animal and demonstrate damages they themselves have sustained.[69] Having legislation that provides animals the right for their grievances to be heard is a huge step in the right direction, but the ideal next step from here would be recognition across the board of animal rights cases regardless of human damages and ownership.

Trust law is one unique avenue in state jurisdictions that allows animals more protections than inanimate objects of property.[70] This is perhaps the most natural protection for an expansion of animal protections because of how people feel about

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[63] William A. Reppy, Jr., *supra* note 58 (refers to the criminal anti-cruelty law, section 14-360 of the North Carolina General Statutes. In the codified version of the civil enforcement act, the title is 'Civil Remedy for Protection of Animals.' N.C. Gen. Stat. §19A-1 (2003).

[64] "The term 'person' used herein shall be held to include any persons, firm, or corporation, including any nonprofit corporation, such as a society for the prevention of cruelty to animals." 1969 N.C. Laws at 926. (A 2003 revision removed the reference to nonprofit organizations. However, a look at the legislative history shows that the purpose was to expand the right to standing, not narrow it.)

[65] William A. Reppy, Jr., *supra* note 58 at 41.

[66] William A. Reppy, Jr., *supra* note 58 at 61.

[67] 510 ILL. COMP. STAT. ANN. 70/16.3 (2016).

[68] *Id.*

[69] *Id.*

[70] Gerry W. Beyer, *Estate Planning for Non-Human Family Members*, WWW.PROFESSORBREYER.COM 2 (June 2, 2014), *available at* http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last visited April 27, 2016).

their pets and often treat them like members of the family.[71] Both the Uniform Probate Code and the Uniform Trust Code recognize the rights of animals to be protected under trusts that are left to benefit them directly.[72] For example, the Uniform Probate Code, § 2-907 covers Honorary Trusts and validates "a trust for the care of a designated domestic or pet animal and the animal's offspring."[73] The Uniform Probate Code includes language that treats animals in a manner equivalent to that of a person because the trust terminates when there is no living animal to benefit from the document and no portion of the trust may be used for anything other than the benefit of the animal just as if a human benefitted from the same document.[74] At least ten states have enacted this provision,[75] and several other states have used the provision to create a model for their individual legislation.[76] The Uniform Trust Code has a similar provision, § 408, Trust for Care of Animal.[77] Section 408 states that a "trust may be created to provide for the care of an animal alive during the settlor's lifetime."[78] While the Uniform Trust Code has similar language to that of the Uniform Probate Code, the Uniform Trust Code includes further protections of an animal possibly being appointed a guardian.[79] At least twenty states have adopted this

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[71] Leona Helmsley, Doris Duke, and Natalie Schafer are all famous examples of people who left a trust specifically to benefit their pet that was upheld in court upon their death. *See* Gerry W. Beyer, *supra* note 70 at 1

[72] *Id.*

[73] UNIF. PROB. CODE § 2-907, cmt. (1990).

[74] Gerry W. Beyer, *supra* note 70.

[75] Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina, South Dakota, and Utah are the states that have enacted this legislation. *Id.* at 6.

[76] *Id.*

[77] *Id.*

[78] UNIF. TRUST. CODE § 408 (2000) *quoted in* Gerry W. Beyer, *Estate Planning for Non-Human Family Members*, WWW.PROFESSORBREYER.COM 6 (June 2, 2014), *available at* http://www.professorbeyer.com/Articles/Pet_Trusts_06-02-2014.pdf (last visited April 27, 2016).

[79] Appointment in the trust or by the court in order to enforce the terms for its benefit. Gerry W. Beyer, *supra* note 70 at 3.

provision or modeled a similar statute for their individual legislation.[80]

Establishing standing for non-human claims in court is a different task. Currently, in the United States it seems that courts are more open to award standing where a person can show harm regardless of the benefit to the animal. Ultimately, the best chance for an animal to have its claim heard rests on the possibility that principles from various state protection provisions becoming influential on the federal level in the future. Case law allowing for animal rights and protections to be heard has taken several different avenues. First, there is the possibility that an organization or individual could establish standing on a claim for purely aesthetic, individualized harm. Second, an animal's claim could be heard under statute because of Congressional intent. Finally, on the state level there is an avenue for animal protection claims in areas such as criminal and estate law.

Turning first to the possibility that an organization or individual could establish standing on an individualized harm claim, in *Animal Legal Defense Fund v. Glickman*[81] an animal welfare group and individual plaintiffs brought a claim against United States Department of Agriculture (USDA) to challenge its regulatory treatment of primates under the Animal Welfare Act (AWA).[82] The United States Court of Appeals found that one of the individual plaintiffs had in fact satisfied the requirements for standing.[83] The court found that an individual plaintiff demonstrated an injury in-fact based on his claim that "he has an aesthetic interest in seeing exotic animals living in a nurturing habitat."[84] The court recognized that this injury may not be

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[80] Alabama, Arkansas, District of Columbia, Florida, Georgia, Kansas, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming are the states that have adopted this provision or a form of this provision. *Id.* at 6.

[81] 154 F.3d 426 (D.C. Cir. 1998).

[82] *Id*. at 428.

[83] *Id.* at 426 (The requirements met were: "(1) individual plaintiff satisfied injury in fact requirement for constitutional standing; (2) individual plaintiff satisfied causation requirement for standing; (3) individual plaintiff satisfied redressability requirement for standing; and (4) individual plaintiff fell within zone of interests protected by AWA, satisfying prudential standing requirements.").

[84] *Id.* at 432.

interpreted as individualized but regardless stated that the mere possibility that others could suffer similar injuries on seeing animals in this way, "does not make it less cognizable, less 'distinct and palpable.'"[85]

The Court implemented the Supreme Court's reasoning from *Lujan*[86] that stated "'the desire to use *or observe* an animal species, *even for purely aesthetic purposes,* is undeniably a cognizable interest for purpose of standing.'"[87] The Court awarded standing for causation because the Plaintiff showed how the conditions that caused his injury "complied with current USDA regulations," and how the redressability of the "regulations complying with the AWA would have prohibited those conditions and protected him from the injuries."[88] Further, the Court found that the plaintiff met the redressability requirement because the tougher regulations would either have made the farm the plaintiff visited more humane, or made the owners decide to close rather than comply with the higher legal standards.[89] This case is influential in allowing an individual plaintiff to establish standing for aesthetic injury, which indirectly meant a recognized claim for the harmed animals simply from people seeing them treated poorly.[90]

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[85] *Id.*

[86] *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, at 2130, 2134 (1992). (Wildlife and environmental organizations brought a claim that a new regulation "erred as to § 7(a)(2)'s geographic scope" and an injunction for a new rule to restore the original interpretation. The Court held that the groups did not demonstrate an injury in fact because they failed to demonstrate that "one or more of their members would thereby be directly affected.") *See also Sierra Club v. Morton,* 405 U.S. 727, 735, 739 (1972) (held that an organization lacked standing to sue).

[87] *Glickman*, 154 F.3d at 433 (The Court also pointed to *Sierra Club* and *Lujan* for the demonstration that a plaintiff was able to establish standing under a claim of aesthetic value that had not been met in those cases).

[88] *Id.* at 442.

[89] *Id.* at 443.

[90] *Id.* at 429 (The human-centric aesthetic injury claim was recognized by the Court. The aesthetic injury was a harm to the individual for having to witness animal harm. Therefore, it stands to reason that recognition of the claim will indirectly benefit the animals harmed); *see also* Cass R. Sunstein *supra* note 2 at 259. (court found injury in fact can be established where a plaintiff's interest is in the "quality and condition of an environmental area he used").

Two influential cases on the group aesthetic harm claim front are *Japan Whaling Assn. v. American Cetacean Society*[91] and *Animal Welfare Institute v. Kreps*.[92] *Japan Whaling* concerned a claim brought by several wildlife conservation groups whose members were committed to watching and studying whales against the secretary of commerce over a failure to certify that "people in Japan were endangering whales."[93] The court found that the organizations had standing because of the 'injury in fact' suffered by their members who participated in the study and watching of whales; a purely aesthetic harm.[94] Similarly the court in the *Kreps* case found that the members of the Animal Welfare Institute had standing for an aesthetic injury.[95] Here, the claim challenged a "waiver of the moratorium on marine mammal importation under the Marine Mammal Protection Act."[96] The Court held that the members had the right to view Cape fur seals alive and in their natural habitat without inhumane treatment or harvesting of the young pups while they were still nursing.[97] Again, courts have no problem recognizing the human-centric claim that people have the right to view animals who are not being abused. While these cases do not recognize the animals as plaintiffs, the cases are influential because the claims and relief are directly linked to animal harms in a way that courts are often reluctant to recognize.

In contrast, *Animal Lovers Volunteer Asso., Inc. v. Weinberger*[98] involved a claim before the Ninth Circuit Court of Appeals. The Court relied on *Sierra Club*[99] to find that an organization did not have standing to sue on behalf of a native population of wild goats that the navy sought to eradicate from California's San Clemente Island.[100] The court applied well

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[91] 478 U.S. 221 (1986).
[92] 561 F.2d 1002 (D.C. Cir. 1977).
[93] This failure led to the diminished effectiveness of the International Convention for the Regulation of Whaling. Cass R. Sunstein *supra* note 2 at 258.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] 765 F.2d 937 (9th Cir. 1985).
[99] *Id*. at 938-39 citing *Sierra Club*, 405 U.S. 733.
[100] Believing that the goats' presence could compromise the island's fragile biodiversity, the Navy authorized the aerial eradication of the

established case law to find that in order for the organization to have standing to sue, it needed to demonstrate that one of its members suffered an injury in fact that is distinct from the general public.[101] The organization in this case argued that this standard was impossible to prove because the public had no access to the island and that the Court should hold the Navy responsible for violating the law regardless.[102] Had the organization's claim clearly differentiated itself from the concerned public at large, the Court may have found standing based on a protective statute or aesthetic interest.[103] Therefore, according to the Court, a proper plaintiff could have existed for this claim.[104]

This is an important case for the movement to protect animal rights in courts. Even though the case did not succeed in the interest of the goats, the Court recognized the ways in which an organization could establish standing in order to sue under court-sanctioned guardianship of the animal(s) at issue in a case.[105] The court expressed how a more established organization could have succeeded to establish standing in the suit because "a qualified organization with a demonstrated commitment to a cause could indeed bring suit on behalf of the speechless in the form of a court-sanctioned guardianship."[106] While standing was not granted in this case, it demonstrates the challenges that organizations face in seeking to protect what beings are seen as inanimate in the eyes of the law.[107]

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entire population. The claim in this case was brought under NEPA which does not specifically grant nonhuman animals any rights. Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morton*, 95 CAL. L. REV. 513, 515 (2007).

[101] *Animal Lovers Volunteer Asso.,* 765 F.2d at 938.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 939 (an organization needed to differentiate its concern from general members of the public, history of legal action, or activities to demonstrate interest in the outcome).

[106] Here, if the organization could have demonstrated a long-established commitment to the protection of animals it may have been awarded standing. Marguerite Hogan, *supra* note 100 at 518.

[107] *Id.* at 515.

Are there cases that involve an animal plaintiff? In *Cetacean Community v. Bush*[108] the claim was brought against the government for the cetacean community of whales, dolphins, and porpoises by the Cetacean's self-appointed attorney.[109] The harm alleged concerned a proposed deployment by the Navy of low frequency active sonar (LFAS) that violated various environmental statutes.[110] However, the court found that the Cetaceans did not have adequate standing to sue in their own name.[111]

The court discussed standing under the reasoning from *Laidlaw*.[112] First, the court covered whether the plaintiff has satisfied Article III standing, such that the plaintiff has "suffered sufficient injury to satisfy the 'case or controversy' requirement."[113] Second, the Court looked at the possibility that a plaintiff can demonstrate statute issued right of action where constitutional standing is not provided.[114] However, the most influential part of this decision for the purposes of standing is when Justice Fletcher related the right of an animal to be a plaintiff to that of a city, a non-profit, or a ship.[115] While the Court explained that animals are far from being considered a plaintiff in the same way that a human being is, the Court made major strides

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[108] 386 F.3d 1169 (2004).
[109] *Id*. at 1171-72 (claim was brought under the name of the world's cetaceans).
[110] *Id.* at 1172.
[111] *Id.*
[112] *Id.* at 1174.
[113] "To satisfy Article III, a plaintiff 'must show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.*
[114] *Cetacean Community*, 386 F.3d at 1175.
[115] *Id*. at 1176 (court compares animals to: "corporations, partnerships or trusts, and even ships, or of judicially incompetent persons such as infants, juveniles, and mental incompetents.") *Cf. generally Sierra Club*, 405 U.S. at 727. (the Court compares the environment to those entities that are provided rights under the law such as corporations and ships. In contrast to the language used in *Cetacean*, the Court in *Sierra Club* compared the environment to these legal entities in order to show how it was nowhere close to achieving similar rights and protections under the law).

by holding that there is no reason that Article III could be interpreted to prevent an animal from bringing a suit any more than any artificial person can.[116] Ultimately, the Court found that there was an absence of any statement in the ESA, the Marine Mammal Protection Act (MMPA), National Environmental Protection Act (NEPA), or the Administrative Procedure Act (APA), that provided Cetaceans with statutory standing to sue,[117] but based on its other statements the court believed there is room for an animal plaintiff to achieve standing in the future.[118]

Similarly, the claim in *Tilikum v. Sea World Parks & Entm't Inc.*,[119] involved a constitutional rights claim on behalf of five orca whales. Sea World argued that the plaintiffs failed to establish Article III standing for their claim under the Thirteenth Amendment[120] based on the reasoning used in *Cetacean* and *Laidlaw*.[121] The court agreed with Sea World and found that the Thirteenth Amendment only applied to humans.[122] Since the

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[116] *Cetacean Community*, 386 F.3d at 1176 (9th Cir. 2004).
[117] *Id.* at 1179.
[118] *Cf. Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, (N.D. Cal. Jan. 28, 2016) *appeal pending*, Naruto v. Slater, 9th Cir. Case No. 16-15469. (The People for the Ethical Treatment of Animals and Antje Englehardt as "Next Friends" alleged that the defendants violated a crested macaque's copyright by displaying, advertising, and selling copies of the monkey's selfies. The court found that the crested macaque did not have standing under the Copyright Act because the Act does not give standing to animals. The court did not need to address whether or not the crested macaque met Article III standing because when a plaintiff seeks redress under a statutory violation, the plaintiff must establish statutory standing, no standing was found in this case. The court relied on *Cetacean Community* for the proposition that when a plaintiff has suffered an injury sufficient "'...to satisfy the jurisdictional requirement of Article III but Congress has not granted statutory standing, that plaintiff cannot state a claim upon which relief can be granted' and dismissal is appropriate." The court held that the plain language of the Copyright Act, past judicial interpretation of the Copyright Act, and guidance from the Copyright Office all proved that Next Friends failed to demonstrate that the Copyright Act granted standing to the crested macaque.)
[119] 842 F.Supp.2d 1259 (S.D. Cal. 2012).
[120] The Thirteenth Amendment prohibits slavery and involuntary servitude. *Id.* at 1260.
[121] *Id.* at 1262.
[122] *Id.* at 1264.

whales lacked Article III standing to sue the aquarium, there was no longer a case or controversy on which to bring the claim.[123] Accordingly, the case was dismissed.[124] However, the court then pointed out that this decision did not mean to suggest that animals have no legal rights.[125] Instead, the court emphasized that many statutes provide redress "to Plaintiffs, including, in some instances, criminal statutes that 'punish those who violate statutory duties that protect animals.'"[126] Since this claim argued a violation of a constitutional right, there was no statutory duty to extend to the plaintiffs. Instead the court seems to imply that this claim may have survived had Congress explicitly stated a protection that is violated.[127]

Another case that names an animal plaintiff is *Okinawa Dugong v. Gates*.[128] The Okinawa dugong,[129] Japanese citizens and environmental organizations brought the action against the Department of Defense under the National Historic Preservation Act for the approval of plans to construct a military air station off the coast of Okinawa.[130] In its analysis considering whether the plaintiffs satisfied Article III's standing requirements, the Court relied on the test from *Lujan*[131] and cited the additional prudential standing requirements under the APA:

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[123] Ultimately, since the Thirteenth Amendment only applies to humans, the chance for redress by favorable decision to the whales under a statute that only applied to humans was none. Therefore, without a claim on which to achieve relief, the whales lacked standing. *Id.*

[124] *Id.*

[125] *Tilikum*, 842 F.Supp.2d at 1264.

[126] *Id*. (quoting *Cetacean Community,* 386 F.3d at 1175, "Animals have many legal rights, protected under both federal and state laws. In some instances, criminal statutes punish those who violate statutory duties that protect animals").

[127] *Tilikum*, 842 F. Supp. 2d at 1265.

[128] The Okinawa dugong was named as a Plaintiff in a case under its own name. 543 F. Supp. 2d 1082 (N.D. Cal. 2008).

[129] The Okinawa Dugong is a marine mammal related to the manatee. *Id*. at 1093.

[130] *Id.* at 1083.

[131] *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) (test required the Plaintiff to suffer an injury-in-fact, demonstrate harm that is actual or imminent, and show that the harm is personal or particular to the plaintiff).

> (1) a final agency action (which the court has discussed above and has resolved in favor of plaintiffs); and (2) an injury falling within the "zone of interests" protected by the statutory provision the plaintiff claims was violated.[132]

The court then addressed each plaintiff group individually in order to assess whether or not each plaintiff satisfied all the standing requirements.[133]

First, the court turned to whether the Okinawa dugong satisfied the requirements for standing.[134] The court found that according to *Cetacean*, Congress did not authorize suits in the name of an animal under the APA.[135] Instead, the APA affords standing to persons and defines persons as "an individual, partnership, corporation, association, or public or private organization other than an agency."[136] Therefore, the court dismissed the Okinawa dugong under reasoning from *Cetacean* that did not extend this definition to whales, porpoises and dolphins.[137] Second, the court turned to analysis of the standing for each of the three individuals.[138] Ultimately, the court found that the three individuals had standing to sue because each individual suffered a procedural injury linked to the plaintiff's concrete interest in preserving the Okinawa dugong.[139] Finally, the court assessed the associations' standing in the action.[140] The court used the test for association standing from *Laidlaw*[141] and

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[132] *Okinawa Dugong,* 543 F. Supp. 2d at 1093.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id*. (quoting Administrative Procedure Act, 5 U.S.C. §§ 551(2), 701(b)(2).
[137] *Id*.
[138] *Okinawa Dugong*, 543 F. Supp. 2d at 1094.
[139] *Id.* at 1095-96 (found that the interest of seeking to preserve the dugong was within the "zone of interests" that are protected by the NHPA, caused by the DOD's failure to comply with the NHPA, and redressable by DOD compliance).
[140] *Id.* at 1096.
[141]*Id.* ("[T]hat (1) its members would have standing to sue "in their own right"; (2) the interests at stake in the lawsuit are "germane to the organization's purpose"; and (3) neither the claim nor the relief sought requires members to participate individually in the litigation.")

ultimately found that four plaintiff organizations had standing to assert the claim in this case.[142] While the court failed to award standing to the affected animal itself, it did properly apply the requirement test for standing so that organizations and individuals could be heard.[143] While this appears to be more human-centric approach, the holding may have been different if the court had been able to rely on some Congressional intent in the APA or another statute that intended to cover animals.

One of the seminal cases to this effect is *Palila v. Hawaii Department of Lawn and Natural Resources*,[144] which involved a claim brought under the Endangered Species Act (ESA).[145] The plaintiffs sought the removal of sheep that were destroying the habitat of the endangered species.[146] The court recognized the Palila's right to sue as a plaintiff.[147] The Palila was represented by attorneys from the Sierra Club, Audubon Society and others that sought to protect the Palila's habitat. In the opening part of his opinion, Judge O'Scannlain said "[a]s an endangered species under the Endangered Species Act. . . the bird . . . also has legal status and wings its way into federal court as a plaintiff in its own right."[148] Judge O'Scannlain recognized an endangered species' right to statutory standing to sue on its own behalf under the ESA and opened the door for future cases to recognize a species protected under the statute to achieve the same right to statutory standing.[149]

On the state level, animal protections in case law are being brought in various areas of the law such as criminal law. In *State v. Nix*[150] the issue concerned whether the Defendant was

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[142] *Id*. at 1096.
[143] *Id.*
[144] 852 F.2d 1106 (9th Cir. 1988).
[145] *Id*. at 1107.
[146] The palila is an endangered species of bird, a member of the Hawaiian honeycreeper family, in Hawaii. *Id.*
[147] *Id.* (The Palila earned the right to be capitalized as a party to the proceeding).
[148] *Id.*
[149] Here, the issue before the court centered on the showing of an actual harm to the endangered species. The Court found that the district court's holding that the Department's permitting mouflon sheet in the area constitutes a "taking" of the Palila's habitat. *See Id.* at 1110.
[150] 355 Or. 777 (2014), *vacated and appeal dismissed by*, State v. Nix, 356 Or. 786 (2015) (Here, the filed a motion stay the issuance of the

guilty of 20 separately punishable offenses.[151] The question before the Court turned on whether animals are considered "victims" for the purpose of Oregon's "anti-merger" statute.[152] The statute states that when a defendant violates a single statute for multiple victims "there are 'as many separately punishable offenses as there are victims.'"[153] The Oregon Court of Appeals found that animals could be victims, and separated the charges into 20 separate counts.[154] The Supreme Court agreed.[155] The Court held that the "victim" was not the public or the animal's owner, but instead it is the animal that the provision is meant to protect.[156] The Court cited to the *Glaspey*[157] case that found for the purposes of the statute, the victim is the one who suffers the harm

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appellate judgment and a motion to determine jurisdiction. Even though the state prevailed on the first appeal in *Nix*, the court noted that perhaps the state lacked standing to appeal in the first place because no statute authorized the state to appeal the judgment of a conviction of a misdemeanor. Accordingly, the defendant responded by moving to vacate both opinions and dismiss the appeal. The court concluded on the second appeal that the state lacked subject matter jurisdiction for its first appeal and therefore vacated the previous appeal.) This means that the decision which separated the 20 counts of second-degree animal neglect no longer applies. For the purposes of this paper, the decision is included to show what potential there is in recognizing animal victims as equal to human victims for sentencing purposes.

[151] *State v. Nix*, 251 Or. App. 449, 283 P3d 442 (2012) *quoted in State v. Nix*, 355 Or. 777, 779 (2014). ("[P]olice officers entered defendant's farm and found dozens of emaciated animals, mostly horses and goats, and several animal carcasses in various states of decay. Defendant owned those animals…Defendant was indicted. Each separate count identified a different animal and charged conduct by defendant toward that animal. A jury convicted defendant of 20 counts of second-degree animal [neglect].")

[152] *Nix*, 355 Or. at 779.

[153] *Id.* at 782.

[154] *Id.* at 779.

[155] *Id.* at 783.

[156] *Id.* at 781.

[157] *Glaspey*, 337 Or. at 565 (2004), 100 P.3d 730 (2004) *quoted in Nix*, 337 Or. 777, 797 (2014). (In *Glaspey*, two counts of fourth-degree assault were entered as a single conviction. The Court states that a "'victim," for the purposes of ORS 161.067(2), is the one that "suffers harm that is an element of the offense.")

of the offense.[158] Further, the Court found no indication from the legislature that the animal's owner was intended to be the victim.[159] Therefore, the Court held that the individual victim was the animal.[160] The Court clearly stated that this ruling was not meant to create policy that animals were deserving of this treatment, but more that the decision was an interpretation of precedent and the legislature's intentions.[161] Regardless, animals were found as protected by the legislature as victims, a designation generally thought to apply to those with personhood under ORS 167.325.[162]

Similarly, in *People v. Garcia*,[163] the defendant was convicted of aggravated cruelty to animals, which is a felony in New York.[164] In the course of an assault, the Defendant killed the family's goldfish by stomping on it.[165] The Court found that under §§ 353–a(1) and 350(5) of the Agriculture and Markets Law,[166] the pet goldfish was a companion animal of the family.[167] The defendant argued that the killing of the goldfish was a misdemeanor under §353[168] of the statute because the fish was not a companion animal and stomping on it was not "aggravated

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[158] 355 Or. at 797 (recognizing animals as victims where a harm to each is an offense).
[159] *Id.*
[160] *Id.*
[161] *Id.* at 798.
[162] *Id.* at 781.
[163] 812 N.Y.S.2d 66 (2d Dep't 2006).
[164] *Id*. at 69.
[165] *Id.*
[166] *Id.* at 70. (AGRIC. & MKTS. LAW § 353–a(1) provides: A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, aggravated cruelty shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner. The term "companion animal" is defined in, *id*. § 350(5): "Companion animal" or "pet" means any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. "Pet" or "companion animal" shall not include a "farm animal" as defined in this section.).
[167] *Id.* at 69.
[168] *Id.* at 70.

cruelty."[169] The Court turned to the legislative history of the statute and ultimately found that the killing of a household pet in front of a child constituted a "depraved act" because it was meant to cause emotional harm.[170] This holding implies that the purpose of animal cruelty statutes is to determine whether the perpetrator meant to inflict harm on the owner.[171] Therefore, *Garcia* stands for a human-centric approach to animal protection statutes, where the animal harmed can stand to benefit if there is a claim benefitting the human owner.[172]

In United States case law, there are three categories that show up in animal rights claims cases. The first category is where an organization or individual could/can establish standing on a claim for animal harm. In the second category an animal could/can also be awarded standing when the legislature or Congress has expressed a clear intent for animal protections under a statute. Finally, on the state level, the individual legislatures have recognized animal claims in various areas of law where criminal charges are held to apply to animals as they would equally apply to human victims. As seen above, even with some case law on each of these scenarios, animal claims are irregularly awarded standing in the United States court system.

IV. INTERNATIONAL STANCE ON STANDING FOR ANIMALS

A. Australia

Since there are no national laws that apply universally on animal welfare in Australia, each state regulates this field individually [173] However, State animal protection statutes designate particular persons who are authorized to bring

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[169] *Garcia*, 812 N.Y.S.2d at 70 (AGRIC. & MKTS. LAW § 353 covers an unjustifiable killing of any animal, whether wild or tame).

[170] Luis E. Chiesa, *Why is it a Crime to Stomp on a Goldfish? — Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 5-6 (2008).

[171] *Id.* at 6.

[172] *Id.*

[173] *What is the Australian legislation governing animal welfare?*, RSPCA AUSTRALIA KNOWLEDGEBASE, *available at* http://kb.rspca.org.au/what-is-the-australian-legislation-governing-animal-welfare_264.html (last visited April 23, 2016).

prosecutions.[174] One of the primary issues regarding suits for the protection of animals is that animals are property.[175] As property, animals are not readily recognized as beings with rights in the absence of statutes or laws that say differently.[176] Therefore, granting standing to sue on an animal welfare statute could interfere with another's property right.[177] For now, in both Australia and the United States, animal rights and protections seem to be wrapped up in other human-centric concerns.[178]

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[174] *See* Graeme McEwen, ANIMAL LAW: PRINCIPLES AND FRONTIERS 31 (2011), *available at* http://bawp.org.au/wp-content/uploads/2013/07/eBook-FINAL.pdf. (In Victoria, section 18(1), Prevention of Cruelty to Animals Act 1986 states: "(1) The following persons are general inspectors-(a) any member of the police force; and (b) any person who is (i) an inspector of livestock appointed under the Livestock Disease Control Act 1994; or (ii) a full-time or part-time officer of the Royal Society for the Prevention of Cruelty to Animals-and who is approved as a general inspector by the Minister in writing; and (c) Any person who is an authorised officer under section 72 of the Domestic Animals Act 1994 and who is approved as a general inspector by the Minister in writing, but only in respect of an alleged offence committed or a circumstance occurring in the municipal district for which that person is an authorised officer.")

[175] Robert Garner, Political Ideology and the Legal Status of Animals, 8 ANIMAL L. 77, 81 (2002).

[176] *Cf.* Endangered Species Act, 16 U.S.C. § 1531 (in the United States this statute provides access to citizen suits where an endangered or threatened species covered by the Act is harmed).

[177] This is an issue that Australian laws continue to grapple with and that many courts have grappled with in the United States as well. Rhianne Grieve, *Achieving Legal Standing for Factory Farmed Animals*, THE LAW SOCIETY OF NEW SOUTH WALES 2 (2007), *available at* https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/2007third.pdf: *see also* Robert Garner *supra* note 176.

[178] *Id.* at 6. (*Australian Law Reform Commission Report 78* states that standing should be available when there is "a benefit to the public at large in allowing persons other than those whose immediate rights and interests are at stake to bring the matter to court."): *see also* Graeme McEwen, *supra* note 175 at 61. (This could be a way through which to establish citizen suits on behalf of animals; where someone without a direct interest in the claim, such as a guardian for the animal, brings a claim on behalf of the animal for the right violated. While the claim still needs be human-centric, it is an avenue by which to start. Additionally, animal welfare claims have some reliance on *Australian Consumer Law.* For example, if a claim is brought because of "misleading and deceptive

As stated in *Australian Conservation Foundation v. Commonwealth*,[179] to establish standing in Australian courts, the plaintiff must satisfy the special interest test.[180] The court held that standing is awarded when a plaintiff demonstrates a "recognizable special interest or injury arising from an impugned act or omission."[181] The special interest test from *Onus v. Alcoa of Australia Ltd*.[182] states that a plaintiff has to have a private right or an interest in the action, beyond a mere intellectual or emotional concern, and more than any other member of the public.[183] In *Onus*, an Aboriginal woman applied for injunctions in the Victorian Supreme Court to protect Aboriginal relics under threat from construction of a smelter.[184] On appeal, the High Court held that Ms. Onus had standing.[185] This is a substantial

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conduct," where a business for example advertises that animal products came from animals who were well cared for when in reality they were not, standing could easily be awarded under a claim of animal harm under this law. (Or, for a case similar to the claims from *Tilikum ex rel. PETA*, 842 F.2d 1259 (2012)) Again, a claim under the *Australian Consumer Law* would have the human-centric focus of correcting a public wrong and creating a more informed consumer, but the animals indirectly involved in the claim can still stand to benefit from a favorable outcome (by a humane change in producer practices))

[179] Rhianne Grieve, *supra* note 178 at 6 n. 30 (citing [1979] HCA 1; (1980) 146 CLR 493).

[180] *Cf. Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (As an integral case on standing in environmental claims cases found that special interest was more than just a "mere 'interest in a problem." The Court held that it did not matter how long the group held the interest or how qualified the organization was in evaluating similar problems. Ultimately, on special interest standing the Court found that it "is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.").

[181] Rhianne Grieve, *supra* note 178 at 6; *cf. Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (holding that the plaintiff satisfied injury in fact based on a claim of aesthetic harm).

[182] Graeme McEwen, *supra* note 175 at 31 (citing (1981) 149 CLR 27).

[183] Rhianne Grieve, *supra* note 178 at 1.

[184] Graeme McEwen, *supra* note 175 at 60.

[185] *Id.* (The decision of the court focused on fact and degree of standing. "In particular that the Aboriginal people were the custodians of the relics and actually used them, so that there was more than a mere intellectual or emotional concern.")

start for recognition of representative standing that could spill over into animal rights cases in the future.[186]

When recognizing animal harms and protections, Australian law relies heavily on a human-centric approach. Should the legislature ever be compelled to enact an overreaching statute that provides for protections and remedies to animals' individual harms, then the status of animals in law may become similar to how courts in the United States came to award standing statutorily under the Endangered Species Act.[187]

B. Canada

Canada also recognizes animals as property first, and therefore the country generally qualifies animal rights as property rights of the owner. On the federal level, the Criminal Code of Canada, Part XI, elaborates on the Wilful and Forbidden Acts in respect of Certain Property, under which an owned animal is protected to a certain extent.[188] Canada also has a Species at Risk Act that serves a similar purpose to the Endangered Species Act in the United States.[189] The Act is meant to prevent the extinction of distinct populations of wildlife from going extinct.[190] To this end, the Act names the wildlife at risk, provides enforcement officers and lists inspection rights, and sets the offences and penalties to be used in prosecution.[191] On the provincial level, Ontario has a Dog Owners' Liability Act that sets out what a dog owner is liable for when his or her dog harms a person or domestic animal.[192] The implementation of this Act demonstrates how animals are viewed as property where the owner is responsible for the damages his property causes to another person or another person's property.[193] An overview of the Canadian laws compared to those in the United States shows that the United States has stronger provisions on the state level

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[186] As sentient beings, animals should have access to similar custodial guardianship as that provided to the relics in *Onus*. *Id.*
[187] *See generally* Endangered Species Act, 16 U.S.C. § 1531-1544.
[188] Criminal Code, R.S.C., 1985, c. C-34, s. 385.
[189] Species at Risk Act (S.C. 2002, c. 29).
[190] *Id.* § 6.
[191] Canada Wildlife Act, (R.S.C. 1985, c. W-9).
[192] Ontario supports the banning of pit bulls based on the purpose of this Act. ONT. REGS. 157/05 & 434/05 Pit Bull Controls.
[193] *Id.*

for non-human protections than those in Canada.[194] At the federal level, Canada's wildlife statutes are similar to those in the United States, such as the Endangered Species Act that are working to preserve certain species and ecosystems in the country.[195]

Canada's equivalent to the United States' *Sierra Club*[196] decision came in 2011 with *Reece v. Edmonton (City)*.[197] Here, the court entertained the possibility for an elephant, Lucy, to have standing to sue for her rights or the right for a guardian to sue on her behalf.[198] Zoocheck, a Canadian animal protection agency, reached out to the Edmonton Humane Society, as a designated agent of the Minister of Agriculture and Rural Development, to enforce the Animal Protection Act.[199] When the Humane Society failed to step in, Tove Reece, an animal rights activist, and the organizations Zoocheck Canada and People for the Ethical Treatment of Animals (PETA) initiated a claim in the Court of the Queen's Bench of Alberta.[200] However, without the Humane Society's decision on the claim, the Court found that the plaintiffs lacked standing to sue on Lucy's behalf.[201] Further, on appeal the Alberta Court of Appeal affirmed and found that they could not seek enforcement of the Animal Protection Act.[202]

Canadian courts are generally open to awarding standing to private plaintiffs suing in the public interest.[203] In *Reece*, both the lower court and the Court of Appeal applied the test for standing from *Gouriet v Union of Post Office Workers*.[204] The House

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[194] *See supra*.

[195] *Cf.* the Endangered Species Act, 16 USCA § 1531-1544 *Cf.* Canada's Species at Risk Act (S.C. 2002, c. 29) *available at* http://laws-lois.justice.gc.ca/eng/acts/S-15.3/page-4.html#h-13 (last visited April 27, 2016).

[196] *Sierra Club v. Morton*, 405 U.S. 727 (1972).

[197] 2011ABCA 238 [Reece] *referenced in* Tyler Totten, *Should Elephants Have Standing?*, 6:1 online: UWO J LEG. STUD 2. 1 (2015), *available at* http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1165&context=uwojls (last visited April 27, 2016).

[198] *Id.*

[199] RSA 2000, c A-41, ss 3–4, 9 [APA] *referenced in* Tyler Totten, *supra* note 198.

[200] Tyler Totten, *supra* note at 5.

[201] *Id.* at 4.

[202] *Id.* at 5.

[203] *Id.* at 9.

[204] [1978] AC 435 (HL (Eng)) *referenced in* Tyler Totten, *supra* note 198 at 8.

of Lords found that an individual plaintiff "could only circumvent the authority of the Attorney General to sue on the public's behalf if the plaintiff would suffer a distinct injury from the general public."[205] In her dissent from the majority, Chief Justice Fraser instead applied *Finlay v. Canada (Minister of Finance)*'s three part test.[206] The test states, "(1) The issue must be justiciable; (2) the plaintiff must have a genuine interest in the issue; and, (3) there must be no other reasonable and effective manner to bring the issue to the court."[207] Chief Justice Fraser noted that the Applicants had a " 'real continuing interest in the City's compliance with its legal obligations to Lucy.'"[208] The Chief Justice found the plaintiffs achieved public interest standing and that the claim could then be subject to judicial review, a huge step in the right direction for recognition of standing for animal rights before the court.[209]

Chief Justice Fraser's dissent is akin to the type of interpretation that Justice Douglas provided in his dissent from *Sierra Club*.[210] She remarks on the rights that animals are granted by the Bench of Alberta and qualifies them as protections that Alberta law extends to animals with a high threshold for justifying a violation of these protections.[211] Her dissent also considered the laws and the evidence provided by the Applicants and concluded that the city was "violating Lucy's legally mandated right by failing to uphold its duty of care."[212] While the focus of her dissent was on the issue of establishing public interest standing, it is important to note that the mention of Lucy achieving her own standing alone is influential on future possibilities in the

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[205] *Id.* at 489–490, 494.

[206] Tyler Totten, *supra* note 198 at 9.

[207] [1986], 2 SCR 607 [*Finlay*] *quoted in* Tyler Totten, *supra* note 198 at 8.

[208] Tyler Totten, *supra* note 198 at 10.

[209] *Id.* at 9.

[210] *Id.* at 12; *cf. Sierra Club*, 405 U.S. at 741 (Douglas, J. dissenting) (Justice Douglas proposed a more comprehensive recognition of animals' personhood rights).

[211] Tyler Totten, *supra* note 198 at 11.

[212] *Id.* at 12. (In *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, the Privy Council personified a Hindu idol, and ruled as if the nonhuman object had standing. The Council noted that the idol's interests were not being adequately represented and called for an appointed Court representative).

development of the standing doctrine in Canada.[213] Organizational representation is the logical next step for recognition of animal rights in the court.[214] However, it will be a difficult road, as we have seen with the lack of application of Justice Douglas' ideals in the United States.

V. CONCLUSION

Currently in the United States, the most appropriate way for an animal to establish standing on its own behalf at the federal level is under a statutory provision. As seen above, many endangered or threatened species are protected and recognized as plaintiffs under the ESA. However, this leaves much to be desired for those species that are not listed as endangered or threatened under the ESA. Other statutes remain in dispute on whether or not an animal is provided the right to sue on its own behalf. Therefore, in the United States there is little statutory intent protection for animals to have the universal right to sue. Instead, it seems that even the act meant to protect animals falls short of conveying the right for them to sue for themselves.

Internationally, courts seem to be in the same spot as the United States because more often than not animals are still recognized simply as property or as an entity without personhood interests. While Chief Justice Fraser's dissent from the *Reece*[215] case provided some insight, as Justice Douglas' dissent from *Sierra Club*,[216] the majority opinions in these cases continually fail to follow suit. Canada instead has an easier time

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[213] A similar effect that Justice Douglas' dissent from *Sierra Club* had in the U.S.

[214] Combining this holding, in favor of rights for inanimate objects and implementing the ideas from Chief Justice Fraser's dissent in favor of animal interests in court may be a conceivable possibility. Tyler Totten, *supra* note 198 at 11. (In *Reece*, "Zoocheck and PETA, as organizations focused on animal protection, and Reece, as the founder of the Voice for Animals Humane Society, had demonstrated long-term, sustained interest in animal protection generally as well as for Lucy, in particular. These factors led the Chief Justice to conclude that the Applicants "all have a real and continuing interest in the City's compliance with its legal obligations to Lucy" and therefore met requirements for the second part of the test").

[215] 2011ABCA 238 [Reece] *referenced in* Tyler Totten, *supra* note 198.

[216] 405 U.S. 727 (1972).

awarding personhood to an inanimate idol than a living, breathing being.[217] More so, Chief Justice Fraser's dissent seemed to call for exactly what Justice Douglas proposed in the United States. Therefore, both countries are in a very similar position, with dissents and alternate interpretations opening doors and potential for future cases. However, no plaintiff has seemed to quite fit the bill to establish standing just yet.

There seems to be hope, both domestically and abroad, that with the right set of facts, right party, right statute, and right bench animals could one day have standing to sue on their own behalf across the board. An animal's best chance at being awarded standing comes from statutory intent. Beyond explicit awards of standing, the courts are hesitant to bring what several dissents easily recognize to light—that animals are deserving of the right to sue on their own behalf. Until the law broadens the definition of personhood, cases should be brought under the statutes that provide for standing and interpretation of other statutes needs to continue to be thought of and analyzed in new ways in an attempt to provide for protections of other and all animals under the law. Case law is not quite at the point where the ideas set out in Justice Douglas' dissent could become a reality, but, step by step, those ideals could become a reality in the future.

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[217] *See supra* note 213.

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